

Number: X-KRŽ-06/236
Sarajevo, 5 October 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, the Panel of the Appellate Division, the Section I for War Crimes, composed of Mirza Jusufović, as the Presiding Judge, and Judges Dragomir Vukoje and Marie Tuma as the Panel Members, with the participation of the Legal Officer Medina Džerahović, as the record-taker, in the criminal case against the Accused Zdravko Božić et. al., for the criminal offence of Crimes Against Humanity in violation of Article 172(1)(h) in conjunction with sub-paragraphs (a), (d), (e), and (k) of the Criminal Code of Bosnia and Herzegovina ("CC BiH"), as read with Article 180(1) and Article 29 of the CC of BiH, ruling on the Appeal of the Prosecutor's Office of Bosnia and Herzegovina, No. KT-RZ-132/06 of 23 March 2009 and the Appeal filed by Mladen Blagojević's defense counsels Miroslav Ristić and Goran Nešković of 21 March 2009, against the Verdict of the Court of Bosnia and Herzegovina No. X-KR-06/236 of 6 November 2008, at the session held on 5 October 2009, in the presence of the accused, their Defense Counsels and the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, delivered the following:

VERDICT

DISMISSING AS UNFOUNDED the Appeal of the Prosecutor of the Prosecutor's Office of BiH, No. KT-RZ-132/06 of 23 March 2009 and the Appeal filed by Mladen Blagojević's defense counsels of 21 March 2009 and upholding the Verdict of this Court No. X-KR-06/236 of 6 November 2008.

REASONING

I. PROCEDURAL HISTORY

A. The Verdict

1. The Appellate Panel of the Court of Bosnia and Herzegovina is seized of two appeals filed by the Office of the Prosecutor ("Prosecution") and Defense Counsels for Mladen Blagojević against the First Instance Verdict ("the Trial Verdict") rendered on 6 November 2008, No. X-KR-06/236.

2. Under the Trial Verdict, the Accused Mladen Blagojević was convicted of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with sub-paragraph (k) (*Count 8/1 of the Amended Indictment*) and Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

3. Accordingly, the Trial Panel, pursuant to Article 285 of the Criminal Procedure Code of BiH (“CPC of BiH”) and Articles 39, 42, 48 and 49 of the CC BiH, sentenced the Accused Blagojević to 7 (seven) years of imprisonment. Pursuant to Article 56 of the CC BiH, the time he spent in custody, starting from 15 November 2006 until his committal to serving the sentence, was credited to the sentence of imprisonment. Finally, the Accused, pursuant to Article 188(4) of the CPC of BiH, was relieved of the duty to reimburse the costs of the criminal proceedings.

4. The same Verdict acquitted the Accused Blagojević of the charges that he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) in conjunction with sub-paragraphs (a), (d), (e) of the CC of BiH under Counts 1-7, 9, and 10 of the Amended Indictment.

5. The Trial Verdict also acquitted the Accused Zdravko Božić of the charges that he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) in conjunction with sub-paragraphs (a), (d), (e) of the CC of BiH under Counts 1-9 of the Amended Indictment.

6. The Trial Verdict also acquitted the Accused Željko Zarić of the charges that he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) in conjunction with sub-paragraphs (a), (d), (e) of the CC of BiH under Counts 1-8, and 10-12 of the Amended Indictment.

7. The Trial Verdict also acquitted the Accused Zoran Živanović of the charges that he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) in conjunction with sub-paragraphs (a), (d), (e) of the CC of BiH under Counts

1-8, 11-12, and 14 of the Amended Indictment. The Trial Panel did not consider Count 13 of the Amended Indictment since the Prosecution dropped it at trial.

8. Pursuant to Article 188(4) of the CPC of BiH, the Accused are relieved of the duty to reimburse the costs of the criminal proceedings, which will be paid from the Court budget.

B. The Appeals

9. The Prosecutor of the Prosecutor's Office of BiH filed an Appeal from the Trial Verdict on the following grounds:

- a. Essential violation of the criminal procedure pursuant to Article 296(a) as read with Article 297(1)(h) of the CPC of BiH;
- b. Violation of the Criminal Code pursuant to Article 296(b) as read with Article 298(1)(a) of the CPC of BiH;
- c. Erroneously and incompletely established state of facts pursuant to Article 297(c) as read with Article 299(1) of the CPC of BiH; and
- d. The decision on sentence pursuant to Article 300(1) of the CPC of BiH.

10. Therefore, the Prosecutor's Office of BiH proposed to partially revoke the Trial Verdict pursuant to Article 315(2) of the CPC of BiH concerning the parts raised in its appeal, order a new trial to eliminate the violations of the criminal procedure provisions and re-adduce the evidence in relation to which the state of facts has been erroneously and incompletely established and consequently, find all Accused guilty of all crimes as charged in the Amended Indictment.

11. The Prosecutor of the Prosecutor's Office of BiH also filed a Response to Appeal of Second Accused Mladen Blagojević moving the Court to dismiss it as unfounded.

12. Defense Counsels for the Accused Mladen Blagojević ("Appellant") filed an Appeal against the Trial Verdict on the following grounds:

- a. Essential violations of the provisions of criminal procedure, pursuant to Article 297 of the CPC of BiH;
- b. Violations of the criminal code pursuant to Article 298 of the CPC of BiH;
- c. Incorrectly or incompletely established facts pursuant to Article 299 of the CPC of BiH.

13. The Defense Counsels for the Accused Mladen Blagojević also filed a Response to the Appeal of the Prosecutor's Office moving the Court to dismiss it as unfounded and to uphold the Trial Verdict in the part acquitting the Accused Blagojević of the charges.

14. The Defense Counsel for the Accused Zdravko Božić filed a Response to the Appeal of the Prosecutor's Office moving the Court to dismiss it as unfounded and to uphold the Trial Verdict in the part related to the Accused Zdravko Božić.

15. The Defense Counsel for the Accused Željko Zarić filed a Response to the Appeal of the Prosecutor's Office moving the Court to dismiss it as unfounded and to uphold the Trial Verdict in the part related to the Accused Željko Zarić.

16. The Defense Counsel for the Accused Zoran Živanović and the Accused Zoran Živanović filed their respective Responses to the Appeal of the Prosecutor's Office moving the Court to dismiss it as unfounded and to uphold the Trial Verdict in the part related to the Accused Zoran Živanović.

17. The Appellate Panel, pursuant to Article 304 of the CPC of BiH, held a session on 5 October 2009. The Defense and the Prosecutor presented their appeals and responses and fully supported their respective written arguments and proposals.

18. The Appellate Panel, having reviewed the Trial Verdict insofar as contested by the Defence appeal and the Prosecution appeal, rendered the decision as in the operative part for the reasons that follow.

II. GENERAL CONSIDERATIONS

19. Pursuant to Articles 296 *et seq.* of the CPC of BiH, a first-instance verdict may be appealed on the grounds of an essential violation of the provisions of criminal procedure, a violation of the criminal code, or erroneously or incompletely established state of facts,

the decision as to the sanctions, the forfeiture of property gain, costs of criminal proceedings, claims under property law and announcement of the verdict through the media.

20. The primary grounds of appeal provided in the CPC of BiH are: 1) errors of procedural law (Article 297); 2) errors of substantive law (Article 298); 3) errors of fact (Article 299); and 4) errors in sentencing (Article 300).

