Number: X-KRŽ -06/275
Sarajevo, 6 November 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, in the Panel of the Appellate Division of Section I for War Crimes, composed of Judge Dragomir Vukoje, as the Presiding Judge, and Judges Azra Miletić and John Fields as the Members of the Panel, and Legal Officer Neira Kožo as the Record-taker, in the criminal case against the Accused Mitar Rašević and Savo Todović for the criminal offense of Crimes against Humanity referred to in Article 172(1) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC of BiH), deciding upon the Appeals of the Prosecutor's Office of BiH (hereinafter: Prosecutor's Office) number: KT-RZ-162/06 dated 18 July 2008, Defense Counsels for the Accused Savo Todović, Lawyers Mladen Šarenac and Jovan Debelica of 11 July 2008, the Defense Counsel for the Accused Mitar Rašević, Lawyer Slaviša Prodanović of 28 July 2008, and the Appeal of the Accused Savo Todović of 19 July 2008, filed from the Verdict of the Court of Bosnia and Herzegovina number: X-KR-06/275 of 28 February 2008, at the session on 6 November 2008 held in attendance of the Prosecutor with the Prosecutor's Office of BiH, Behaija Krnjić, the Accused Mitar Rašević and the Accused Savo Todović and their Defense Counsels, Lawyers Slaviša Prodanović, Mladen Šarenac and Jovan Debelica, pronounced the following

V E R D I C T

The Appeal of the Prosecutor's Office of BiH is **refused as ungrounded**, whereas, by **granting in part the appeals** of the Defense Counsel for the Accused Mitar Rašević, Lawyer Slaviša Prodanović, and the Defense Counsels for the Accused Savo Todović, Lawyers Mladen Šarenac and Jovan Debelica, and the Appeal of the Accused Savo Todović in person, the Trial Panel Verdict of the Court of BiH, number: X-KR-06/275 of 28 February 2008, is hereby **revised:**

- with regard to the legal qualification of the criminal offense, wherein the Accused Mitar Rašević and the Accused Savo Todović are found guilty of the crimes established in the operative part of the Trial Panel Verdict whereby they committed the criminal offence of **Crimes against Humanity in violation of Article 172(1)(h) in conjunction with subparagraphs a), c), d), e), f), i) and k) of the CC of BiH, as read with Article 29 and Article 180(1) of the CC of BiH, and**

- in the sentencing part of the decision pertaining to the Accused Mitar Rašević, wherein, for the criminal offence of Crimes against Humanity under Article 172(1)(h) in relation to subparagraphs a), c), d), e), f), i) and k) of the CC of BiH, as read with Article 29 and Article 180(1) of the CC of BiH, the Accused Mitar Rašević was found guilty and **sentenced to 7 (seven) years in prison**, wherein, pursuant to Article 56 of the CC of BiH and Article 2(4) of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in

BiH, the time spent in custody from 15 August 2003 shall be credited towards the pronounced sentence of imprisonment.

In the remaining part, the Trial Panel Verdict shall remain unmodified.

R e a s o n i n g

By the Verdict of the Court of Bosnia and Herzegovina (Court of BiH) number: X-KR-06/275 of 28 February 2008, the Accused Mitar Rašević and the Accused Savo Todović were found guilty of the acts described in the operative part of the referenced Verdict, under Counts 1 through 5, by which they committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the Criminal Code of BiH, as read with Article 29 and Article 180(1) and (2) of the CC of BiH, that is:
- under Count 1 which encompasses sub-counts 1.b) and 1.c) – torture and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health, under Article 172(k) and (f) of the CC of BiH;
- under Count 2 - depriving another person of his life (murder), under Article 172(a) of the CC of BiH;
- under Count 3 – imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health, under Article 172(e) and (k) of the CC of BiH;
- under Count 4 which encompasses sub-count 4a) – enslavement under Article 172(c) of the CC of BiH, under counts 4b) and 4c) – enslavement and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health, under Article 172(c) and (k) of the CC of BiH; and
- under Count 5 – deportation, forcible transfer and enforced disappearance, under Article 172(d) and (i) of the CC of BiH.
For the referenced crime, pursuant to Article 285 of the CPC of BiH and applying Articles 39, 42, 48 and 49 of the CC of BiH, the Trial Panel sentenced the Accused Mitar Rašević to imprisonment for a term of 8 (eight) years and 6 (months), and the Accused Savo Todović to imprisonment for a term of 12 (twelve) years and 6 (six) months.

Pursuant to Article 56 of the CC of BiH and Article 2(4) of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH, the time which the Accused spent in custody was credited towards the pronounced sentence, under the Decisions of both the ICTY and the Court, that is, in the case of the Accused Mitar Rašević from 15 August 2003, and in the case of the Accused Savo Todović from 15 January 2005, to the time of their referral to serve the sentence, whereas, pursuant to Article 188(4) of the CPC BiH, they are relieved of the duty to reimburse the costs of the criminal proceedings.

The same Verdict acquitted the Accused of the charges that they had committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(f) and (k) of the CC of BiH in a manner as described under Sections 1 and 1a) of the acquitting part of the Verdict.

The Prosecutor with the Prosecutor's Office of BiH, Defense Counsel for the Accused Mitar Rašević, Lawyer Slaviša Prodanović, Defense Counsels for the Accused Savo Todović, Lawyers Mladen Šarenac and Jovan Debelica, and the Accused Savo Todović himself filed the appeals from the Verdict in a timely manner.

The Appeal of the Prosecutor's Office contests the Trial Panel Verdict due to the alleged erroneously and incompletely established state of facts as provided for under Article 299 of the CPC of BiH, and the Decision on the criminal sanction as provided for under Article 300(1) of the CPC of BiH, and moves the Court to entirely uphold the Appeal as founded and to revise the Trial Panel Verdict by imposing more severe sentences on the Accused than those pronounced.

The Defense Counsel for the Accused Mitar Rašević, Lawyer Slaviša Prodanović, contests the Verdict due to the alleged essential violation of criminal procedure provisions, the erroneously and incompletely established state of facts, violation of the Criminal Code and the Decision on the criminal sanction, and moves the Appellate Division of the Court to revise the contested Verdict and acquit the Accused of the charges, or to revoke the Verdict and schedule the trial.

The Defense Counsels for the Accused Savo Todović, Lawyers Mladen Šarenac and Jovan Debelica, also contest the Trial Panel Verdict on all grounds of appeal as foreseen by Article 296 of the CPC of BiH, and move the Appellate Division of the Court to entirely uphold the appeal as well-founded, to revise the contested Verdict in its convicting part by finding the Accused not guilty of any counts under which he has been found guilty, or to entirely revoke the contested Verdict and schedule a new trial or, alternatively, to impose a more lenient sanction.

Finally, the Accused Savo Todović contests the Verdict due to the alleged violation of the criminal code, the state of the facts being erroneously or incompletely established, and the Decision on the criminal sanction. He moves the Court to grant the Appeal, revise the Trial Panel Verdict in its convicting part and acquit the Accused of the charges.

The Defense Counsels for the Accused, Lawyer Slaviša Prodanović (for Rašević) and Lawyer Jovan Debelica (for Todović), and the Accused Savo Todović, responded to the Appeal by the Prosecutor's Office and proposed the Appeal to be refused as ungrounded.

In the reasoning of its appeal, the Prosecutor's Office argues that the Trial Panel, in the Reasoning of the Verdict, failed to establish the decisive facts as they existed in reality and that the facts were established erroneously and incompletely as the Verdict does not include sufficient reasons, that is, it does not sufficiently reason the decisive facts. The Accused were acquitted of the counts of the Indictment that related to their criminal acts such as persecution by way of imprisonment, inhumane conditions, torture and beatings, of which many witnesses testified. The Prosecutor's Office believes that these criminal acts must have been defined as perpetration under Article 172(1)(f) and (k), as defined by the Indictment. More specifically, the Prosecutor's Office deems that, materially, the elements of inhuman treatment and cruel treatment are the same. The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of willfully causing

great suffering or serious injury to body or health which results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. According to the arguments in the Appeal, any comment on whether this happened to the imprisoned civilians is redundant; it would suffice to once again listen to the evidence of all witnesses. Therefore, the Appeal concludes that, with regard to the criminal acts of which the Accused have been acquitted, the Trial Panel did not establish the decisive facts as they existed in reality, and the facts were established erroneously and incompletely, as the reasons stated in the Reasoning of the Verdict do not sufficiently reason the decisive facts which the Appeal claims to be proven.

Furthermore, the Prosecutor's Office argues that the Trial Panel did not sufficiently analyze the aggravating circumstances specified by the Prosecution in the Closing Argument, where the Prosecution in particular stressed that that it sees no grounds for any mitigating circumstance on the part of the Accused, whilst the Trial Panel focused greatly on the mitigating circumstances that affected the length of the pronounced sentence. The Prosecutor's Office argues that the imposed sanctions are not appropriate in relation to either the gravity or the consequences of the crime because, in order to achieve the purpose of punishment, the sanction has to be, *inter alia*, a just and morally justified one. Therefore, the sanctions imposed in this case do not satisfy the purpose of punishment, neither in the sense of special nor general deterrence.

The arguments in the Appeals by the Defense Counsels for the Accused Mitar Rašević and Savo Todović, and the Accused Savo Todović, primarily refer to the violation of the Criminal Code, wherein they state that not only is the Court of BiH's jurisprudence unacceptable, but it is also unlawful. The Defense believes that the Court must have applied the law which was applicable at the time of the perpetration of the acts qualified in the Indictment as acts of the criminal offenses of which the accused Rašević and Todović were found guilty, namely the Criminal Code of the former SFRY, which, as the adopted law, was also applicable in the Republic of BiH after it was recognized as an independent state. That Code, under Chapter 16, which is entitled *Criminal Acts against Humanity and International Law*, stipulated various forms of criminal offenses under the title *War Crime against the Civilian Population*, and a prison sentence of at least 5 years or the death penalty were prescribed for those offenses. When the death penalty was eliminated from the system of punishments in BiH, the most severe punishment was a 20-year imprisonment, in which way the requirements have been met to apply the CC SFRY as a more lenient law, which also recognizes the regulation on mandatory application of a more lenient criminal code. The application of this code is also justified by the analysis of the criminal offenses in Article 142 of the CC SFRY, under Chapter 16, which has almost identical and substantively completely the same title as Chapter 17 of the CC BiH, and the criminal offenses in Articles 172 and 173 of the CC BiH, which clearly indicates that Article 142 of the CC SFRY protects all that is protected in Articles 172 and 173 of the CC BiH. In their Appeals, the Defense Counsels also contest the application of Article 4a of the CC of BiH, whereas it is argued in the appeal by the Defense Counsel Slaviša Prodanović that it is unlawful, unconstitutional and contrary to Article 11 of the International Bill of Human Rights and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since Article 4a of the CC BiH makes worthless the legal postulates protected under international bills and conventions, and it is therefore clear that the mentioned provision cannot be used as a ground for the application of the CC BiH

to criminal offenses which were committed before the enactment of that code, while the Appeal by the Defense Counsels Mladen Šarenac and Jovan Debelica states that this provision derogates the provisions of Articles 3 and 4 of the CC of BiH, thus nullifying the two principles on which the criminal law is based, the principle of legality and the principle of time constraints regarding applicability.