21. The Appellate Panel emphasizes that an appeal is not a trial de novo. In resolving appeals against a first instance Verdict, the Appellate Panel applies standards of review to ensure that the Appellate Panel's review is limited to the critical issue confronting the Appellate Panel: namely, whether the Trial Panel committed errors of such gravity to occasion a miscarriage of justice or invalidate the Verdict. Accordingly, appeals must address specific issues in a specific manner so as to limit the scope of argumentation to the scope of the Appellate Panel's review.

22. Therefore, pursuant to Article 295(1)(b) and (c) of the CPC of BiH, the Appellant must state in the appeal both the grounds for contesting the Verdict and the reasoning behind the appeal. Mere general recitation of appellate grounds as well as pointing to the alleged errors during the first instance proceedings without specifying the grounds of appeal raised by the Appellant does not constitute a valid basis to review the Trial Verdict.¹

23. Finally, the Appellate Panel's decision on a contested verdict is limited to only those issues raised and argued by the parties on appeal pursuant to Article 306 of the CPC of BiH. Accordingly, the Appellate Panel may not revoke or revise a contested verdict or revise the decision on the sentence on the basis of issues not raised by the parties on appeal.

¹ *Prosecutor v. Stevanović Miladin*, No. X-KRŽ-05/24-2, dated 9 November 2009, p. 5; *Prosecutor v. Miloš Stupar*, No. X-KRŽ-05/24, dated 9 September 2009, p. 9

24. Nonetheless, the Appellate Panel may consider issues of general importance to the work of the Court of BiH in order to promote the efficient and fair adjudication of criminal proceedings. The Appellate Panel will not issue an opinion on or decide factual or legal issues that have not been presented and argued but will limit itself to observations and comments of a broader nature that can provide useful guidance and promote the efficient and effective work of the Court.

III. THE APPEAL OF MLADEN BLAGOJEVIĆ

A. ESSENTIAL VIOLATION OF THE CRIMINAL PROCEDURE (GROUND I)

25. Under the first ground of appeal of Accused Blagojević, the Appellant contends that the Trial Panel committed an error of law when it partially granted the Prosecutor's motion to accept thirty one (31) adjudicated facts from the two ICTY judgments, namely *Prosecutor v. Radislav Krstić*, IT-98-33-T dated 19 April 2004 and *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T dated 17 January 2005. The Appellant submits that those facts were inadmissible because the burden of proof was shifted from the Prosecutor to the Defence, which constitutes an essential violation of the criminal procedure under Article 297(1)(i) of the CPC of BiH. The Appellant also submits that the accepted facts did not relate to him or to the events in question.²

26. In response, the Prosecutor submits that the Trial Panel accepted the proposed adjudicated facts in accordance with Article 4 of the Law on Transfer Cases from the ICTY (LOTC) and in a manner that safeguarded the right of the Accused to a fair trial. The Prosecutor points out that the Trial Panel did not restrict the right of the defense to challenge any of the accepted facts and that all of the Accused were given an opportunity to contest these facts during the main trial. Therefore, the Prosecutor contends that there has been no shift in the burden of proof from the Prosecution to the Defense and that

² Appeal of Mladen Blagojević, p. 2

acceptance of these facts did not affect the rendering of a lawful and proper verdict on this ground of the Appeal.³

27. The Appellate Panel finds this ground of appeal to be unfounded.

28. The Appellate Panel recalls that the procedure of judicial notice is primarily intended to ensure the expediency of the proceedings. The discretionary power to take judicial notice of facts, however, has to be exercised on the basis of a careful consideration of the accused's right to a fair and expeditious trial which is in accordance with the principle of a fair trial enshrined in Article 6(1) of the ECHR and Article 6(2) and Article 13 of CPC BiH. So long as these principals are upheld, this Court has a duty to avoid a waste of unnecessary time and resources.

29. It is a well established and consistent practice of the Court of BiH to accept previously adjudicated facts as long as they satisfy legal criteria which safeguard the rights of the Accused to a fair trial yet promote the efficiency and economy of the proceedings.⁴ In accepting those facts, the Court has consistently stated that the accepted adjudicated facts do not amount to *presumptio juris et de jure*, i.e. irrebutable presumptions, since the Accused can always challenge and refute the truthfulness of the admitted facts in accordance with the principle of free evaluation of evidence contained in Articles 6(2) and 15 of the CPC BiH and the right of fair trial pursuant to Article 6(3)(d) of the ECHR.

30. In reviewing this ground of appeal, the Appellate Panel notes that the Appellant failed to explain how the Trial Panel decision to accept adjudicated facts resulted in violation of Article 297(1)(i) of the CPC of BiH or how it affected a rendering of a lawful and proper verdict. The Appeal also fails to explain how this decision shifted the

³ Prosecutor's Response, pp. 2-3

⁴ *Prosecutor v. Mandić*, X-KR-05/58, Trial Judgment; *Prosecutor v. Stanković*, X-KR-05/70, Trial Judgment; *Prosecutor v. Miloš Štupar et al.*, X-KR-0524, Trial Judgment; *Prosecutor v. Samardžija*, X-KR-05/07, Trial Judgment; *Prosecutor v. Janković*, X-KRN-06/195, Trial Judgment.

Prosecutor's burden of production to the Defence. Finally, the Appeal fails to contest either the accuracy of any particular fact or the Trial Panel's reasoning in support of their acceptance.

31. The Appellate Panel finds that the Trial Panel reviewed each of the proposed facts in accordance with the Court's established legal criteria and jurisprudence of the ICTY and the Court of BiH. The Trial Panel did not accept all the facts proposed by the Prosecutor and rejected those facts, which were also disputed by the Defence, which did not satisfy the legal criteria; namely, the facts that were irrelevant to the case, contained legal conclusions and characterizations, were insufficiently distinct or indirectly incriminated the Accused.⁵

32. For these reasons, the Appellate Panel concludes that the Appellant has failed to establish a violation of Article 297(1)(i) of the CPC of BiH and dismisses this ground of appeal as unfounded.

B. VIOLATION OF THE CRIMINAL CODE (GROUND II)

33. Under the second ground of appeal, the Appellant contends that the Trial Panel erred in law when it retroactively applied the Criminal Code of Bosnia and Herzegovina in violation of Article 7 of the European Convention of Human Rights (ECHR) and the principle of *nullum crimen sine lege* envisioned in Article 4 of the CC of BiH. The Appellant submits that the Trial Panel should have applied the Criminal Code of the Republika Srpska (Official Gazette No. 12/93, 19/93, 26/93, and 41/96) which was in force at the time the alleged crimes were committed and which is more lenient to the perpetrator. The Appellant submits that such application would have been in accordance with Article 7 of the ECHR as well as the ICTY jurisprudence and the respectable scholarly opinion.⁶

⁵ Verdict, pp. 25-30

⁶ Appeal of Malden Blagojević, p. 3

34. The Appellant also argues that Article 4(a) of the CC of BiH violates the principle of legality and the principle of time effectiveness of the criminal code set forth in Articles 3 and 4 of the CC of BiH⁷ as well as Article 7 of the Universal Declaration of Human Rights and Article II (4) of the Constitution of BiH⁸ because it enables the retroactive application of the CC of BiH in violation of Article 298 of CPC of BiH.⁹

35. In response, the Prosecutor argues that there was no violation of the criminal code since the legality of the application of the Criminal Code of BiH (2003) has been upheld by the Constitutional Court of BiH in its *Maktouf* decision. The Prosecutor points out that all submissions made by the Appellant have been considered and ruled by the Constitutional Court of BiH; hence, making this ground of appeal moot. The Prosecutor, therefore, submits that the Trial Panel's application of the CC of BiH was lawful and not in contravention of Article 7 of the ECHR.¹⁰

36. The Appellate Panel finds this ground of appeal to be unfounded.

37. The principle of *nullum crime sine lege* requires as a matter of justice that a criminal conviction be based on violation of a norm in existence at the time of the Accused's alleged acts or omissions. The Appellate Panel agrees with the general argument of the Defence that the principles of legality and non-retroactivity are fundamental principles of criminal law and that these principles prevent a court from creating new law or interpreting existing law beyond reasonable limits of acceptable clarification. The Appellate Panel also agrees with the argument 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 apply.