With regard to command responsibility, it is stated in the appeal by the Defense Counsel for the Accused Mitar Rašević that the Prosecutor did not prove, nor was he proving the guilt of the accused Rašević as a co-perpetrator of the acts with which he was charged under so-called command responsibility, which is prescribed under the 2003 CC BiH. The Defense submits that the accused Rašević should not be found guilty either under the previously existing doctrine of so-called command responsibility in international law or under the broadly established doctrine of this form of individual responsibility which was established and came into existence in judgments of the ICTY in The Hague. The Appeal further argues that the command responsibility, as well as membership in joint criminal enterprise, may only be considered from the aspect of the overall actions of the Accused Rašević, who was the Commander of Guards at the KPD (*Trans. Note: Correctional Facility*), and he therefore had no competences over the military persons, nor did he have authority to punish the guards if they exceeded their authority, although he was their superior, and there is no failure in this case. It is also argued that the events stated in the charges were obviously accidental, hence not planned in advance, so the accused Rašević could not have even known that any of the guards was about to commit an unlawful act, and thereby he could not have taken any measures, even if he had been authorized to take them, to prevent such conduct of the guards. The Appeal concludes that the Court should not have found the Accused guilty under the theory of command responsibility, because he did not have the command responsibility, nor could he have had it.

With regard to the concept of "command responsibility", the Defense for the Accused Savo Todović submits in its appeal that the law applicable to this particular case is the CC SFRY which does not include the theory of command responsibility, which cannot be incorporated into the legal system of BiH either through Article 4a of 2003 CC of BiH, or as the "general principle of international law". The Defense argues that even if the theory of command responsibility were to be applied, in the way as it can be found in the ICTY jurisprudence, the Prosecutor's Office failed to prove all foreseen elements based on which the Accused Todović could be found guilty. Therefore the Defense is of the view that the decision on his criminal liability under the theory of command responsibility, as rendered by the Trial Panel, is erroneous.

Insofar as the Joint Criminal Enterprise is concerned, the Defense for the Accused Mitar Rašević claims that the provisions of the General Part of the CC BiH indicate that the Criminal Code of BiH does not recognize the provision of the joint criminal enterprise, which means that every perpetrator of a crime must commit the criminal act with intent or negligently and that he is always held responsible only within the limits of his intent or negligence, whether he personally commits the act which constitutes an element of a criminal offense or helps another in the commission of that act, or incites another to commit a criminal offense. The Defense notes that the First Instance Verdict amply uses this concept from the ICTY judgments, then it would be necessary to decide which category of the joint criminal enterprise is involved here, given that there are three categories. Citing

certain ICTY judgments without linking those positions to the testimonies of the witnesses who were victims and who testified about the behavior of the accused Rašević makes the verdict completely unclear. The Defense asks as to what is the contribution and the individual responsibility of the accused Rašević for the crimes committed within the systematic joint criminal enterprise, and how he contributed to the improvement of the system? The Defense believes that the Verdict does not offer the answers to that question, but it only offers the statements. Furthermore, the Accused could not foresee his criminal liability by referring to Article 62 of the SFRY CC (it is likely that they actually referred to Article 26 of the CC of SFRY) as stated in the First Instance Verdict, nor could he or the persons familiar with the criminal law have known or presumed that the laws retroactively valid would be passed. The Accused could not have presumed that his acts of kindness would contribute to the imagined criminal association about whose existence the Accused did not know.

In its appeal, the Defense for the Accused Savo Todović also objects to the application of a concept that does not exist in the criminal legislation of BiH, that is, the concept of joint criminal enterprise, which is, furthermore, not even foreseen in the CC SFRY as well, nor does it have the underpinning in international customary law. Criminal responsibility of Savo Todović under the joint criminal enterprise concept does not accrue from statute or Article. To the contrary, it was a theory devised and developed by the ICTY judges, which was argued by ICTY prosecutors so as to broaden the scope of criminal responsibility beyond the Statute, as it arises from a historical context and from the ICTY Statute, as well as from international customary law, that joint criminal enterprise may not be incorporated in any valid theory of responsibility applicable to Savo Todović. Even if we presume it possible, the Appeal argues that the Verdict still failed to provide a consistent and coherent explanation of the joint criminal enterprise concept.

The Appeal further elaborates that the CC of BiH includes the form of liability because of the common purpose or goal, but in Articles 29 and 35 of the Code. Although the text of Article 29 of the CC BiH differs from Article 22 of the CC SFRY and leads to the expansion of the doctrine, similar distinctions can be drawn between Article 29 of the CC BiH and the doctrine on joint criminal enterprise which differs from co-perpetration in that the joint criminal enterprise does not require causation between the conduct of the accused and the committed criminal offence. According to Article 29 of the CC BiH the conduct of the accused must be *sine qua non*, that is, if the accused had not participated, the common plan would not have been executed. The *mens rea* element in terms of Article 29 of the CC BiH and the joint criminal enterprise also differs, that is, the burden is therefore shifted on the accused to prove that he was not aware of the system of ill-treatment and accordingly, he did not intend to bring about such consequences, whereas, according to Article 29 of the CC BiH, the presumption on *mens rea* cannot be inferred only from the requirement that *actus reus* of complicity has been met. The Prosecution must prove that the perpetrator acted with the explicit *mens rea* according to Article 35 of the CC of BiH.

Moreover, the Appeal by the Defense for the Accused Mitar Rašević highlights that the First Instance Verdict contains a number of essential violations of the criminal procedure, because the operative part of the Verdict is incomprehensible, internally contradictory, failing to present the reasons for the decisive facts and, in addition, the charges have also gone beyond their scope. The Defense submits that there is an obvious difference in terms

of the qualification of the criminal offence when comparing the allegations from the Indictment with the contents of the operative part of the Verdict. To wit, it is not possible to see from the Indictment under which type of the primary offence the criminal actions of the criminal offence can be subsumed since the Indictment claims that the accused committed the criminal offence in violation of Article 172(1)(h) in conjunction with subparagraphs a), d), e), f), k) and i), as read with Articles 29 and 180(1) and (2) of the BiH CC. Therefore, it is not clear whether all seven Counts of the criminal offence are subsumed under each action as charged or only some counts of the basic form of the criminal offence are related to individual actions. The Verdict has separated the Counts of the basic part of individual actions so the Defense is in the dilemma whether they now go beyond the scope of the Indictment. If only Count k) of the Indictment is connected with the actions as described under Counts 1b) and 1c), taking into consideration that the Verdict contains Section f) added to Section k), the Defense is of the view the Accused Rašević was found guilty also of something he is not even charged with. Furthermore, a lot has been changed in the factual description, which is a violation of the identity of the Indictment. To wit, Count 1b) of the Indictment does not mention at all the prisoner with the initials Dž.B., however, the person with these initials is mentioned in the Verdict.

The Defense Counsels for the Accused Savo Todović also submit in their Appeal that the criminal procedure was gravely violated when the challenged Verdict was rendered, as provided in Article 297(1) i) and j) of the CPC of BiH. In addition, the Appeal argues that the right to a fair trial was considerably imperiled by the fact that no appeal was allowed to contest a Decision on established facts prior to filing an appeal to challenge the verdict. The Defense refers to Article 318(1) of the CPC of BiH claiming the right to appeal and to challenge the Decision should have been allowed before the Appellate Division Panel of the Court of BiH prior to the main trial. This is even more so because the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH (hereinafter: the Law on Transfer - LoT) does not define the "right to appeal" from the decisions rendered pursuant to Article 4 of the Law. However, Article 1(2) stipulates that "in case the provisions set forth in this Law do not provide for special provisions for the matters referred to in paragraph 1 of this Article, other relevant provisions of the BiH Criminal Procedure Code shall apply…", which clearly and precisely applies to Article 318(1) when the appeals are permitted from the Decision.

The Defense also argues that the principle of *in dubio pro reo* principle was also violated because the Prosecution had to prove beyond a reasonable doubt that Savo Todović was guilty as charged, since the accused person is presumed to be innocent. The contested Verdict, however, entirely adopts the Prosecution theory that Savo Todović had effective control over the perpetrators of the crimes but it primarily followed from subjective impressions of the witnesses for the Prosecution, thus violating the right of the Accused to the presumption of innocence.

With regard to the facts as established in the contested Verdict, the Defense Counsel for Accused Mitar Rašević argues in the Appeal that he cannot see how the accused Rašević participated in the maintenance of the system of punishment and mistreatment of detainees, from April 1992 to October 1994. In the view of the Defense, all presented evidence confirms that the Accused had nothing to do with the military police and that the detainees

were under the sole competence of the Army whereby the staff and the premises of the KP Dom served only as an assistance service for the Army. In addition, the Appeal argues that the guards had never selected detainees for interrogation but that they had always done that based on the lists brought by the authorized military persons and at the beginning by the civilians who were inspectors of the PSC Foča.

With regard to Section 1b), the Defense submits that it did not contest that DŽ.B. was beaten up and locked in the solitary confinement cell nor did the Defense contest the events related to Nurko Nišić and to the detainee S.M. However, the Defense cannot see how the Accused Rašević contributed to the above mentioned. As for the incident with the detainee S.M, the Defense argues that the incident did not take place as stated in the operative part of the Verdict. The Accused himself described the event in detail; however, the Verdict does not evaluate evidence either individually or in their correlation. There is no evaluation as to which witness the Court did or did not give credence to, for what reasons it finds the facts proven or not proven, particularly evaluating the authenticity of contradictory evidence by which it was guided while adjudicating legal issues, in particular while establishing whether there exist the criminal offence and the criminal responsibility. According to the Appeal, these formal defects result in the failure of the First Instance Verdict to present the grounds on decisive facts, having as a consequence the essential violation of the criminal procedure provisions.

As for the incident with the witness FWS 71, the Defense also contests that the incident took place in the manner as described. Apart from this witness, witness FWS 76 was also examined and their testimonies differ essentially. In addition, witness FWS 71 gave two different statements before the Investigators which differ from the testimonies at the main hearing. The Defense claims with certainty that witness FWS 71 made up a story that he was beaten up by the guards for twenty minutes until he fainted.

Finally, the Appeal does not contest that there were incidents. However, there were no failures by the Accused Rašević which could be included under the acts of the criminal offence of which he was found guilty.

With regard to the operative part of the Verdict pertaining to Count 1c) under which Rašević was found guilty, it is unclear which actions constitute the element of the criminal offence. That is, the evaluation is missing as to which reasons guided the Court to resolve this legal matter, particularly concerning the existence of the criminal offense and criminal liability of the Accused Rašević. To wit, it is stated in the operative part of the Verdict that the Accused Todović, together with other guards, mistreated and beat Enes Zeković, so the Appellant inquires what the failure of the Accused Rašević was since he was not present on that occasion.

Furthermore, with regard to Section 2 of the operative part of the Verdict, the Defense claims that a pattern of beatings and mistreatment of detainees by the guards did not exist although there were some sporadic incidents. This was corroborated by the statements of a majority of witnesses. According to the Appeal, such incidents may not be considered under the actions of the primary criminal offence committed in violation of Article 172 of the BiH CC. In addition, the Defense notes that ample evidence confirms that nothing could have been done without the permission or consent by the military Commander, Colonel

Kovač, and the Accused Rašević was not authorized to oppose that or to prohibit interrogations and beating up of detainees by the military police officers and the army.

The Appeal also argues that the Accused Rašević, as the Commander of Guards, had nothing to do with the bad conditions in the KP Dom at the beginning of the armed conflict, of which he was found guilty under Section 3 of the Verdict nor did he have anything to do with the hygiene conditions in the KP Dom. Witness Milutin Tijanić confirmed that the Accused, as the Commander of the prison guards, had nothing to do with whether the detainees had heating, warm water, bath, soap or toothpaste. However, the First Instance Verdict does not contain any of the comments of this witness' testimony which makes the Verdict defective and constitutes essential violations of the criminal procedure. As for the medical care, it existed in the KP Dom but the Defense is of the view that it was insufficient due to the developments of the war and general shortages which the Accused could not influence. He claims he did his best to help the detainees and that many of the witnesses confirmed that in their testimony. The Accused claims that although it is stated on page 80 of the Verdict that the Indictment accurately describes the factual situation, "the evidence does not establish the existence of the third element, intent, of the crime, or other inhumane acts necessary to make that factual situation a crime against humanity." Regardless of such a conclusion, in Section C of the First Instance Verdict the Accused Rašević was found guilty of the criminal offence committed in violation of Article 172(1)(h) in conjunction with subparagraphs e) and k) although the Accused claims that such actions cannot be committed if there is no intent. The Accused claims this also constitutes an essential violation of the criminal procedure provisions.