38. Having said that, the Appellate Panel emphasizes that the law provides a narrow exception to principles spelled out in Articles 3 and 4 of the CC of BiH. Article 7(2) of

⁷ Appeal of Mladen Blagojević, p. 3

⁸ Appeal of Mladen Blagojević, p. 4

⁹ Appeal of Mladen Blagojević, p. 5

¹⁰ Prosecutor's Response, p. 3

the ECHR, prescribing standards fully adopted by Article 4(a) of the CC of BiH, provides that it 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. A long and consistent stream of judicial decisions of the Court of BiH, the decision of the Constitutional Court of BiH in the *Maktouf* case, numerous international instruments cited by the Trial Panel¹¹ and a consistent endorsement of various national systems that the egregious violations of international law must be punished support this exceptional derogation from the principles enshrined in Articles 3 and 4 of the CC of BiH.¹² For these reasons, the Appellate Panel finds that according to Article 4(a) of the CC of BiH a retroactive application of law is possible only in accordance with Article 7 of the ECHR and Articles 3 and 4 of the CC of BiH.

39. With respect to the application of CC of BiH in the case at hand, the Trial Panel provided a detailed and sufficient reasoning about the Code's application. Specifically, the Trial Panel found that "at the critical time, crimes against humanity were not explicitly proscribed"¹³ by the CC of SFRY but that "punishability of crimes against humanity represents an imperative standard of international law or *jus cogens*".¹⁴ Therefore, the Trial Panel concluded that it could not apply CC of SFRY to the case at hand. It also concluded that the alleged crimes fell within the scope of Article 4(a) of the CC of BiH, which allowed the Trial Panel to invoke and apply Article 172 of the CC of BiH.

40. The Appellate Panel finds this explanation to be well-reasoned and in accordance with the position that this Court has previously adopted with respect to the applicability of Article 4(a) of the CC of BiH. The Appellate Panel also notes that this issue has been reviewed by the Constitutional Court of BiH in the *Abduladhim Maktouf* case, which

¹¹ Verdict, pp- 92-93

¹² *Prosecutor v. Željko Lelek*, X-KRŽ-06/202, Appeal Verdict, dated 12 January 2009, pp. 32-33; *Prosecutor v. Željko Mejakić, Momčilo Gruban and Duško Knežević*, X-KRŽ-06/200, dated 16 July 2009, pp. 43-45; *Prosecutor v. Miloš Stupar, et.al*, X-KRŽ-05/24, Appeal Verdict, dated 9 September 2009, pp. 70-75

¹³ Verdict, p. 92

¹⁴ Verdict, p. 93

upheld the application of the CC of BiH in the proceedings before the Court of BiH in accordance with Article 7 of the ECHR.

41. For these reasons, the Appellate Panel finds that an application of Article 4(a) does not violate the principle of legality and the principle of time effectiveness of the criminal code set forth in Articles 3 and 4 of the CC of BiH as well as Article 298 of CPC of BiH.

42. The Appellate Panel also finds that the Defense's argument pertaining to the application of the Criminal Code of the Republika Srpska (CC of the RS) to be inherently flawed. The Operative Part of the contested verdict clearly states that the alleged criminal acts took place in July 1995. It is beyond dispute that the CC of SFRY, adopted in 1977, was in effect during that time. Although the Defence concedes that the Criminal Code of the Republika Srpska came in to force in 1996 after the Dayton Agreement was signed, it nonetheless insists that the CC of the RS should apply because it was in force at the time the alleged offense was committed and because it is more lenient to the perpetrator.¹⁵ The Defense did not provide the Court with any explanation how it reached its conclusion regarding the temporal validity of the CC of RS and which provisions, if any, of the CC of RS are applicable to the case at hand.

43. For these reasons, the Appellate Panel finds this entire ground of appeal as unfounded.

C. INCOMPLETE ESTABLISHMENT OF FACTS (GROUND III)

44. Under the third ground of appeal, the Appellant contends that the Trial Panel committed a number of errors of fact resulting in his conviction for persecution (other inhumane acts) as crime against humanity. The Appellant's submission under this ground of appeal can be divided into three distinct sub-grounds.

¹⁵ Appeal of Mladen Blagojević, p. 3

45. First, the Appellant submits that the Trial Panel erred in fact making its factual finding that he "fired the Browning mounted on the Pintzgauer targeting this window {with a Bosniak man appearing in the window} while other Bosniak men were also in that room and that the bullets hit the window and the wall around the school window".¹⁶ He argues that the Trial Panel based its findings on the testimony of witness P1 whose prior statements significantly differed from his testimony. Specifically, the Appellant points out that witness P1 identified Željko Zarić as the shooter during the investigation but changed his testimony during the main trial. In addition, the Appellant submits that the allegedly corroborating statements of other Prosecution's witnesses indeed fail to support statements of witness P1 and that the Trial Panel never attempted to reconcile the internal and external inconsistencies of their statements and testimonies in reaching its conclusions.¹⁷ Therefore, the Appellant contends that the Trial Panel violated his right to a fair trial (principle of presumption of innocence and in *dubio pro reo*) guaranteed by Article 6 of the ECHR and Article 3 of the CPC of BiH when it failed to reconcile major inconsistencies and accepted doubtful evidence to his detriment especially when that impugned evidence was given by the protected witnesses.

46. Second, the Appellant argues that the Trial Panel committed an error of fact when it found that there was a nexus between the widespread or systematic attack and his actions.¹⁸ Specifically, the Appellant contends that there was no sufficient evidence to establish that he "was aware that the specific operation "Krivaja 95", according to its nature, was a widespread or systematic attack against the civilian population of the Srebrenica enclave".¹⁹ In support of its argument, the Appellant states that many witnesses, including Mirko Janković, commander of the Military Police Platoon, as well as expert witnesses Radovan Radinović and Richard Butler, confirmed his claim that the military police members did not know anything about the attack and that they only knew what they were informed about and ordered by their commander.²⁰ Therefore, the

¹⁶ Verdict, p. 50

¹⁷ Appeal of Mladen Blagojević, pp. 5-8

¹⁸ Appeal of Mladen Blagojević, p. 11

¹⁹ Appeal of Mladen Blagojević, p. 12

²⁰ Appeal of Mladen Blagojević, p. 12

Appellant submits the Trial Panel erred when it concluded that because of the widespread and massive nature of the attack, the Appellant knew about it and acted accordingly.²¹

47. Thirdly, the Appellant argues that the Trial Panel committed an error of fact when it found that his actions constituted a crime of persecution. Specifically, the Appellant argues that there was insufficient evidence to infer that he possessed a discriminatory intent required for persecution.²² The Appellant argues that he was instructed to secure the area around the Primary School in Bratunac given the dire situation in the town. He also argues that the shooting occurred after the detainees cursed and insulted members of the army and others who provided security of the area.²³ Therefore, the Appellant submits that the shooting, assuming that the Accused fired the Browning, was to prevent provocations and escape of detainees and not to discriminate against Bosniak men or to cause serious injury or mental suffering.²⁴ Therefore, the Appellant submits that if the Court were to find him responsible for the shooting, that shooting was lawfully sanctioned and was inherent to his duty as a police officer.

48. The Appellant also argues that his actions did not cause great physical or mental suffering and that, assuming that he fired the Browning, his shooting was lawful.²⁵ The Appellant submits that the Prosecution failed to introduce a single piece of evidence to demonstrate that detained Bosniak men suffered great anxiety and possibly severe injuries or death as a result of the Appellant's shooting. Considering that the shooting was ongoing all night throughout the town as well as inside and outside the school, the conclusion of the Trial Panel that the Accused's action "specifically caused great mental suffering to the Bosniak detainees" is not convincing.

49. In response, the Prosecutor submits that the Trial Panel did not err in finding that the Appellant fired the Browning gun. The Trial Panel based its findings on the testimony of the witness P1, which was corroborated by other witnesses and other circumstantial

²¹ Appeal of Mladen Blagojević, p. 13

²² Appeal of Mladen Blagojević, p. 14

²³ Appeal of Mladen Blagojević, p. 16

²⁴ Appeal of Mladen Blagojević, p. 16

²⁵ Appeal of Malden Blagojević, p. 18

evidence.²⁶ Furthermore, the Prosecutor argues that the immunity granted to testifying witnesses is a limited testimonial immunity, which does not shield them from giving false testimony.²⁷

50. In addition, the Prosecution submits that the Appellant's submissions with respect to the nexus is misguided in that the necessary knowledge is related to the widespread or systematic attack against the civilian population, namely the forcible transfer, the capture and unlawful detention of the civilian Bosniak men, and not necessarily to the military plans and actual combat operations conducted to liberate the enclave that took place between 6 and 11 July 1995. The Appellant participated in the attack from 11 to 12 July 1995 onwards and thus, he was aware that his actions were a part of and in furtherance of that widespread or systematic attack when he fired the Browning.²⁸

51. Finally, the Prosecution submits that the Appellant's submissions with respect to the lawfulness of his shooting and insufficient evidence regarding his discriminatory intent are perverse, contradictory and misguided.²⁹ They are perverse because of the Appellant's contention that firing a deadly weapon was a necessary and proportionate response to oral taunting. They are contradictory because despite Appellant's contention that firing was an isolated incident, the Trial Panel found that the weapon was fired twice. Finally, the Appellant's arguments are misguided because by his own submission he concedes to have possessed a discriminatory intent.³⁰

52. The Appellate Panel finds this ground of appeal to be unfounded.

1. NEXUS TO WIDESPREAD OR SYSTEMATIC ATTACK

53. Trial Panel found that the Appellant's acts formed a part of a widespread or systematic attack against the civilian population in the area of Srebrenica and that, given

²⁶ Prosecutor's Response, pp. 4-5

²⁷ Prosecutor's Response, p. 4

²⁸ Prosecutor's Response, p. 6

²⁹ Prosecutor's Response, p. 7

³⁰ Prosecutor's Response, p. 8

his role as a military police officer of the Bratunac Brigade Military Police and his movement around the Srebrenica enclave at the critical time, the Appellant had knowledge of the attack on Bosniak civilians and that his actions were a part of that attack.³¹

54. The Appellate Panel finds that the Appellant has misinterpreted the Trial Panel's factual findings on the widespread or systematic nature of the attack underlying his conviction for crimes against humanity. The Appellant focuses his submission on his lack of knowledge that the military operation "Krivaja 95", by its nature, was a widespread or systematic attack against the civilian population.

55. The Appellant, however, fails to address the main aspect of the Trial Panel's findings on the nature of the attack, which concerns the resulting impact on the civilian population after the fall of the enclave on 11 July 1995. The Appellant's argument, therefore, is insufficient to call into question the reasonableness of the Trial Panel's findings that the attack carried out pursuant to the "Krivaja 95" order continued after the fall of Srebrenica; was directed at the Bosnian Muslim civilian population; affected the approximately 40,000 people living in the enclave at the time; and constituted a widespread or systematic attack against the civilian population.³²

56. The totality of evidence relating to the humanitarian crisis that followed the fall of the Srebrenica enclave, forcible transfer of civilians from Potočari, the detention and mistreatment of the Bosniak men in Bratunac town, coupled with their ultimate execution, leaves no room for any other reasonable conclusion about the widespread or systematic nature of the attack.

57. In addition, the Appellant's denial that he was unaware of the nature of the attack and a broader context in which it occurred is insufficient to call into question the reasonableness of the Trial Panel's findings on this point. The Trial Panel reasonably

³¹ Trial Verdict, pp. 46-47

³² Trial Verdict, p. 42

concluded that given his constant movement around the enclave immediately after the fall of Srebrenica, the Appellant was aware of the dire humanitarian situation, the transfer of women and children from Potočari, and the detention and mistreatment of thousands of Bosnian Muslim men in Bratunac town, as well as the role played by the Bratunac Brigade personnel in these events. It was also reasonable for the Trial Panel to conclude that given his role as a military police officer of the Bratunac Brigade Military Police, the Appellant would have had knowledge of the wider context in which his own acts occurred, namely the widespread or systematic attack against the civilian population of Srebrenica, and that his actions, by their nature and consequences, had an effect of furthering that attack.

58. Accordingly, the Appellate Panel dismisses this sub-ground of appeal.

2. INHUMANE TREATMENT

59. In the convicting part of the Verdict the Trial Panel found that the Accused Blagojević committed the criminal offence charged in the Indictment by opening fire from a Browning machine gun mounted on the Pinzgauer at a window of the Vuk Karadžić school, after a Bosniak man had appeared in that window, and that his action constituted a persecutory act.

60. Having analyzed appeal arguments of the Accused Blagojević, the Appellate Panel notes that they primarily contest the credibility of witness P1 and a failure of the Trial Panel to reconcile major internal and external inconsistencies in his evidence. The Appeal of this Accused essentially argues that there was sufficient reasonable doubt in the evidence before the Court to warrant his acquittal. In this regard, that the Accused Blagojević primarily argues that the Prosecution failed to prove beyond a reasonable doubt that he fired the Browning as alleged in the Indictment. Alternatively, the Accused argues that the Prosecution failed to prove that his actions, assuming he fired the Browning, caused great mental suffering to the detained Bosniaks, and that the Trial

Panel erred in finding that the Appellant possessed a discriminatory intent required for the underlying acts of persecution. These contentions will be dealt with in turn.

61. While reviewing the relevant part of the Verdict within the limits it was contested by the Appeal, the Appellate Panel found that in the evaluation of evidence related to these charges, the Trial Panel provided valid and detailed reasons as to why it took some facts as proven, or as not proven, and it properly reasoned and explained how it evaluated witness testimonies, specifically that provided by witness P1.