As for the Section 4 of the operative part of the Verdict, the Defense argues that it is unclear what the Court meant by the actions described under this Section and under which elements of the underlying criminal offence they can be subsumed. That is, there is a general confusion which makes this Verdict so unclear that the Defense does not know why the accused Rašević was found guilty. To wit, by comparing the operative part of the Verdict with the Indictment, it is possible to note that the accused Rašević is not charged with the perpetration of the criminal offence under Article 172(1)(c) but despite that he has been found guilty also of what he has not been accused. It is indisputable that the Court is not bound to the qualifications from the Indictment. However, the actions constituting the elements of the criminal offence with which somebody is charged must follow from the factual description, whereas nothing follows from the factual description of Section 4, let alone the incriminating action constituting the element of the criminal offence of which he was found guilty. First of all, according to the Appeal, the Court should have addressed the issue as to whether the actions as described in Section 4 could be subsumed under the criminal offence at all since the work obligation was compulsory in the KP Dom before the outbreak of the armed conflict and the convicted persons were obliged to also continue working after the war. The Accused Rašević did not assign detainees or select the persons for labor, or monitor their assignments, and the Verdict did not explain what it understood by the word 'cooperate' with the civilian and external military authorities, as arbitrarily written in the operative part. It is further stated in the Appeal that the operative part of the Verdict in Section 4c) is instructive since the Indictment does not charge the accused Rašević at all with these actions although he was found guilty of those too, but it only charges the accused Todović, which consequently constitutes an essential violation of the criminal offence since the Verdict goes beyond the scope of the Indictment.

By the operative part of the Verdict in Section 5, the Accused Rašević was found guilty of the criminal offence committed in violation of Article 172(1) of the BiH CC in conjunction with subparagraphs d) and i). By comparing the operative part of the Verdict with the Indictment, the Defense notes that it can be seen in the Indictment that the accused Rašević is charged with all counts pertaining to the primary offence (a, d, e, f, k and i) as written in the Indictment. Thus, the Court was obliged to release the Accused Rašević under the other counts of the primary offence, a), e), f) and k), which resulted in an essential violation of the criminal procedure provisions under Article 297(h) of the CPC of BiH, since the Court failed to fully adjudicate the subject of charges by its Verdict. Furthermore, it is not evident in the factual description that the Accused Rašević was in any way linked with the exchanges and the release of detainees from the Foča KPD, which was the exclusive competence of the army. The fact that he served as an escort based upon the order but not by his own will does not constitute the element of the criminal offence as found guilty.

With regard to Section 5, paragraph 2 of the operative part of the Verdict, the Defense notes that the factual description does not show the charges against the Accused Rašević. It does not even mention his name but the first-instance Verdict finds him guilty of the criminal offence in violation of Article 172(1)(i), of which he has not been accused. The same pertains to Section 5 subparagraph 3 of the operative part of the Verdict. The Accused did not know in any way who would be on the list and did not influence in any way whatsoever the drafting of the list. He neither knew nor could have known what would happen to the persons put on the above list. Finally, even if he had had any doubts the Accused could not have prevented the military police to take over the detainees.

In stating its view on the criminal sanction, the Defense argues that only an acquitting Verdict would be adequate for everything the Accused Rašević was doing in the critical period while the non-Serbs were detained in the KP Dom. In a time of evil he was a true human which is a fact corroborated by all witnesses who testified sincerely and honestly and this is a unique case in that the Prosecution witnesses defended the Accused. Regardless of being convinced that the only fair verdict would be an acquittal, the Defense is of the opinion that there are particularly mitigating circumstances to that extent that the reduction of punishment beyond the legal minimum up to the minimum by which the punishment may be reduced would be relatively adequate if the accused Rašević must be convicted.

The Appeals by the Defense Counsels for the Accused Savo Todović and the Accused himself also object to the erroneous and incompletely established state of facts. Therefore, the Defense Counsels submit in their Appeal that they never disputed the fact that crimes were committed in the KP Dom Foča but they stress that Savo Todović is not responsible for those crimes. The Defense highlights as the most important fact that the civilian authorities did not have absolute control over the happenings in the KP Dom concerning the imprisoned Bosniaks and that they were only in charge of the regular prisoners who served their prison sentences. It can be undoubtedly established from ample evidence that it was the army that had exclusive control and was in charge of the prisoners in the KP Dom Foča who were considered to be prisoners of war. The Appeal states that the Trial Panel erroneously concluded that Savo Todović voluntarily participated and even agreed to take part in the events in the KP Dom Foča. It therefore recalls the position taken by the ICTY

Trial Chamber in the Aleksovski case where the situation was similar to the particular situation in the Todović case.

With regard to Section 1b) of the Trial Verdict, the Defense considers that the state of facts pertaining to the events alleged in the operative part of the verdict has not been established correctly since there are inconsistencies in the witness statements about this event. The Defense also reminds the Court that it was accepted as an established fact in the *Krnojelac* case that there were certain groups of persons that entered the KP Dom and the warden had only a limited control over them (interrogators and members of paramilitary forces) and these are the persons that committed the acts under this count of which Savo Todović has been found guilty. The Appeal stresses that from 20 May to 20 June 1992, after his departure from the frontline, he was on furlough in July in the village of Rijeka, near Foča, helping his parents. The Defense further believes that the Prosecution did not offer any evidence to support the averment that Savo Todović compiled lists for anything, in particular for beatings, takings away and similar. As for the interrogations, the detainees were interrogated by the persons they named, namely Koprivica, Vladičić and Tepavčević, members of the Ministry of the Interior. In addition, the Accused claims he never personally ill-treated the detainees and that is also confirmed by the testimony of the prosecution witnesses.

With regard to the referenced Section, the accused Savo Todović submits in his Appeal that even if the acts constituting the criminal offence as charged had been perpetrated, he could not be charged with that criminal offence because during that "imprisonment and keeping in inhumane conditions" he was under a work obligation in the KPD Foča until 19 May 1992. His work obligation was cancelled on 20 May of the same year and he was assigned to the army to perform compulsory military service. He explains that he was under a work obligation from 23 April 1992 and during that period of time he was not a superior to the alleged perpetrators of that criminal offence nor could he have prevented the perpetration of the alleged offences as he was assigned the duty of an officer in charge of criminal sanctions. He further notes that the factual findings and conclusions about the injured Dž.B. are also inconsistent with the operative part of the Verdict concerning the period of his confinement in the solitary cell, and there is also a difference in the identity of the injured party since it is stated in the Indictment that the person's initials were J.B, while the initials stated in the Verdict are Dž.B.

With regard to this Section, the Accused further notes that his participation in the developments wherein witness FWS71 was beaten up has not been proven in any way whatsoever, which is even more so as, at that time, he was not in the KPD Foča, and witness FWS 71 did not connect him with that event either. In addition, as regards Section 1b), the Accused submits that the incrimination about detainee S.M. being beaten up, which was done by the military police officers, cannot be connected with him since it clearly follows from the presented evidence that he was not present at the time of the perpetration nor could he have prevented it or punished the perpetrators. Whereas, it has been found that the perpetrators of the offense were members of the military police over whom he never had any commanding role. The Accused considers the witnesses Ekrem Zeković and the protected witness FWS 76 hostile witnesses who testified so as to harm him.

The Accused Todović submits that it is unclear as to why the Panel found it proven that he had participated in the perpetration of the criminal offence of torture of Nurko Nišić since the witnesses who also testified about this event stated that the prohibited act took place just before St. Vitus's Day in 1992, that is, at the time of his deployment to the military service. The Accused believes that the beating, if it happened at all, was done by members of the military police, specifically, Drago Zelenović, as testified to by many witnesses including the injured party Nišić. Besides, the KPD staff, either the guards or other employees, could not be present during the interrogations.

With regard to Section 1c), the Defense considers that the conclusion of the Trial Panel stated in paragraph 115 of the First Instance Verdict is wrong. He supports that argument with the statements of witnesses FWS 216 and Ekrem Zeković. He claims that his criminal liability was not proved and that the elements of the criminal offence were also not proved. Concerning this Section, the Accused Todović also refers to the testimony of witness Ekrem Zeković (FWS 216) who, when describing the escape and what followed after he was returned to the KP Dom, did not mention the name of the Accused. The Accused contests the part of this witness's statement wherein he described being beaten up in the solitary confinement cell since the witness cannot recall the name of a single guard who allegedly inflicted serious injuries upon him although the witness stated that he knew all of the employees, and the guards in particular. Further, he referred to this witness's statements given to The Hague Tribunal investigators and the Prosecutor's Office of BiH and before the Court of BiH wherein he stated that the Accused physically mistreated him as well. The Accused pointed out contradictions in these statements and the Accused claims that the testimony was malevolent and intended to harm him.

The Accused admits that he addressed the detainees after Zeković was recaptured and returned to the KP Dom and that he informed them that, as punishment, their food rations would be reduced. It was not his decision but he only passed on the message, which he accepts as his mistake. However, he denies that he told them on that occasion that they would not receive medical care and that their work and walks would be forbidden.

With regard to Section 2, the Defense argues in the Appeal that the Accused Todović had no control over the perpetration of the killings. That is, he had no control over the military police and consequently no control over their actions. Many witnesses stated that members of military police were principal perpetrators of the beatings in the KP Dom and the guard who participated in them, Milenko Burilo, refused to receive the orders of the superiors who were unable to control him.

The Accused Todović stressed in his Appeal that he was not in the KPD from 20 May to early July. Therefore, it is unclear why he had been charged with the incriminations stated under Section 2 of the Verdict. This is even more so as no witness mentioned his name in the context of these events. Furthermore, the Panel also did not prove the participation of guards in this criminal offence since the witnesses were often unconvincing and contradictory in proving the alleged incriminations.

In relation to Section 3 of the operative part of the Verdict, the Defense submits that the Prosecutor's Office found no formal evidence to refute the averments of the accused Todović and Rašević that the prisoners were arrested and brought to the KP Dom by

members of the military police and that the military command informed them those people were prisoners of war. The Defense further submits that the Panel did not have sufficient precise information to conclude whether the rooms were overcrowded because not a single witness gave a clear indication as to the number of prisoners in respective rooms, the number of rooms or the number of beds. The defense submits that the Prosecutor's Office did not obtain a single witness from the group of Serb convicts who could confirm that the Serb convicts received much better food than the non-Serb prisoners, which is considered an indicator of a discriminatory intent. The conclusion of the Trial Panel that the Accused was competent and able to participate in any way in the creation of living conditions in the KP Dom is utterly wrong.

With reference to Section 3 of the operative part of the Verdict, the Accused in his appeal does not contest that non-Serbs were imprisoned in the Foča KP Dom between April and October 1992. However, he claims that all of them were imprisoned by members of the military and sometimes by the civilian police without the involvement of the employees of the Foča KP Dom. Furthermore, some protected witnesses presented by the Prosecutor's Office claimed that a number of elderly, underage and ill persons, or in other words, physically and mentally ill persons and disabled persons were imprisoned in the Dom. The Accused claims this was not corroborated by other evidence which was required in order to establish these facts beyond a reasonable doubt. Likewise, the employees of the KPD had no competencies regarding this category of prisoners or any authority for their incarceration and interrogation. In addition to that, the Accused submits in his appeal that the number of prisoners was never established beyond a reasonable doubt during the proceedings, whereas the testimonies of witnesses who gave evidence about that were not compelling and some were even biased and partial (testimony of the witness Amor Mašović). With reference to the fact established by the Trial Panel that the imprisoned persons were civilians rather than prisoners of war, the Accused submits that his personal knowledge about that issue is irrelevant. He adds that he did not even know or have any personal contact with the majority of imprisoned non-Serbs of whose status he had no information about at the time they were brought to the KPD.

Further, the Accused submits that the rooms where non-Serbs were quartered at the relevant time were not overcrowded, a fact which many witnesses confirmed. The Accused contested the testimonies of Ekrem Zeković and protected witnesses FWS 250 and "A" who testified about the crowded situation in the solitary cells. He claims their testimony is contradictory, unconvincing and shows a clear intention to harm him. With regard to hygiene, the Accused states that he never disputed that the hygienic supplies were limited and the heating conditions were very difficult because there was no way to provide funds for the heating. With reference to beds, bedding and blankets, all detainees (convicted Serbs and non-Serb prisoners) had the same conditions. The Accused also did not dispute that there was not enough food for the prisoners but he emphasized that it was not the intention of the management of the KPD to deprive the imprisoned non-Serbs of adequate food. This was a result of a difficult situation in which the provisions of food for the KP Dom required for meals for all detainees (both Serbs and non-Serbs) depended on the amounts provided by the army. Finally, the Accused concluded that non-Serb prisoners were treated in accordance with the legal provisions on the life and work of convicts which were in force until the outbreak of the war so that prisoners who worked received four meals, whereas the people who did not work received three meals.

With reference to the guards arbitrarily incarcerating people in the solitary cells, the Accused avers that the Prosecutor's Office failed to prove those incidents. He does not dispute that there might have been individual incarcerations on the grounds explained in the convicting part of the Verdict. However, those were exceptional cases rather than the rule. In any event, the management of the KP Dom was not informed of such incarcerations.

The appeal further argues that the Trial Panel found that the evidence confirmed the Accused personally threatened prisoners with severe physical punishment should they violate prison rules, attempt to escape or refuse to work even though the witnesses who gave such evidence were neither credible nor objective.

With reference to Section 4 of the operative part of the Verdict, the defense has underlined throughout the proceedings that certain forms of prison labor are a standard operative procedure in all prisons throughout the world. He claimed that some prisoners personally asked to perform labor and that Savo Todović could not influence whether prisoners would perform certain labor and thus it remains unclear why the Accused was found guilty of this offence. The witnesses of the Prosecutor's Office testified, inter alia, that the labor was not forced and that there was certain compensation for the labor. Thus, many prisoners volunteered for labor. The employment in the KPD was a war time assignment of Savo Todović, the assignment every able-bodied man had and he had to obey. That was the reason why he made the lists of arrested people who were to perform labor which was his responsibility according to the job specification.

With reference to Section 4b), the defense highlights that the military issued the orders, not Savo Todović. This was also the case with witness FWS 141 who was forced to look for and activate mines. The same circumstances pertain to Section 4c) regarding prisoners FWS 109 and K.G. who were used several times to detect landmines by driving vehicles at the front of Serb convoys.

With reference to the foregoing Section in the operative part of the Verdict, the Accused claims in his appeal that he had organized the work of part of the imprisoned non-Serbs but not during the period of time and in the manner referred to in the Verdict. Since early September 1992, he served, among other duties, as the duty officer for employment of convicts in accordance with the Rulebook on Internal Organization of the Foča KPD. He performed the duties within the limits defined in this document and on a voluntary basis, which was not denied by a great majority of the witnesses heard. The imprisoned non-Serbs performed their labor in accordance with their qualifications and the working hours never exceeded 8 hours per day, 3 or 4 days of the week. He emphasized that the work of convicts on the private property of an individual was unlawful and morally wrong and that he had nothing to do with that because it was contrary to his own moral convictions. During the relevant time, he never had the authority to order labor to imprisoned non-Serbs. He only performed the duties the warden assigned to him which included the labor in the Miljevina mine. He made lists of people to work in the mine after the warden decided that the imprisoned non-Serbs would work in the mine. The work in the mine was on a voluntary basis. The coal from the mine was used for the needs of the Foča KPD which shows that this labor did not produce gain for others to the detriment of the imprisoned non-Serbs. The same applies to the labor in the Furniture Factory and Metal Workshop, where the labor was

temporary and could not produce considerable financial gain. It was done to contribute to the generally difficult operations of the KPD in the time of war.

Finally, the Accused emphasized that the criminal offence of enslavement, which was the qualification the Trial Panel used in this case was not defined in the Law that was applicable at the time relevant to the indictment. The Panel explained in the Verdict the elements of this criminal offence by referring to the Rome Statute which was enacted in 1998, i.e. a long time after the alleged commission of this criminal offence.

With reference to Section 4b), the Accused Todović emphasizes that during the relevant period he was not deployed to the Foča KPD under the compulsory work order and thus could not have been a participant in the commission of the offence. The protected witness FWS 141 never saw him or knew him.

The Accused Todović argues in his appeal that Section 4c) has not been proven because the evidence submitted does not corroborate beyond a reasonable doubt that this criminal offence was committed. The operative part of the Verdict is unclear and contradictory with the reasoning in this part.

With reference to Section 5 of the operative provision of the Verdict, it is averred that the prison management was subordinate to the army and that the army acted willfully in every specific instance. Likewise, the prisoners were taken to be exchanged in the presence of the members of the military police or the army and one should have in mind that the Accused Todović was not a military officer. The decisions on exchanges were not made by Savo Todović and the Prosecutor's Office did not prove beyond a reasonable doubt that the Accused Todović ordered these exchanges or was aware of them. Thus, Savo Todović's intention to transfer non-Serb prisoners from that region and prevent their return was not proven. In addition to that, not a single witness stated he/she wanted to stay in Foča which is understandable considering the difficult state of war in Foča. The appeal further argues that the management of the KP Dom could not be linked directly or indirectly to the missing of the people mentioned in the Verdict. The prison management believed the prisoners would be exchanged and was not aware that some of the prisoners were never exchanged.

The Defense also submitted that the Prosecutor's Office failed to prove, and did not attempt to prove, the discriminatory intent of any of the accused persons, which is a necessary element of the criminal offence of persecution. The appeal submitted that it is not sufficient to conclude that the non-Serbs in Foča were persecuted during the period of time relevant to the indictment. It was necessary to prove that Savo Todović in person, as an individual, had the intention to commit criminal offences with discriminatory intent.

With reference to Section 5 of the operative part of the Verdict, the Accused submits that he did not dispute in his defense the transfer of a certain number of non-Serb prisoners to the detention facilities in Kalinovik, Rudo and Kula at the relevant period of time. These transfers were based on the decisions of military authorities of Foča. None of the KPD employees could or did order these transfers. It is therefore unclear why he is criminally liable for the alleged deportations, even more so because none of the purportedly deported persons who appeared as witnesses before the Court of BiH linked his name to the exchanges. Besides, the accused avers he was not in Foča on 5 October 1994 when the last

group of prisoners was released and he considers the testimony of witnesses Ekrem Zeković and FWS 83 who testified to seeing him on that occasion, malevolent and partial.

The appeal further submits that the Panel failed to prove that the prisoners were forcibly transferred with the intention to prevent their return. These people were transferred during commencement of the conflict during war-time operations at a time when staying in their place of residence was dangerous and unsafe.

Even though the defense for the Accused did not contest that some of the persons who were in the KPD are considered missing, the Accused notes that the number and time when these people were taken away are contentious, as well as the evidence provided by witnesses A, FWS 113, FWS 172 and FWS 119 which he considers contradictory and unreliable. The appeal further explains the procedure of the discharge of the prisoners from the KPD in the following manner: the lists were made outside the KPD and no one in the KPD could have known the purpose of the discharge of the persons and they would then be taken to the gate and handed over to those who brought the lists. Due to this manner of discharge the Accused wonders how the employees of the KPD could be liable for this.

With reference to the subparagraph in Section 5 charging that he personally saw off a group of 55 prisoners and instructed them not to look out of the bus windows, the Accused referred to the statements of witnesses E, FWS 86, FWS 172, FWS 58 and FWS 02. None stated he/she saw the Accused on that occasion. Likewise, the Accused denies that people younger than 18 or older than 65 were on the 55 list, which can easily be verified by inspecting the list.

Finally, the Accused submits it is not his intention to deny some of the crimes but to deny a causal relationship between himself, as the Accused, and these incidents.

The Accused denies in his appeal the existence of a joint criminal enterprise, when it comes to the imprisonment of non-Serbs, torture and other misconduct, alleged killings and forcible transfer. He argued that his participation or the participation of any other KPD employee in the perpetration of those offences was not proven. To the contrary, the Trial Panel in its findings explained how the actions charged were perpetrated, mentioning the perpetrators of those actions, which suggests no participation of the employees of the KPD in the alleged "joint, systemic, criminal enterprise". In addition, he emphasized that Foča KPD, at the relevant time, did not function as a camp because it did not have a single feature of any camp established by any of the warring parties in BiH.

As for the individual criminal liability of the Accused, he emphasizes that not a single relevant fact was established beyond a reasonable doubt to confirm his liability. The evidence of witnesses Ekrem Zeković, FWS 210, FWS 71, FWS 250 and "C", which the Court found convincing, thorough and specific, is actually contradictory, biased and provided in an effort to obtain a conviction. On the other hand, the Panel was not satisfied with the testimony of protected witnesses FWS 141, FWS 02, FWS 03, FWS 104 and some others pertaining to the fact that the Accused was not present at the KPD between 20 May and late July 1992. Furthermore, the Accused does not understand the foundation for the charges regarding his role in the organization of meals, tasking the employees, making quartering arrangements and establishing procedure, particularly regarding the engagement

of civilian and military police because the Prosecutor's Office not only failed to prove such a role of his but also did not attempt to do so. In addition to that, his own testimony is not and cannot be a manifest proof of some kind of his role in that period of time.

The Accused claims in his appeal that the Trial Panel found him liable for punishing the prisoners as well even though he actually only exercised his authority. Furthermore, the Accused underlines that it has not been proven that he performed the function of deputy warden until 16 December 1992, which implies that he did not have the authority by virtue of that office. He could not have had any personal knowledge of the alleged system of the joint systemic criminal enterprise regarding the imprisoned non-Serbs because he was not under the compulsory work order until late July. The enforcement of "discipline" to achieve a common criminal purpose was also not proven. During his term at the KPD, only a few disciplinary sanctions were pronounced for obvious violations of the house rules. He conducted such proceedings in accordance with the Rulebook on Internal Organization and House Rules. The sanctions were imposed by the warden of the KPD who had the sole authority to do so. His participation in the alleged torture of Ekrem Zeković was also not proven. It was also not proven that he had ordered anyone's maltreatment or incarceration in the solitary cell. There was no forced labor as a result of enslavement because all prisoners worked voluntarily. Additionally, knowledge of the alleged interrogation conducted to classify the prisoners, which included the alleged torture of Nurko Nišić and criminal actions to the detriment of DŽ.B. and S.M., could not be linked to him because all of these incidents allegedly took place in June 1992 when the Accused was obviously not deployed at the KPD.

In the convicting part of the Verdict, the Accused submits a precedent was set in relation to earlier verdicts referring to criminal liability, namely individual liability, for criminal offences committed within a systemic criminal enterprise. Even though the evidence submitted clearly shows that he could not have been a member of the so-called criminal enterprise, at least between 20 May and 30 June 1992, the Trial Panel found him guilty under the charges covering that period of time.

With respect to command responsibility, the Accused emphasizes he could not have had such a position either *de facto* or *de jure* within the period of time relevant to the indictment. As he explains, even if he had been at the KPD at that time, his position was not that of authority or that of a superior to the perpetrators (guards). The Panel did not prove that he had control over the guards at any one time during his term in the KPD.

Furthermore, the defense submits that the Trial Panel did not properly consider all the mitigating factors it should have considered when deciding on the sentence. This includes his voluntary surrender to the ICTY and the genuine remorse the Accused Todović expressed for the suffering of the KPD prisoners.