62. The jurisprudence of the ICTR, the ICTY and the Court of BiH shows that Trial Panels have the primary responsibility for assessing and weighing evidence, determining whether a witness is credible and the evidence reliable, and according to the tendered evidence its proper weight.³³ The following statement of the ICTY Appeals Chamber in *Kupreškić* is on point:

As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence. The presence of inconsistencies does not, *per se*, require a reasonable Trial Chamber to reject it as being unreasonable.³⁴

63. It is not a legal error *per se* to accept and rely on evidence that varies from prior statements or other evidence. However, a Trial Panel is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence.³⁵ The Trial Panel in the present case gave adequate explanations for the discrepancies existing between the stated facts recorded in prior

³³ See, e.g., *Prosecutor v. Rutaganda* Appeal Judgment, ICRT-96-3, para. 188; *Prosecutor v. Musema* Appeal Judgment, ICTR-96-13, para. 18; *Prosecutor v. Kayishema and Ruzindana* Appeal Judgment, ICTR-95-1, paras. 319, 323, 324; *Prosecutor v. Akayesu* Appeal Judgment, ICTR-96-4, para. 132; *Prosecutor v. Aleksovski* Appeal Judgment, IT-95-14/1-A, para. 63; *Prosecutor v. Tadić* Appeal Judgment, IT-94-1-A, para. 64; *Prosecutor v. Kupreškić et al.* Appeal Judgment, IT-95-16-A, paras. 31, 32, 156; *Prosecutor v. Mucić et al.*, (*Čelebići Case*) Appeal Judgment, IT-96-21-A, para. 491.

³⁴ *Kupreškić et al.* Appeal Judgment, para. 31.

³⁵ *Kupreškić et al.* Appeal Judgment, para. 31.

statements and the testimony before it. These explanations are sufficient to justify Trial Panel's findings of the guilt of the Appellant.

64. Specifically, a review of the verdict indicates that the Trial Panel did not rely exclusively on the evidence of the witness P1 for the finding that the Appellant fired the Browning. The Trial Panel also evaluated testimonies and prior statements of Slobodan Mijatović, Milovan Đokić, Mile Babić, Milan Gvozdenović, Mile Janić, witness P4, witness P1 and witness P3 pertaining to the event at issue and the Appellant's actions. Thus, Slobodan Mijatović, Mile Babić, Milan Gvozdenović, Milovan Đokić, witness P1 and witness P3 testified about seeing the Accused Blagojević by Pintzgauer when the incident at issue took place. Furthermore, witness P3 and witness P1 testified about the Accused firing the Browning at the school's windows. Witness 4 stated during the main trial that he heard that it was the Accused Blagojević who fired the gun. Finally, the evidence given by Milovan Đokić during the investigation corroborated the fact that it was Mladen Blagojević who fired the Browning.

65. In considering all discrepancies and corresponding explanations, the Trial Panel found that the "testimonies of these witnesses *about the aforementioned circumstance* {firing of the Browning by the Appellant} are credible and reliable because they are consistent and complementary"³⁶ The Appellate Panel finds that the Trial Panel meticulously analyzed their evidence, rejected any uncorroborated parts of it and arrived at its conclusions in a fully reasoned and methodical manner.

66. In addition, the Trial Panel recognized that witness P1's credibility was in issue and expressly noted that his evidence was disputed. Nevertheless, the Trial Panel decided that witness P1's evidence was of probative value and was credible to the extent when it was "consistent with the accounts given by other mentioned witnesses"³⁷

³⁶ Trial Verdict, p. 49

³⁷ Trial Verdict, p. 50

67. The Appellate Panel finds that the Trial Panel's treatment of witness P1's testimony was thorough and cautious. Taken together with the manner in which it was relied upon at trial, the Appellate Panel concludes that the Appellant failed to demonstrate that the Trial Panel erred in its assessment of the credibility of that witness or that the extent of the Trial Panel's reliance on witness P1's testimony, was erroneous.

68. The Appellate Panel also finds that the Appellant's challenge to the credibility of the protected witnesses, based on their cooperation with the Prosecution is unpersuasive and does not in itself call into question the reasonableness of the Trial Panel's reliance on their testimony especially when that testimony is corroborated.

69. The Appellate Panel recalls that, to merit its interference in the findings of a Trial Panel, an alleged error of fact must have occasioned a miscarriage of justice. The Appellant failed to show that the Trial Panel committed any error evaluating the evidence and that it resulted in a miscarriage of justice. The fact that the Trial Panel did not evaluate and interpret the evidence the way the Appellant would have liked it and/or that it did not analyze each and every statement that the witnesses made during the investigation and the main trial, does not invalidate the Panel's findings.

70. On 22 September 2009, subsequent to the appeal from the Trial Verdict, Defense counsel for the Accused Blagojević filed a request to present an additional piece of evidence before the Appellate Panel. Specifically, the evidence concerned a list of witnesses in the ICTY case IT 02 60 PT, Vidoje Blagojević et al. including witness Đorđe Pejić and a 56 page transcript No. T000-1096 of this witness's interview with an ICTY investigator Dean Manning that took place in Banja Luka on 29 November 2001. The Appellate Panel admitted these documents because the Defense claimed that they had been unable to present that evidence for objective reasons during the trial or along with their appeal. The Panel considered it in conjunction with the rest of the evidence. Using this piece of evidence the Defense attempted to prove that the Accused Blagojević did not commit the offense of which he was convicted by the contested Verdict, that is, they claimed that another person fired at Bosniak civilians from the Browning that day

and that this piece of evidence was *in favore* of the accused. However, having thoroughly examined it the Panel concluded that all decisive facts pertaining to the circumstance of the Accused's firing from the Browning had been established beyond a reasonable doubt in the course of the first instance proceedings and that the presented piece of evidence was not of such quality so as to compel a different Court decision (see further reasoning below).

71. Having in mind the above-referenced findings as well as the relevant documentary and testimonial evidence, this Panel also established beyond reasonable doubt the existence of the criminal liability on the part of the Accused Blagojević for the relevant charge.

72. Namely, the Panel concluded from the presented evidence that the actions of the Accused satisfied the elements of the criminal offence of the Other Inhumane Acts under Article 172 (1) Crimes against Humanity, which includes the following:

- Action or omission of the similar gravity (or similar nature) as of other actions under Article 172 (1) of the CC of BiH;
- That the action or omission caused serious mental and physical suffering or injury, or that they constitute an attack on human dignity;
- That the action or omission was intentionally committed by the Accused or person or persons for whose actions and omissions the accused is criminally liable.

73. The CC of BiH does not define "other inhumane acts" under Article 172(k) of the CC of BiH. However, the ICTY jurisprudence provides numerous examples of that particular criminal offense:, namely, mutilation and other types of severe bodily harm³⁸; beatings and **other acts of violence**³⁹; inflicting serious or severe harm⁴⁰; **severely damaging physical or mental integrity**⁴¹; a serious attack the human dignity⁴²; an act

³⁸ *Prosecutor v. Kvočka et al.*, Trial Judgment, IT-98-30/1, para. 208.

³⁹ *Ibid*, para. 208.

⁴⁰ *Prosecutor v. Kordić and Čerkez*, Appeal Judgment, IT-95-14/2, para. 117.

⁴¹ *Prosecutor v. Blaškić*, Appeal Judgment, IT-95-14, para. 239; *Prosecutor v. Krstić case*, Trial Judgment, IT-98-33, para. 523.