With regard to the criminal sanction, the Accused in his appeal argues that the Panel overestimated the weight of the aggravating factors and that it gave little appreciation to his difficult financial situation and the fact that he stopped working at his peak, that he was retired involuntarily and that his pension is extremely low and insufficient for him to provide for his family. The Panel also did not appreciate his demeanor during the proceedings.

At a session of the Appellate Panel held on 6 November 2008 in the presence of the prosecutor of the Prosecutor's Office of BiH, Behaija Krnjić, the Accused Mitar Rašević and Savo Todović and their defense counsel, Attorneys Slaviša Prodanović, Mladen Šarenac and Jovan Debelica, pursuant to Article 304 CPC BiH, all parties briefly presented their appeals and responses to the appeals. They maintained their written submissions and motions in their entirety.

Having examined the contested Verdict in line with the appellate arguments, the Appellate Panel decided as stated in the operative part hereof, for the following reasons:

The First Instance Verdict, in the opinion of this Panel, does not contain essential violations of the criminal procedure to which the appeals referred in which they claimed that the Verdict was incomprehensible and contradictory to the evidence submitted. A Verdict is incomprehensible if there are doubts as to the Court's findings or contradictions or if its meaning cannot be clearly established, which does not apply here in the opinion of this Panel because the operative part of the Verdict is clear and consistent in its reasoning.

The First Instance Verdict precisely presents the facts to which it refers, the reasons why it refers to them, the law that applies and the Court's findings as a final result. The appellate arguments of the defense do not offer specific or precise foundations for identifying alleged flaws in the contested Verdict. Therefore, the appellate arguments pertaining to the alleged incomprehensible and contradictory Verdict and the alleged lack of reasoning of the decisive facts are without merit and unfounded.

The detailed methods used in the Verdict completely comply with the provisions of the procedural law on this matter. The Verdict first identifies the evidence submitted, then presents its content without any discrimination in terms of the actual content and evaluates from both possible points of view in terms of content and veracity. Therefore, the appellate argument that there is no evaluation of the evidence is misplaced. The contested verdict does not violate the methodological approach to establishing and examining decisive facts under Article 14 CPC BiH which pertains to "equality of arms" since the Verdict examines and establishes inculpatory and exculpatory facts equally. Consistent with this methodological and procedural approach, the Verdict presents an evidentiary foundation for every fact that it finds to be established regardless of the category the given fact falls under (decisive, initial or controlling). In doing so, the Verdict did not overlook a single fact of relevance to the Verdict.

In any case, "equal attention paid to inculpatory as well as exculpatory facts" will be evaluated when considering appellate arguments regarding various paragraphs of the operative part of the Verdict. However, the Appellate Panel first notes that the Trial Panel at all times addressed the issues raised by the defense pertaining to the reliability of the witnesses and gave these issues due consideration. It is quite reasonable to expect certain contradictions or inconsistencies from witnesses who themselves suffered great trauma as a consequence of the incident they were required to testify about, particularly bearing in mind that the incidents took place many years before they appeared before the Court. Such inconsistencies in most part do not disqualify the essence of the testimony of such witnesses.

With reference to the appellate objection of the defense counsel for the accused Mitar Rašević that an essential violation of the criminal procedure pursuant to Article 297(1)(j) CPC BiH occurred because the indictment was exceeded, given that the contested Verdict contains a different legal definition of individual actions of the perpetration of the underlying offence, Crimes against Humanity, as opposed to the confirmed Indictment, this Panel notes that "the Court is not bound to accept the proposals regarding the legal evaluation of the act" (Article 280(3) CPC BiH). This means that the Trial Court is not bound by the proposals of the Prosecutor and the Court can independently determine facts under the substantive criminal law and can always have a different opinion in terms of the legal definition of the offence as opposed to the prosecutor's opinion presented in the Indictment. Therefore, the Trial Court may define the offence in the manner it deems correct if it provides a reasoned explanation in the Verdict. In the present case, the legal definition of the offence under the paragraphs of the operative part of the Verdict follows from the factual description of the criminal offence charged under the Indictment coupled with the factual findings from the evidentiary proceedings rather than from the legal definition contained in the Indictment. The First Instance Panel clearly explained this procedure and this Appellate Panel accepts that explanation in its entirety. Therefore the appellate objection that the indictment was exceeded and that the Accused was found guilty of an offense that he was not charged with is unfounded.

The appeal also submits that the identity of the indictment was violated (more precisely, the appeal argues that the factual description was changed in many aspects, although the appeal refers specifically only to Count 1b) and that the prisoner whose initials are Dž.B. is not mentioned in the indictment at all, whereas a person with these initials is mentioned in the Verdict.

It is correct that there is no mention in the Indictment of the person with the initials Dž.B., but the appeal neglected the reference to a person with the initials Z.B. This is important because the First Instance Court, following evidentiary procedure, established the exact identity of the person including his/her initials and, therefore, made this proper modification in the factual description. This was correctly explained and did not result in a violation of the identity of the indictment bearing in mind that the criminal offence at issue is not a criminal offence against life and limb where the protected object is life or limb and where the existence of a criminal offence depends on establishing the identity of the person who was murdered or injured. In this case, the main protected objects are humanity and values protected by the international law and the death or injury to the bodily integrity of the injured parties is a secondary consequence. Therefore, the offence exists even if identity cannot be established. In sum, the Court is bound by the state of facts as presented in the confirmed indictment or the indictment amended at the main trial, which means that it is bound not only by the offence in the indictment as a specific event in the past but also by the description of that offence or event as provided in the indictment. The Court must not exceed that description or consider facts established at the main trial not included in the description of the offence in the indictment to the detriment of the Accused. In practice that means that the Court must not exceed the body of facts described in the indictment and consider, to the detriment of the Accused, facts that were not included in the indictment. Likewise, the description of the offence in the Verdict, if it is more favorable to the Accused, must not constitute a criminal offence of a different type (they must be identical in

terms of their genus). Furthermore, this identity does not have to be absolute because some details can be left out from or added to the description without changing the basic identity of the offence. Main definitions should be in line with the subject matter elements of the criminal offence or elements of the definition that cannot be changed if they are to the detriment of the Accused. The objective identity of the indictment and the verdict will not be questioned if circumstances that are not important for the description of the offence are changed in the Verdict or if the general factual description of the offence from the indictment is more complete or precise in the Verdict or if a person is charged with a continued criminal offence when it has been established at the hearing that a concurrence of criminal offences is at issue (the Court is not bound by the legal definition).

The contested Verdict deleted from the factual portion of the indictment everything that was not proven and inserted facts and circumstances that were established without changing the factual basis, especially not to the disadvantage of the Accused since, after the determination of the Trial Panel there are fewer charges of criminal conduct against the Accused than in the indictment. The changes made by the Trial Panel benefitted the Accused.

With reference to the appellate argument pertaining to the inability to lodge an immediate appeal from the decision on established facts, this Panel finds that the principle of a fair trial was not violated. This does not mean that there is no right to appeal in general. However, there is no right to an interlocutory appeal. In other words, established facts may be contested only in an appeal from a Verdict which is a sufficient safeguard of the Accused's rights. In addition to this, it is interesting to note that the Defense did not use the right to contest the established facts in the course of evidentiary proceedings or in the appellate proceedings, as the appeal of the Defense does not contest the accuracy of the established facts but objects to the lack of the possibility to lodge an immediate interlocutory appeal.

Considering the appellate arguments raised on the ground of erroneously or incompletely established state of facts, this Panel is satisfied that the First Instance Court, based on the evidence admitted at the main trial and the facts referred to in the reasoning of the Verdict, properly found that the Accused significantly participated in the commission of the criminal acts referred to in paragraphs 1 through 5 of the operative part of the Verdict. The First Instance Panel correctly concluded that the acts described contain all of the legal elements of the criminal offence of Crimes against Humanity under Article 172(1)(h) in relation to subparagraphs a), c), d), e), f), g), i) and k) CC BiH. This Panel accepts those conclusions in their entirety.

With reference to the evaluation of evidence upon which the decision on liability of the Accused is based, the First Instance Verdict, in the opinion of this Panel, provides valid and extensive reasons explaining how it determined certain facts were proven and it explains in sufficient detail how it evaluated the testimony of the witnesses and other evidence submitted. The Defense does not have to agree with the findings of the First Instance Panel but it cannot justifiably claim that there was no evidence upon which the First Instance Panel could base its factual and legal findings. The fact that the First Instance Panel did not evaluate evidence in the manner that the defense claims and that it did not analyze each individual word and sentence of the testimony provided by the witnesses, either during investigation or at the main trial, does not make the First Instance Verdict deficient and

incomplete. The Verdict was clear and focused on the important elements of the criminal offence in the trial.

In view of the above, the Appellate Panel finds that the First Instance Panel dealt with the state of facts in the case in detail. The First Instance Panel always applied the approach of listing the evidence it referred to, analyzed the evidence separately and in connection with other evidence, and **drew conclusions** on the state of facts. Therefore, the contested Verdict contains a valid analysis of all of the decisive facts. The Appellate Panel finds that there is no foundation for the objection that the evidence submitted was not evaluated in accordance with the CPC, as argued by the appeals.

The Appellate Panel finds that the defense does not offer a single serious, well-founded reason to conclude that the conclusions of the Trial Panel are "erroneous or incomplete". In other words, the defense did not point to a reasonable basis for an error in the Verdict of the First Instance Panel.

All of the appeals include a claim that does not focus on the specific events that occurred in Foča KPD as much as they focus on the participation of the Accused in those events. The appeal of defense counsel for the Accused Rašević emphasizes that, "There is no description of the manner in which the Accused participated in the system of punishment and mistreatment of detainees between April 1992 and October 1994" while the appeal of the Accused Todović states that, "The defense never disputed the fact that crimes were committed in the KP Dom Foča but we stress that Savo Todović is not responsible for the crimes." Accused Savo Todović himself claims in his appeal that the First Instance Panel did not prove either his participation or the participation of any other employee of the KPD in the perpetration of criminal offences. Regardless of this joint position, all respective appeals object to the factual findings under individual counts of the Indictment questioning the veracity of the testimony of witnesses heard, including the existence of subject matter elements of the criminal offence charged against them. Thus, with reference to Section 1 of the operative part of the Verdict, the defense for Accused Rašević does not contest that Dž.B. was beaten up and locked in a solitary cell or the incidents regarding Nurko Nišić (the defense sees no contribution of the Accused in that) but it contests that the incidents involving witnesses S.M. and FWS 71 took place as described in the operative part of the Verdict. The appeal of the defense for the Accused Todović also emphasizes that there are considerable inconsistencies between the testimonies of the witnesses on this incident (there is no mention of the witnesses at issue). The Accused Todović considers protected witness FWS 71 and witness Ekrem Zeković hostile witnesses, who gave evidence with the intention to harm him (that is the position of the accused regarding almost all witnesses whose evidence was not in favor of his defense).

The Appellate Panel believes that the First Instance Verdict contains a thorough and comprehensive analysis of the testimonies of witnesses who gave evidence about the circumstances referred to under this count. In that regard, a valid inference was made in this Verdict and this Panel fully accepts it.

The defense contested during the trial the veracity of the witness FWS 71. This Panel finds that the Trial Panel considered the alleged contradictions in his testimony and explained the weight they gave to it when rendering their Verdict. The Trial Panel also presented

compelling reasons why it decided to accept this testimony as true and consistent (page 56 of the contested Verdict).

Additionally, this Panel notes that the evaluation of evidence, as an important part of the First Instance Verdict, must contain clear reasons and grounds for the Court's finding, or lack thereof, on the existence of the elements of the offences and evaluation of contradictory evidence. However, this does not mean that the Court has the obligation to clarify absolutely every single inconsistency among the testimonies of witnesses.