⁴² *Prosecutor v. Vasiljević*, Trial Judgment, IT-98-32, paras 239-240.

which caused serious mental harm or physical suffering or injury or constituted a serious attack on human dignity⁴³; deportation and forcible transfer of groups of civilians⁴⁴; enforced prostitution⁴⁵ and enforced disappearance of persons⁴⁶.

74. To assess the seriousness of an act consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. The fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.⁴⁷

75. The Appellate Panel opines that the *actus reus* (an objective element) of this criminal offence has been proven. Namely, having established the credibility of the witness evidence who testified about this circumstance, it can be undoubtedly concluded that the Accused Blagojević did fire the so-called Browning machine gun at the school window while a detained Bosniak man was standing at the window and a great number of Bosniak prisoners were detained in the same room. All circumstances surrounding the incident in question must bear the same weight as other acts under Article 172 of the CC of BiH and it constitutes the first element of this criminal offence (see para. 71). The Bosniak prisoners were unlawfully detained in the said school. Facing terror and uncertainty of their further destiny, being realistically under a deadly threat, they feared for their lives as they witnessed how some of the detainees were killed in the school.

76. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious⁴⁸. Taking into account the status of the prisoners as well as the domineering position and power that the accused Blagojević had at that particular moment, the Appellate Panel concludes that the Accused's conduct inflicted a great

⁴³ *Prosecutor v. Naletilić and Martinović*, ICTY Trial Judgment, IT-98-34, paras. 271, 289, 303.

⁴⁴ See *Kupreškić et al.*, Trial Judgment, para. 566.

⁴⁵ *Ibid*, para. 566.

⁴⁶ *Ibid*, para. 566.

⁴⁷ See *Vasiljević*, Trial Judgment, para. 235, *Blaškić*, Trial Judgment, para. 243.

⁴⁸ *Krnjelac*, Trial Judgment, para. 131

mental suffering to the detained Bosniak men and that it constitutes a serious attack on human dignity. Firing a powerful weapon at detainees who were in the state of despair, subordination, hopelessness, and fear for their own lives which was beyond normal human experience is a willful act and constitutes a heinous act in the context of inhumane acts and treatment. Their feelings culminated with a rapid succession of fire from the heavy and high-impact weapon which the Browning undoubtedly was. How can one otherwise describe the fact that one of the detainees appeared again at the window even after the first succession but as the peak of the mental tension and exhaustion caused by fear and uncertainty for their own lives which leads to the point of total indignation as well as the spite which was caused by such state.

77. In that regard, the allegation of the Appeal that it was not a great mental suffering of the prisoners given that the man after the shooting and the fall, stood up and continued insulting the Accused, is entirely unfounded. It is necessary to analyze this conduct psychologically and comprehensively. Taking into account the position of the detainee and his enormous fear after the shooting, it is clear that his reaction would have been unusual under normal circumstances, which was by no means the case in that situation. Different forms of unusual reactions may result from this kind of experience and the victim can be expected, having passed the threshold of bearing, to be brought into the state of resignation and indifference. Yet, the victim in this case displayed his readiness to bear any consequence in order to show his dignity. That is exactly what happened when the victim stood up and continued to insult the Accused even if by doing so he put his own life at peril, which at that moment surely was not worth much. In fact, this gesture of the detained Bosniak indicates that the gesture is reciprocal (commensurate) to the fear and intensity of mental suffering.

78. *Mens rea* for the inhumane acts under this Article is satisfied where the principal offender, at the time of the act or omission, had the intention to inflict serious physical and mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental

suffering or a serious attack upon human dignity, and was reckless as to whether such suffering or attack would result from his act or omission⁴⁸.

79. The Trial Panel found that by firing from “a weapon of large caliber and destructive force” at the school window where a Bosniak man appeared as well as at the wall in the immediate vicinity of the window the Accused Blagojević intended to cause a great suffering and serious bodily injuries to the detainees.⁴⁹

80. The appellate submission that the fire was opened from “the Browning” only around, not at the window frame has a peripheral importance, if one takes into account the fact that it is a weapon of a great destructive force, with the possibility that the fired bullets may ricochet, and that it is hard to expect that the bullet fired in a rapid succession may hit precisely the wall around the window frame and not the window itself.

81. This Panel also shares the opinion of the Trial Panel regarding the proven existence of the subjective element on the part of the Accused. He knew at the time of shooting the Browning that he inflicted a great mental suffering to the prisoners in the school, and that by doing so, he might have caused serious physical injuries. At least he must have known what the consequences could be given the weapon he fired, aiming at the prisoners from extremely small distance. All this indicates that he was aware of his actions and he wanted their execution. In other words, the Accused did want to cause fear and mental suffering of the prisoners.

82. With regard to the legal qualification of the given acts of the Accused, the Appellate Panel fully supports the position of the Trial Verdict that in the case at hand the essential elements of the offence under sub-paragraph k), paragraph 1 of Article 172 of the CC of BiH are met, but not the offence of murder under this Article. In this regard the appellate submissions by the Prosecution and by the Defense, contesting the alternation of the qualification of the offence on one hand, and the meeting of elements of any criminal act under Article 172 of the CC of BiH at all, on the other, have no adequate

⁴⁸ Ibid, para. 132.

⁴⁹ Trial Verdict, pg. 53/54

basis. The Trial Panel is absolutely right in conclusion that for the Accused to be found guilty of murder it should have been clearly proven in the proceedings that the victim was dead, or that the Accused intended to kill the victim or to cause serious bodily injuries to the victim. On the other, hand the fact that the victims did not suffer serious physical consequence, cannot be of such importance to acquit the Accused of any responsibility, because his actions and inflicted mental suffering on the part of the victims as their result, is exactly what is required to meet the charge of Other Inhumane Acts.

3. PERSECUTORY INTENT

83. The Appeal of the Accused pointed out that the Trial Panel erred in finding that the Appellant possessed a discriminatory intent required for the underlying acts of persecution.

84. The Appellate Panel found this submission unfounded.

85. It is necessary to state first that *mens rea* for the persecution is composed of three elements:

- knowledge that there is a widespread or systematic attack on the civilian population and that the offence is a part of that attack,
- intent to commit the persecution,
- discriminatory intent, that is, the intent to persecute victims on the political, racial or religious basis.

86. By this last element, which was contested by the appeal, the persecution differs from other crimes against humanity on which it is usually based.

87. The Appellate Panel primarily notes that the conclusion on the existence of the specific intent, in general, such specific intent can only be inferred from the objective facts and general conduct of an accused seen in its entirety.⁵⁰

⁵⁰ *Prosecutor v. Kordića and Čerkez*, No. IT-95-14/1-A, Appelas Verdict, para. 715.

88. In reaching its conclusions that the Appellant possessed a discriminatory intent, the Trial Panel considered the overall state of events, namely the shelling of the Srebrenica enclave, the humanitarian crisis in Potočari, the bussing of civilians, and the mistreatment of Bosnian Muslim detainees in Bratunac town as well as the Appellant's conduct during the critical time.⁵¹ Specifically, it noted that on the night in question, the Appellant called out Bosniak men from Glogova and verbally insulted them before shooting the Browning. The Trial Panel found that this purposeful selection of Bosniak detainees coupled with ethnic profanity was sufficient to establish that the Appellant possessed a discriminatory intent.⁵²

89. The Appellate Panel finds that the Trial Panel's evaluation of the evidence is reasonable and is convinced by its reasoning. The Appellate Panel accepts that the fall of the Srebrenica enclave, transfer operation, the separations, the mistreatment and killings in Bratunac town are relevant considerations in assessing whether the Appellant had a discriminatory intent. Furthermore, the Appellate Panel is convinced that the general state of facts outlined above coupled with the Appellant's insulting altercations with the detained Bosniak men and his subsequent shooting suffices to demonstrate his discriminatory intent.

90. The Appellant attempted to negate a finding of a discriminatory intent stating that the shooting was aimed to stop oral taunting and prevent the escape of the detained Bosniak men. He also argues that the shooting was lawfully sanctioned as it fell within the scope of his duties as a police officer. The Appellant, however, neither addressed the majority of the evidence relied on by the Trial Panel nor did it challenge the accuracy of its findings pertaining to the ethnic selection of the intended victims.

91. Therefore, on the basis of the evidence outlined above, and the positions from the jurisprudence that only one act may be sufficient to establish the persecution, if such act is really discriminatory on one of the prohibited grounds, the Appellate Panel finds that

⁵¹ Trial Verdict, p. 54

⁵² Trial Verdict, p. 55

the Appellant possessed the specific intent to discriminate required for the crime of persecution.

III. THE APPEAL OF THE PROSECUTOR

A. 1ST GROUND OF THE PROSECUTOR'S APPEAL: ALLEGED VIOLATIONS OF THE CRIMINAL PROCEDURE UNDER ARTICLE 297

B. Standard of Review

92. A Verdict may, pursuant to Article 297 of the CPC of BiH, be contested on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297(1).

93. A substantial violation of provisions of criminal procedure is also established under Article 297(2) when the Trial Panel during the trial or in reaching the verdict failed to notice or incorrectly applied a provision of the Criminal Procedure Code, which affected or might have affected the rendering of lawful and correct verdict.

94. In case of an allegation that the procedural error could have affected the rendering of a lawful or proper verdict, it is not sufficient for the Appellant to simply assert that the procedural error could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only conclude that a relative procedural error was committed when the Appellant establishes that it is impossible to conclude that the alleged error did not affect the rendering of a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

95. The Appellate Panel finally notes that the appellant must establish that the alleged procedural error invalidates the Verdict. A minor procedural error that does not prevent

the Appellate Panel from ascertaining the conclusion and reasoning of the Trial Panel does not invalidate the Verdict and thus will not result in the revocation of the Verdict.

C. Appeal of the Prosecutor

96. The Prosecutor argues that the Trial Panel committed an essential violation of the criminal procedure by failing to consider all factual allegations under Count 5 of the Amended Indictment and to resolve the content of the charge contrary to Article 296(a) as read with Article 297(1)(h) of the CPC of BiH.

97. Specifically, the Prosecutor argues that the Trial Panel erred by misreading and misunderstanding the plain wording of the Count when it found that no specific charges against the Accused Zoran Živanović were pleaded.⁵³ According to the Prosecutor, Count 5 charged the Accused Živanović with coercing the Bosniak men out of the school building and onto the awaiting transport. Yet, the Trial Panel directed itself to consider whether the Accused Zoran Živanović was awaiting transport knowing that the civilian Bosniak men were to be transported to other temporary detention facilities. Therefore, the Prosecutor argues, the Trial Panel failed to completely resolve the content of the Count 5, which is an essential violation of Article 297(1) of the CPC of BiH.

98. In response, the Defence for the Accused Živanović submits that the Trial Panel addressed all charges under Count 5 of the Amended Indictment, assessed the evidence presented and correctly resolved its factual allegations.⁵⁴

D. Findings of the Appeal Panel

99. The Appeal Panel reviewed Count 5 of the Amended Indictment as well as the impugned findings of the Trial Panel to determine whether or not they are correct.

⁵³ Prosecutor's Appeal Brief, p. 8, para. 2.

⁵⁴ Response to the Appeal of the Defence Counsel Danilo Mrkaljević, p.2, Section I.

100. The Panel agrees that there are differences in the plain wording between the English and Bosnian versions of the Count. The English version of the Count 5 reads that "on 14 July 1995, in Bratunac, Božić Zdravko, Blagojević Mladen, Zarić Željko and Živanović Zoran, provided security for the area around Vuk Karadžić (Primary) School (now known as the Branko Radičević School) while Bosniak men were being coerced out of the School building by members of the VRS and RS MUP personnel and Živanović Zoran, and onto awaiting transport knowing that the civilian Bosniak men were to be transported to other temporary facilities in or around the Municipality of Zvornik".⁵⁵ Therefore, the plain wording of the Count charges the Accused Živanović with direct participation in forcing Bosniak men out of the school.

101. The Bosnian version of the Count 5, which the Trial Panel considered to be relevant in resolving the charges, reads that *"on 14 July 1995, in Bratunac, Božić Zdravko, Blagojević Mladen, Zarić Željko and Živanović Zoran, provided security for the area around Vuk Karadžić (Primary) School (now known as the Branko Radičević School) while Bosniak men were being coerced out of the School building by members of the VRS and RS MUP personnel, while Živanović Zoran, awaiting transportation and knowing that the civilian Bosniak men were to be transported to other temporary facilities in or around the Municipality of Zvornik", provided security (together with other Accused).*⁵⁶ Therefore, the wording of the Count indicates that the Accused Živanović is charged that he secured the area around the school together with the other three Accused while the Bosniak men were being taken out and that he knew that those civilians would be transported out of the Srebrenica enclave, thus participating in the forcible transfer of detainees.

102. Accordingly, there is no mention in this count that the accused Živanović also forced the detained men out of the school building. As the defense correctly notes in their response, this allegation pertains only to the members of the VRS and RS MUP.

⁵⁵ Amended Indictment (English version), p. 3

⁵⁶ Amended Indictment (Bosnian version), pp. 3-4

103. Given these findings and as the aforementioned linguistic differences in the opinion of the Appellate Panel only slightly altered the factual allegation of the Count with respect to the Accused Živanović, and as the charge is the same – forcible transfer, the extent of the Trial Panel’s evaluation of the evidence had to be determined. In other words, the determination to be made was whether the Trial Panel could make the finding as to whether this single act of the accused Živanović was proven or not, in light of the linguistic discrepancies and charges in general and whether the Trial Panel could define that act as the commission of the criminal offence as charged. Thus, the Appellate Panel will review the findings in the First Instance Verdict, in view of the Prosecutor’s appellate claims. The Appellate Panel will also consider whether the evidence submitted shows that the state of facts regarding the actions of this Accused in relation to the relevant incident was established erroneously or incompletely.

104. After a thorough review of the evidence as well as the Trial Panel’s findings, the Appeal Panel concludes that the Trial Panel fully considered the charge of forcible transfer against all four Accused and made its determination based on a complete review of the evidence presented. It was the Prosecution’s failure to exercise its due diligence in presenting concrete evidence pertaining to the actions of all four Accused, which was expected in this matter, and not the Trial Panel’s failure to resolve the content of the charge which led to the acquittal of the Accused.

105. Having thoroughly reviewed the content of the Count and all the evidence presented individually and in connection to each other, the Appeal Panel viewed the evidence from the perspective of the arguments made in the Appeals as well as the linguistic discrepancies it discovered during the review of the Count. Despite the linguistic alterations, the Appeal Panel concludes that the Trial Panel fully scrutinized all evidence pertaining to the events alleged in the Count and properly reached conclusions based on that evidence. The Verdict contains valid and acceptable reasons and explanations for the Panel’s conclusions and presents reasonable assessment of evidence, its substance and credibility.