Many witnesses testified about the incident involving prisoner S.M. (witness D, Ekrem Zeković, FWS 76, FWS 83, FWS 86, FWS 111, FWS 119, FWS 138, FWS 142 and FWS 210, as well as the accused Rašević himself). This Panel finds no mistakes on the part of the First Instance Panel when it gave credibility to their testimony and based the factual finding on them. The Court clearly indicated that their testimony was consistent in terms of the decisive facts. Even the appeal does not refer to anything other than Article 290(6) CPC BiH to explain how exactly the First Instance Panel allegedly made a mistake. In fact, it seems that the defense only disagrees with the finding of the First Instance Panel but offers no grounds on which to refute that finding.

With reference to Sections 1c) and 2 of the operative part of the Verdict, the Defense for the Accused contests the proof of the elements of the criminal offence and emphasizes that the Accused could not have opposed or forbidden the interrogations and beatings of prisoners conducted by military policemen and soldiers. The Accused Todović in his appeal objects to the testimony of the witness Ekrem Zeković (FWS 216) and considers it biased and calculated with the intention to harm him.

With reference to the factual findings related to the foregoing paragraphs in the operative part of the Verdict, the Appellate Panel is satisfied that the key evidence – the testimony of witnesses who gave evidence about these circumstances, was properly and completely analyzed in the First Instance Verdict. Based on that, the First Instance Panel made correct conclusions and provided clear reasons why the described actions of the perpetration constitute the criminal offence of torture under Article 172(1)(f) CC BiH under paragraph 1c) and the criminal offence of deprivation of life – murder under Article 172(1)(a) CC BiH (page 61 and pages 65 through 69 of the contested Verdict). The position of the appellants that this pertains only to isolated incidents is rejected. This argument cannot be applied with reference to any other paragraph of the operative part of the Verdict since the First Instance Verdict contains a clear and consistent explanation that all incidents in Foča KPD were "a part of a detailed planning, organization and coordination with the aim to execute what indeed happened – the attack on non-Serb population, which included multiple crimes". The First Instance Panel correctly concluded that there was a necessary objective and subjective nexus between the perpetration and Chapeau elements of the criminal offence of Crimes against Humanity under Article 172 CC BiH.

The Appellate Panel therefore finds that the analysis and conclusions of the First Instance Panel are justified and lawful and the arguments of the defense unfounded and unsubstantiated by a single relevant fact that would seriously refute the findings contained in the contested verdict.

With reference to Section 3 of the operative part of the Verdict, this Panel is satisfied that the First Instance Panel, following a comprehensive evaluation of the evidence regarding all elements of poor living conditions in the camp which resulted in deaths of some prisoners while others showed symptoms of malnutrition and mental symptoms of a stress disorder, reached a correct and the only possible conclusion that the acts of perpetration described under this paragraph amount to the criminal offence of Crimes against Humanity under Article 172(1)(e) (imprisonment) and (k) (inhumane acts) CC BiH.

In the opinion of this Panel, the First Instance Panel correctly evaluated evidence, the testimony of witnesses, injured parties whom the First Instance Panel found to be thorough, consistent and reliable. Most witnesses testified about what they had seen and survived from or were eyewitnesses to (not hearsay evidence), so that their credibility and validity cannot be criticized in any way. Therefore, appellate objections putting these testimonies in question are completely unfounded. In light of this evidence, the testimony of Milutin Tijanić referred to by the defense does not considerably affect the findings in the Verdict relative to the existence of the criminal offence and the criminal liability of the Accused. This witness testified that the Accused Rašević as the Commander of the guards had nothing to do with poor conditions.

With reference to defense objection that the Court concluded on page 80 of the Verdict that "the evidence does not establish the existence of the third element, intent, of the crime of Other Inhumane Acts necessary for the factual support of a Crime against Humanity" but still found the Accused guilty of the offence under Article 172(1)(h) in relation to subparagraph (k) CC BiH, the defense placed the cited part out of the context of the entire explanation of this paragraph of the Verdict in an attempt to discredit this finding of the First Instance Panel. The actual finding of the First Instance Court is that "Except for the finding that the inadequate medical care, though detrimental to the health of the detainees, was not intentional, the living conditions existing at the KP Dom for the non-Serb detainees were intentionally created and intended to cause the great suffering and serious mental and physical injury that in fact resulted. The evidence establishes that the conditions described above were harsh and almost unbearable. This is particularly evident from the disparity between the living conditions for non-Serb detainees and Serb convicts and prison staff. Accordingly, the Panel concludes that the living conditions were intentional and were intended to cause great suffering and serious injury, specifically to non-Serbs" (page 82 of the Verdict).

The lack of proof of intent as an element pertains only to the inadequacy of medical assistance which the First Instance Panel found to be unintentional on the part of the Accused. However, when comparing the living conditions of Serbs and non-Serbs at the Foča KPD, intent was evident and established on the basis of numerous pieces of evidence corroborating the much more difficult living conditions that existed for non-Serbs detained at the Foča KPD. Therefore, all the essential elements of the criminal offense have been satisfied in relation to this paragraph of the Verdict's operative part as concluded by the First Instance Verdict rendering the objection to the existence of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC BiH unfounded. Furthermore, regarding the objection by the Defense for the Accused Todović and the Accused himself that the Prosecution has failed to identify formal evidence refuting the claims of both of the Accused that members of the military police (and sometimes members

of the civil police) arrested the detainees and brought them to the KPD, the First Instance Panel took a clear position (page 74) by stating that "the Accused argued that the detainees were arrested and transported to the KP Dom by the military police, and that they were not responsible for those acts. The Panel notes in this regard that its conclusions pertain to the continued imprisonment and deprivation of liberty of the non-Serb detainees at the KP Dom not the initial apprehension, which was not charged in the Indictment". Indeed, it does not ensue from the state of facts under the quoted paragraph of the Verdict's operative part that the Accused are charged with personally arresting and transporting non-Serb detainees to the KPD. However, the Accused are responsible for the deliberate and arbitrary imprisonment of the detainees at the Dom, and the challenged Verdict provided sufficient reasons warranting the conclusion on the existence of the criminal act of imprisonment as a Crime against Humanity.

With respect to Section 4 of the First Instance Verdict's operative part, the appeal contains an unfounded allegation that the First Instance Verdict is unclear in what the acts set out under this count constituted. As a result, the Defense claims it does not know what the Accused has been found guilty of because nothing arises from the state of facts, least of all the act constituting an element of the offense the accused has been found guilty of. The First Instance Panel provided clear-cut and coherent reasons in terms of facts and law leaving no room for the doubt that the acts of perpetration (set out in the Verdict's operative part) constituted the offense charged. Specifically, the Verdict described in detail the forced labor system at the Foča KPD and based its conclusions on the testimony of many witnesses who have provided consistent and sincere accounts of how they were forced to perform all kinds of work, starting from the furniture factory to the Miljevina Mine, while some were even forced to detect mines by serving as drivers ahead of Serb convoys. By logical deduction and evaluation of the factual circumstances as a whole, the First Instance Panel correctly concluded that using detainees to perform forced labor (as in the present case) constituted enslavement and this Panel agrees with this conclusion in its entirety. There is nothing unclear in the state of facts, especially in the reasoning of the Verdict that would raise doubts about the correctness of the factual and legal conclusions in the challenged Verdict, rendering the allegations made in the appeal unfounded.

The arguments made in the appeals that the acts set out under this paragraph of the Verdict did not constitute a criminal offense since labor was compulsory at the KPD even prior to the outbreak of the armed conflict, and that convicted persons were obliged to work even after the war ended, is totally without merit for the simple reason that the detained non-Serbs were not convicted persons but, as stated in the challenged Verdict, persons who were unlawfully and arbitrarily imprisoned. Therefore, no penal regulation or law applicable to convicted persons or lawful prisoners of war could have justified the forced labor of the detainees.

The allegations made in the appeals that certain detainees requested to perform labor and that there was certain compensation for that labor are also unfounded. The challenged Verdict gave special attention to this issue (and any other contentious issue) that was raised during the main trial and provided convincing reasons for finding that the issue could not be accepted as a ground for relieving the Accused of their responsibility for committing the acts charged. Specifically, the First Instance Verdict clearly indicates that some of the witnesses stated that they had performed labor on a voluntary basis or had not opposed

being taken to perform labor. However, the largest number of the detainees who gave evidence about these circumstances stated that they were forced to perform labor and that no one asked them if they wanted to do that or not. Additionally, voluntariness cannot be based on the fact that detainees chose the lesser of two evils. That is, that they wanted to perform labor because it meant receiving more meals and movement. As the challenged Verdict correctly stated on page 90, "the choice to escape or ameliorate such conditions is not a free choice, but the essence of coercion and the negation of free will".

With respect to Section 5 of the First Instance Verdict's operative part, all of the appeals emphasized that the Accused were not linked in any way to the exchanges that occurred and that the exchanges were solely within the military purview thus contesting the criminal responsibility of the Accused. As the Accused Todović put it in his appeal, "it was not my intention to deny some of the crimes but to rather contest the causal connection between me, as the Accused, and these events". As noted above, this view (along with other complaints considered) is also taken in relation to the facts found in other sections of the Verdict's operative part. Nonetheless, this Panel takes the view that the complaints made by the Defense in that regard are not well-founded.

Defense Counsel for the Accused Savo Todović challenged the introduction of the notion of Joint Criminal Enterprise arguing that this notion has no basis in customary international law. However, in the reasons for his appeal Defense Counsel merely made a blanket statement that Joint criminal Enterprise did not exist as part of international law and that it was "incorporated" into the case-law of the ICTY only after the offense with which Accused Savo Todović is charged was committed.

Defense Counsel for the Accused Mitar Rašević contended in his appeal that the First Instance Verdict relies heavily on the case law of the ICTY with respect to this institution, without defining the categorization of the Joint Criminal enterprise in the present case.

In contrast, this Panel finds that the First Instance Verdict clearly stated that the present case involves a Systemic Joint Criminal Enterprise. The First Instance Panel reached this conclusion after having analyzed in detail the institution of Joint Criminal Enterprise, its categories and the required essential elements of each category. The First Instance Panel stated in detail its reasons for finding the Accused to have participated in a Systemic Joint Criminal Enterprise. This Panel finds that the analysis of the First Instance Panel regarding Joint Criminal Enterprise was correct in its entirety with the exception of the required "degree of contribution" of an Accused in a Joint Criminal Enterprise. The Appellate Panel's reasoning for this finding is set out in detail below.

In the view of this Panel, the customary status of Article 7 of the ICTY Statute is not an issue as it has been confirmed in numerous war crimes trials (starting from trials of crimes committed during World War I onwards). The Appellate Panel finds the arguments and examples stated by the First Instance Panel to be quite sufficient to support this conclusion. In particular, the First Instance Verdict referred to the customary status of Article 7 on page 122, paragraph 3 of the First Instance Verdict when analyzing the existence and application of a systematic JCE in international law starting from trials of individuals responsible for maintaining concentration camps in Nazi Germany to ICTY's judgments.

This Panel upholds the conclusions reached by the First Instance Panel in their entirety reflecting the fact that JCE is irrefutably an institution of customary international law that existed and was applied long before the Accused committed the offense charged in this case.

The provisions of customary international law, including the ones that pertained to JCE, were binding on Bosnia and Herzegovina (and before that on the SFRY) due to the fact that both Constitutions stipulated a direct application of signed and ratified international treaties, including international humanitarian law treaties (the Geneva Conventions and Protocols thereto, particularly the Martens Clause ensuring the protection of inhabitants and combatants in accordance with customary international law). The Appellate Panel finds that through the application of the doctrine of Joint Criminal Enterprise the First Instance Panel effectively applied the rules of customary international law that were established long before the commission of the specific crimes, which leads to the conclusion that the Principle of Legality was not violated as erroneously argued in the appeals.

Notwithstanding the fact that the CC BiH, the CC SFRY and the ICTY Statute do not explicitly mention JCE as a form of individual criminal responsibility, the concept of Joint Criminal Enterprise has been recognized in numerous ICTY judgments and it also appears in cases pending before this Court. As correctly stated in the First Instance Verdict, three categories of JCE have been recognized in the case law; "basic", "systemic" and "extended".

"Basic" JCE implies the existence of several elements. They include more than one person, the existence of a common plan or design which amounts to or involves the commission of a crime (there is no necessity for this plan or design to have been previously formulated or arranged) and participation of the Accused in the common plan or design by committing a crime under Article 171 (Genocide), Article 172 (Crimes against Humanity), Article 173 (War Crimes against Civilians), Article 174 (War Crimes against the Wounded and Sick), Article 175 (War Crimes against Prisoners of War), Article 177 (Unlawful Killing or Wounding of the Enemy), Article 178 (Marauding the Wounded and Killed at the Battlefield) or Article 179 (Violating the Laws and Customs of War), or by contributing to the execution of the common purpose in some other manner.

"Systemic" JCE, established in the First Instance Verdict, represents a variation of the basic form of JCE. It requires the Accused's knowledge of an organized system of ill-treatment as well as the Accused's intent to further this system. "Extended" JCE pertains to cases with a common intent to commit a crime when one or more perpetrators commit a crime that, although not agreed upon in a common plan, was a natural and foreseeable consequence of the execution of that plan.

The doctrine of JCE is contained in Article 7 of the ICTY Statute and its goal is to ensure that the responsibility for serious violations of international humanitarian law is not limited to those who perform the *actus reus* of the mentioned crimes (persons who planned, instigated, ordered, physically committed or otherwise aided and abetted in the planning, preparation or execution of a crime) but to also include persons who execute a criminal activity together or individually with a common purpose. It is clear that most crimes committed during a state of war are manifestations of a collective criminality not brought

about by criminal intent or individual inclinations. Instead, in most cases crimes are committed by groups of criminals acting as part of a common plan. Although some do not perform the *actus reus* of a crime their contribution is often decisive in the successful achievement of a prohibited goal. Aiders and abettors, the ones who aid or abet JCE as accessories, can become co-perpetrators even if they did not physically commit a crime if their participation lasted for an extensive period and advanced the goal of the JCE. On the other hand, this Panel does not uphold the First Instance Panel's view that the existence of a systemic JCE requires substantial contribution on the part of the perpetrator because in that case Article 29 of the CC BiH (co-perpetration) would be applied. However, the importance of participation of the Accused is necessary and relevant to establish that the Accused shared the intent to achieve a common criminal goal.

The distinction between co-perpetration and participation in a JCE is that a larger degree of contribution (that is, more decisive) is required for co-perpetration. On the other hand, the acts of a participant in a systemic JCE carry more weight than those of an aider as the latter only has knowledge of the intent of the principal offender whereas a participant in a JCE shares the intent of the principal offender (Appeals Chamber judgment in the *Krnojelac* case, March 2002, paragraph 74; Trial Chamber Judgment in the *Brđanin* case, September 2004, paragraph 274). Therefore, if an Accused is aware of a system of ill-treatment and agrees to it, it may be reasonably inferred that he has intent to contribute to that system and accordingly be regarded as a co-perpetrator in a JCE and not just as an aider.

However, it is the view of the Appellate Panel that this determination does not affect the correctness of the conclusions reached by the First Instance Panel in terms of the responsibility of the Accused as co-perpetrators, as co-perpetration requires proving more elements than is the case with participation in a JCE. Consequently, the position of the Accused relative to the application of substantive law was more favorable to the Accused rather than less favorable.

The First Instance Verdict addressed the issues of the scope of participation and the significance of the acts of the Accused from April 1992 through October 1994 in detail in paragraphs i) (page 149), and ii) (page 156) and also in sections c), i), ii), iii), iv), v) and d) of the Verdict, and used it as the basis for the correct conclusion that both Accused contributed considerably to the establishment and maintenance of a system of crimes at the KP Dom and, to that end, they acted with direct intent and thus committed the crime charged. The level of participation and the qualification of its importance depend on a number of factors that were taken into consideration by the First Instance Panel when rendering its decision. Therefore, the scope of JCE, the duties performed by the Accused, the time that they spent participating in the system of ill-treatment, the efforts that they took (or failed to take) in order to obstruct or prevent the operation of the system, the serious nature and scope of the crimes committed and the diligence demonstrated by the Accused in performing their duties all clearly support the conclusion that the acts and conduct of the Accused fit into the pattern of crimes committed at the KP Dom, which the Accused intended and were aware of the entire time. Consequently, the appeals contain an unfounded claim that the First Instance Verdict failed to address the issue of contribution of the Accused to the crimes committed as part of the JCE and the causal connection between the acts of the Accused and the consequences that ensued therefrom.

In his testimony, Accused Todović himself stressed that he played an important role in establishing and operating the detention camp and his *de facto* position that allowed him to send individuals to solitary confinement, to perform work, to search the rooms of detainees or to impose disciplinary measures, which is consistent with the testimony of Ekrem Zeković, FWS 104, FWS 138, FWS 71, FWS 85 and others. The persons who were the direct victims of the orders and conduct of the Accused Todović are the best and most credible indicators that the Accused was at the KP Dom at the time relevant to the indictment and that by his acts he established and maintained a system of repression in force at the time. To that end, the First Instance Panel correctly concluded that his temporary absence from the KP Dom does not exclude him from the JCE in which he participated because his absence was not permanent and as no one substituted for him during his absence.

As for the Accused Rašević, his acts contributed considerably to the system of ill-treatment at the Foča KP Dom and his powers and authority were defined under the Book of Rules in force at the time of commission of the offense. He proved to be an exceptionally able Commander of the guards and, as he himself put it, he established and maintained an efficient operation of the KP Dom. Bearing in mind the testimony of almost all of the witnesses, the crimes that were committed there were not isolated individual incidents but constituted an overt pattern of behavior and conduct. The imprisonment, interrogations, the taking away and the killings followed a formal procedure that was maintained and operated by the Accused.

The irrefutable conclusion is that the Accused were not only aware of but agreed with the crimes that were committed and they contributed actively to the furthering of the system.

Based on the foregoing, the Appellate Panel finds that the First Instance Verdict provided valid reasons to conclude that there was an organized system of ill-treatment in force at the KP Dom, that the Accused Rašević and Todović were aware of that system and of the nature and scope of criminal activities that were carried out within that system and that by their acts they contributed decisively to maintain the system.

The Defense's objection that the Accused Rašević was powerless to change anything and that he remained in the detention camp only to help the detainees with his presence is not accepted because it is inconsistent with the aforementioned evidence and facts established during the proceedings. His possible personal disagreement with the committed crimes cannot be used as a ground for releasing him from the responsibility for everything that was done since he did nothing to stop further crimes or to protect or release the detainees (as a group) that were within his purview. Shared intent to implement JCE "does not require personal satisfaction or enthusiasm, or personal initiative in contributing to the joint enterprise." Shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise (Appeals Chamber judgment in the *Krnojelac* case, paragraph 100).

Individual acts of the Accused that possibly could be defined as benevolent do not relieve him of his responsibility for his other actions which establish the essential elements of the offense that he was found guilty of. Some of his actions were taken into consideration as mitigating circumstances in the course of determining the sentence where the First Instance

Panel correctly assessed the overall behavior and conduct of the Accused relative to the offense in question. It is important to stress that the challenged Verdict correctly states that the occasional offering of assistance to certain detainees was never directed at undermining the management and operation of the detention camp but rather constituted individual acts that were carried out in secrecy and they never grew to become possible attempts to change the established system of ill-treatment.

The Appellate Panel finds that the arguments in the appeals that during the First Instance proceedings the Prosecutor's Office failed to prove the existence of a discriminatory intent as an essential element of persecution as a Crime against Humanity are unfounded.

The discriminatory treatment of non-Serbs, as correctly concluded by the First Instance Panel on a number of occasions emanates from almost every act of the Accused covered by the Indictment as clearly confirmed by the treatment of non-Serb detainees that was substantially different from the treatment received by Serb detainees. This Panel fully affirms the First Instance Panel's reasonable conclusion specifically mentioned on page 167 of the challenged Verdict and emphasizes that the acts of the Accused constituted a gross and flagrant denial of fundamental rights of individuals in violation of international law such as the right to life, liberty and security, the right not to be subjected to torture or to inhuman or degrading treatment on the grounds of membership in a group of people or a community of a different ethnicity and religion. Hence the Accused acted solely on discriminatory grounds and with a discriminatory intent. Based on the foregoing, the Appellate Panel finds that the raised objections are unfounded and are refused accordingly.
The appeals by defense counsel also focused on the First Instance Panel's decision to find the accused guilty under the theory of Command responsibility under Article 180(2) of the CC BiH.

Having considered the arguments from the appeals, this Panel first notes that it is completely illogical to find the Accused criminally responsible for planning, instigating, ordering or committing the offense while simultaneously convicting him of failing to prevent the crime or punish the perpetrator thereof.

To that end, the Trial Chamber judgment in the *Krnojelac* case reads that "it is inappropriate to convict under both heads of responsibility for the same count based on the same acts". In the context of placing criminal responsibility on the Accused, it would be reasonable to enter a conviction under the heading of the responsibility that gives the most accurate account of the Accused's conduct. As the Accused in the present case were found criminally responsible as co-perpetrators in a systemic JCE and as the First Instance Panel found beyond a reasonable doubt that they committed acts as co-perpetrators, which this Panel accepts in entirety, it is improper to enter a conviction under both types of responsibility for the same acts.

Generally speaking, conviction under both types of responsibility is not possible and the First Instance Verdict in a way acknowledged that by stating "However, as co-perpetration of a JCE is the more factually appropriate mode of culpability, command responsibility will be used only in connection with sentencing".

In substance, this line of thought of the First Instance Panel is erroneous and this solution is not possible. Command Responsibility can be an aggravating factor and it depends on the status of an Accused in relation to his subordinates. However, the Accused may not be convicted on both grounds but sentenced on only one ground, as was done in the challenged Verdict.

Bearing in mind that the First Instance Panel's determination was to the detriment of the Accused, this Panel grants the appeals in part, reverses the First Instance Verdict in terms of the legal characterization of the offense and finds the Accused guilty of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) in relation to subparagraphs (a), (c), (d), (e), (f) and (k) of the CC BiH, in conjunction with Articles 29 and 180(1) of the CC BiH.

The appeals claim the application of an incorrect substantive law, that is, they claim that the First Instance Panel erroneously applied the CC BiH in lieu of the CC SFRY that was allegedly applicable at the time of commission of the offense. However, their claim of a violation of the Principle of Legality and the time issue under Articles 3 and 4 of the Criminal Code of Bosnia and Herzegovina are unfounded.

It is beyond dispute that at the time of perpetration of the acts charged against the Accused (satisfying all the elements of the criminal offense of Crimes against Humanity) the criminal offense was not prescribed by the Criminal Code of the SFRY as the substantive law applicable at the time of commission of the offense.

It is also beyond dispute that according to the principle of legality, no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law (Article 3 of CC BiH). The principle of time constraints regarding applicability provides that the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense and that if the law has been amended on one or more occasions after the criminal offense was perpetrated the law that is more lenient to the perpetrator shall be applied (Article 4 of CC BiH). The principle of legality is also incorporated in Article 7(2) of the ECHR and Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR").

On the other hand, Article 4a) of the CC BiH, correctly invoked by the First Instance Verdict, provides that Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed was criminal according to the general principles of international law. This effectively adopts the provisions of Article 7(2) of the ECHR and Article 15(2) of the ICCPR and allowing for exceptional derogations from the principle laid down in Article 4 of the CC BiH and for derogation from the mandatory application of a more lenient law in proceedings pertaining to criminal offenses under international law. That is the exact situation in the present case because we are dealing with a charge that involves a violation of rules of international law. As correctly reasoned in the challenged Verdict, Crimes against Humanity at the time relevant to the Indictment was undoubtedly a criminal offense from the viewpoints of customary international law and the "principles of international law"

respectively. The First Instance Panel stated exhaustive reasoning in support of this conclusion, and those arguments are entirely valid and correct and are as such accepted by this Panel in their entirety.

In addition, customary international law and inter-state agreements signed by the Socialist Federal Republic of Yugoslavia automatically became binding on Bosnia and Herzegovina at the time when Bosnia and Herzegovina was part of the Socialist Federal Republic of Yugoslavia and after it became a successor State to the former Socialist Federal Republic of Yugoslavia. The 1978 Vienna Convention on the Succession of States in Respect of Treaties, ratified by the Socialist Federal Republic of Yugoslavia on 18 April 1980, provides in Article 34 that any treaty in force at the time of the succession of States in respect of the entire territory of the predecessor State continues in force in respect to each successor State so formed unless the States concerned otherwise agree. Furthermore, Bosnia and Herzegovina declared on 10 June 1994 that as a successor State it accepted all of the treaties that were binding on the former Yugoslavia. Additionally, Article 210 of the Constitution of the Socialist Federal Republic of Yugoslavia provides that treaties are implemented automatically and applied directly as of the date of their entry into force without having to adopt implementing regulations.

It follows that Bosnia and Herzegovina, as a successor State of the former SFRY, ratified the ECHR and the ICCPR and that these instruments were binding on Bosnia and Herzegovina as these instruments stipulate an obligation to try and punish any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law (there is no dispute that the offence of Crimes against Humanity is criminal). This Panel is of the view that the arguments from the appeals that the trial and punishment for this offense amounted to a violation of the principle of *nullum crimen sine lege* are unfounded in their entirety.

Having reviewed the decision on the punishment together with the appeals of the defense counsel and of the Accused Savo Todović, this Panel took into consideration that the First Instance Panel assessed the circumstances bearing on the magnitude of punishment as required by Article 48 of the CC BiH (General Principles of Meting Out Punishments). The First Instance Verdict considered the sentence prescribed for the offense, the purpose of punishment, the degree of criminal liability of the Accused, the circumstances surrounding the commission of the offense, the degree of danger or injury to the protected object, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offense.

As for the Accused Savo Todović, the First Instance Panel determined that his position at the KP Dom, the manner in which he used or failed to use that position and the manner in which he committed the offenses charged were aggravating circumstances, whereas the Accused's life before the war was a mitigating circumstance. When reviewing this assessment and the reasons adduced by the First Instance Panel to that end, the Appellate Panel disagrees with the arguments of the appeal and this Panel finds that adequate importance was attached by the First Instance Panel to both aggravating and mitigating circumstances and that the First Instance Panel assessed them correctly by taking into consideration all the subjective and objective factors pertaining to the offense and its perpetrator. Accordingly, the imposed sentence of imprisonment for a term of 12 years and

6 months (crediting the time spent in custody) is a proportionate punishment reflecting the serious nature of the offense the Accused was found guilty of in light of the fact that the protected object here is universal human values that are a prerequisite and basis for a joint and humane existence.

Bearing this in mind, the imposed punishment achieves the general and specific purpose of punishment under Article 39 of the CC BiH, rendering the claims of the appeals unfounded.

With respect to the Accused Mitar Rašević, the First Instance Panel considered both aggravating and mitigating circumstances, finding that the manner in which he used or failed to use his authority constituted an aggravating factor while his conduct prior to the commission of the offense constituted a mitigating circumstance. Moreover, the First Instance Panel, having assessed the circumstances surrounding the commission of the offense, found that the mitigating circumstances outweigh the aggravating circumstances to a considerable extent and constitute particularly mitigating circumstances leading to the conclusion that the purpose of the punishment can be achieved by a sentence of imprisonment for a term of 8 years and 6 months.

While noting that the First Instance Panel assessed the mitigating circumstances to the extent that they necessitated the imposition of a sentence below the minimum sentence prescribed by law, this Panel finds that adequate importance was not attached to the mitigating circumstances and those circumstances were not sufficiently reflected in the imposed sentence. This resulted in a sentence that was too harsh, as was maintained by defense counsel in his appeal. The mentioned mitigating circumstances found by the First Instance Panel should carry more weight than was given to them by the First Instance Panel due to their nature and importance in light of the fact that the sentence is meted out not only in relation to the criminal offense but also in relation to the manner and circumstances of the offense and the perpetrator's character.

In the present case, the Accused attempted to alleviate and indeed did alleviate the sufferings of the detainees. Many witnesses attested to this by expressing their gratitude for what he did for them during their detention. This, coupled with the accused' sincere remorse, that according to the conclusion of the First Instance Panel was not motivated by the fact that proceedings were instituted against him, suggests that the purpose of punishment, from the viewpoints of both general and specific deterrence, may be achieved by imposing a lesser sentence of imprisonment than the one imposed by the First Instance Panel.

Consequently, the Appellate Panel partially grants the appeal by defense counsel for the Accused Mitar Rašević, reversing the sanction imposed under the First Instance Verdict and sentences the Accused to 7 years imprisonment for committing the offense. The time that the Accused spent in custody between 15 August 2003 and 28 November 2008 is to be credited towards the sentence of imprisonment. The Appellate Panel is satisfied that this punishment is proportionate to the circumstances surrounding the case that affect the imposed punishment and that it achieves the purpose of punishment under Article 39 of the CC BiH.

Bearing in mind the purposes concerning the decision on the punishments, the arguments made on appeal by the Prosecutor's Office of BiH pertaining to the sentence of the Accused are without merit.

The Prosecutor's Office made submissions with respect to the acquitting part of the challenged Verdict whereby the Accused were acquitted of the charge of torture and of the beating of detainees under Counts 1 and 1a) of the Indictment and Counts 1b) and 1c). The First Instance Panel harmonized the Verdict's operative part with the factual findings and omitted the names of detainees for whom there was no proof of physical ill-treatment. This Panel finds the submissions of the Prosecutor to be unfounded as the First Instance Panel could not reliably establish facts under those counts on the basis of the evidence submitted. Thus, the First Instance Panel could not establish the existence of essential elements of some criminal offenses. The Appellate Panel finds that conclusion to be correct.

Contrary to the views taken in the appeals, this Panel finds that the First Instance Panel provided clear, logical and convincing reasons after having analyzed and assessed the evidence individually and as a whole. As a result, the argument in the appeal that the First Instance Panel established the facts erroneously and incompletely and that the Verdict does not contain sufficient reasons concerning the decisive facts is unfounded.

The challenged Verdict cannot be validly criticized for an incomplete and inconsistent assessment of the evidence as it contains detailed reasons for every count explaining why the Prosecutor's Office has failed to prove all the elements of certain charges. The Appellate Panel finds reasonable the First Instance Panel's finding that the witnesses who spoke in relation to the acquitting part of the Verdict (referred to in the appeal) failed to describe the serious nature of injuries that some of the detainees allegedly sustained. For that reason, an essential element of the criminal offense of Other Inhumane Acts, that physical ill-treatment brought about severe pain or suffering, was not proved beyond a reasonable doubt. Furthermore, the examined witnesses failed to corroborate certain factual allegations. That is, they failed to confirm that some of the events occurred as set out in the Indictment while some of the allegations under the Indictment (e.g. physical ill-treatment of detainees Č.M., A.S. and FWS 198) were not corroborated by a single piece of evidence to establish this fact (which is likely the reason why they were not mentioned in the appeal).

The submission in the appeal that the First Instance Panel "was obliged" to include this Count of the Indictment (1a) is unfounded bearing in mind that the Panel found in relation to subsections b) and c) that the Accused committed the offense under Article 172(k) of the CC BiH. The appeal of the Accused disregarded the fact that unlike Count 1a), the First Instance Panel found sufficient reasons with respect to the acts under other counts to arrive at a conclusion concerning the existence of the offense and criminal responsibility beyond a reasonable doubt.

All of the aforementioned pertaining to the acquitting part of the Verdict also pertain to the omitted parts of the factual accounts under Counts 1b) and 1c) of the Indictment. The First Instance Verdict gave special consideration to this part and provided detailed and correct reasoning for not finding the existence of certain charges under the aforementioned counts.

With respect to Count 1b), witnesses who have been heard either did not corroborate the factual allegations (in connection with Juso Džamalija and Š.H.) or the Prosecutor failed to prove all the elements of the offense for the same reasons stated above. In regard to FWS 76, Đ.H. and M.E., the Indictment does not mention sufficient grounds for the charge as required by Article 284(a) of the CPC BiH.

The First Instance Panel gave special attention to explaining the reasons leading to the omission of certain allegations from the factual account of Count 1c), finding that those allegations were not established beyond a reasonable doubt.

The First Instance Panel assessed the testimony of witnesses FWS 82, FWS 210 and "A", the only direct participants of the described events, and justifiably found that there were serious and substantial inconsistencies in their testimony that do not corroborate the allegations under the Indictment either individually or in conjunction with other evidence. Similarly, with regard to the ill-treatment of FWS 73 and FWS 110, only witness FWS 119 testified that he was told that the Accused "beat" them, whereas witness "A" testified that FWS 73 was taken to solitary confinement but failed to confirm that the latter was physically ill-treated and abused. Witnesses FWS 82 and FWS 210 did not even mention these detainees. They are not mentioned in the appeal although Count 1c) of the Indictment specifically states "… while Savo Todović and other guards beat and kicked detainee FWS 73 in his lower abdominal region and they kicked detainee FWS 110 until he lost consciousness; after that the aforesaid detainees were locked in solitary confinement for various time periods lasting up to 15 days". The First Instance Panel reasonably omitted this part due to lack of evidence.

The appeal refers to a careful reading of the testimony of witness FWS 182 from which it undoubtedly follows that a guard hit him twice with a rifle butt following the escape of witness FWS 216 and that Accused Savo Todović attempted to hit him as well but failed. FWS 182 was then placed in solitary confinement and Todović interrogated him demanding that he confess to have aided a fugitive. It is true that this is decisive testimony but neither this witness nor the event has been mentioned under Count 1c) of the Indictment.

The appeal further states that "the First Instance Panel concluded that it was not disputable that the detainees were beaten (the appeal does not specify the detainees in question). However, the intensity and seriousness of the sustained injuries have not been described and it has not been found beyond doubt that the mistreatment caused sufficient injury to rise to the level of a criminal offense."

This conclusion in the appeal is evidently erroneous as the First Instance Panel actually concluded that the testimony, individual and as a whole, did not corroborate the allegation under the Indictment, and this pertains to detainees FWS 73 and FWS 110, additionally maintaining that "even if the Panel were to conclude that FWS 73 and FWS 110 were physically mistreated, it was not established beyond doubt that this mistreatment caused sufficient injury to rise to the level of a criminal offense."

Therefore, contrary to the appeal, the First Instance Panel found that there was not solid evidence confirming that the events as described in the acquitting part of the Indictment had actually occurred. The First Instance Panel noted that the evidence establishing the

seriousness of the injuries sustained was not of sufficient nature to be used for determining an essential element of the offense in question which is **great** suffering or **serious** injury to body or to physical or mental health.

All of the aforementioned suggests that the allegations from the appeal by the Prosecutor's Office are without reasonable grounds and are unfounded. As such, they are not sufficient to question the totality and correctness of the established facts related to this paragraph of the Verdict's operative part.

For these reasons, the decision was rendered as stated in the operative part above, pursuant to Article 310(1) in conjunction with Article 314 of the CPC BiH.

Neira Kožo
RECORD-TAKER

Judge Dragomir Vukoje
PANEL PRESIDENT
(stamp and signature duly affixed)

LEGAL REMEDY: No appeal is allowed from the present Verdict.