106. The Prosecutor's claim, which goes to the gist of this appeal ground, is that the Trial Panel failed to consider testimony of witness P1 who testified about the Accused Blagojević forcing the Bosniak men out of the school as alleged in the Count, which according to the Prosecutor is a compelling and conclusive evidence of the Accused's participation in forcible transfer.

107. Having reviewed the evidence, the Appeal Panel finds that the Trial Panel gave full consideration to the evidence given by the witness P1. The Trial Panel also fully considered testimonies of other Prosecution's witnesses, who were members of the Bratunac Brigade Military police pertaining to the events at issue and found that their evidence did not corroborate the recounting of P1's version of events. Accordingly, the Trial Panel rejected all parts of the testimony of P1 related to the incident charged, because his testimony was not corroborated by statements of other witnesses, which shows its internal and external inconsistencies.

108. Finally, even if Accused Živanović's direct participation in the forcing of male detainees out of the school had been proven, it would not have met the requirements of the crime of forcible transfer as defined in the law, given the lack of evidence on subjective element and the status and position of the detainees. It would also not meet the requirements of any other war crime. The Trial Verdict contains a thorough explanation of this matter on pages 70 and 71. The Appeal Panel agrees with that explanation in its entirety.

109. Therefore, the linguistic discrepancies between the English and the Bosnian version of the Count did not affect the Trial Panel's full evaluation of the evidence pertaining to the events alleged in Count 5 and did not affect the rendering of a lawful and proper decision. Accordingly, this ground of appeal is dismissed.

JOINT CRIMINAL ENTERPRISE

Introduction

110. This verdict addresses several important issues related to the doctrine of joint criminal enterprise (JCE). Whatever the merits of the overall doctrine of JCE, it is now firmly embedded in the jurisprudence of international tribunals such as ICTY and ICTR.

111. Despite its major role in the charges and convictions before the international tribunals, the JCE doctrine is a judicial innovation in the jurisprudence of the Court of Bosnia and Herzegovina. The basic theory behind the JCE doctrine is deceptively easy to explain: JCE requires a plurality of persons acting pursuant to a common plan, design or purpose involving a commission of a crime, and that the accused participate in the common purpose.⁵⁸ Yet, this seemingly straightforward doctrine has frustrated judges and litigants for many years. It has been intimated that the doctrinal theory is vague and confusing. This verdict tries to dispel some of that confusion in the context of this case.

112. The JCE doctrine has three variations, with the "basic" form being comparable to "co-perpetration", while the "systemic" form includes a contribution to a system or mistreatment, and the "extended" form includes crimes that were not intended by which were foreseeable. The Trial Panel has discussed and charted the conceptual landscape of this theory in its verdict and the Appellate Panel finds it redundant and unnecessary to repeat the basic premises upon which JCE theory rests. Accordingly, the Appellate Panel will focus its review on the hidden elements of the doctrine, which are the primary grounds of the Prosecutor's appeal.

113. Before turning to the discussion of the issues raised by the Prosecutor in his appeal, the Appellate Panel notes that the scope and limits of JCE doctrine have not yet been definitively determined even by the international tribunals. Legitimate concerns have been raised as to the potential for JCE liability to be developed or applied in such a way as to extend a defendant's liability beyond the appropriate limits of individual criminal responsibility. Accordingly, the Appellate Panel emphasizes that pleadings of

⁵⁸ *Prosecutor v. Vasiljević*, Appeal Judgment, IT-98-32-A, para. 100

JCE must be handled with great caution and particularity to avoid a blanket, "one size fits all" approach to cases and to ensure the right of an accused to a fair trial.⁵⁹

114. For purposes of careful analysis, coherent discussion and full coverage of all JCE related appeal issues, the Appellate Panel consolidated all grounds and sub-grounds of Prosecutor's appeal dealing with JCE under one section. Their discussion follows.

Summary of Prosecutor's Appeal

115. The Trial Panel dismissed an application of the JCE doctrine to describe the Accused's responsibility in this case. The Prosecution's two grounds of appeal concern the Trial Panel's decision to reject the doctrine's application. The Prosecution submits that the Trial Panel erred in law by 1) requiring that the Accused shared the common criminal purpose and forged links with other members of JCE in pursuit of common objective; 2) misdirecting itself on the law regarding existence of the arrangement or understanding amounting to an agreement between or among JCE members; 3) misdirecting itself on the law by finding that it would contravene the rights of the Accused for the Trial Panel to identify a particular form of JCE liability; and 4) holding that the mode of liability of JCE is not applicable to common soldiers as well as to the soldiers who are acting pursuant to the superior orders.

116. The Prosecutor also submits that the Trial Panel erred in fact by finding that 1) the pleaded JCE was too broad and over-extended; and 2) that the Prosecutor failed to adequately plead a specific form of JCE in the Amended Indictment.

Parameter of pleaded JCE – Ground III, Item 3(a)

117. The Prosecutor submits that the Trial Panel erred in fact when it misread and misunderstood the plain wording used to describe the joint criminal enterprise alleged in the Amended Indictment. Specifically, the Prosecutor claims that the Trial Panel misread

⁵⁹Mirjan Damaška, Ph.D, "Weak spots in joint criminal enterprise", a lecture held on 7 June 2005 to 31st generation of graduate students of criminal law at the Law School of the University of Zagreb, UDK 311, 485, 343, 222, 343, 342.

the Amended Indictment regarding the alleged scope of the alleged JCE, i.e. "the death of 8,000 Bosniak civilian men by summary execution and opportunistic killings and the forcible transfer of up to 40,000 Bosniak civilians from the Srebrenica enclave".⁶⁰ Instead, the Prosecutor submits that the scope of the JCE alleged in the Amended Indictment and argued during the trial was a removal of "40,000 Bosniak civilians from Potočari in just two days" by "multiple military and RS MUP units and civilian bus companies" and that "individual soldier that participated in the transfer of the population was a necessary participant on this operation".⁶¹

118. Accordingly, the Prosecutor submits that the Trial Panel made an erroneous finding that the alleged JCE was too broad and over-extended.

119. The Appellate Panel carefully reviewed the findings of the Trial Panel and the Prosecutor's submissions with respect to the existence and the scope of the alleged JCE. The Appellate Panel finds that the Trial Panel's findings with respect to the existence and the scope of the alleged JCE were reasonable.

120. In order to ascertain exactly what was pleaded by the Prosecutor, the Appellate Panel first reviewed both the original and the Amended Indictment. The Prosecutor acknowledged that the common plan and purpose of JCE was stated in the Preamble of the Operative Part of the Amended Indictment (Preamble).⁶² A review of that particular part of the Amended Indictment reads:

Between "11 and 18 July 1995, within the municipalities of Bratunac, Zvornik and Srebrenica, during an armed conflict in the Republic of Bosnia and Herzegovina, in which the Army (VRS) and Police (RS MUP) of the Republika Srpska (RS) directed a widespread and systematic attack against the Bosniak civilian population of the Srebrenica Enclave, a "safe area" established by the United Nations, an attack that was pursuant to and in furtherance of a state or organizational policy to commit such an attack, wherein the attack lead to the death of up to 8,000 Bosniak civilian men by summary execution and opportunistic killings and the forcible transfer of up to 40,000 Bosniak civilians of the Srebrenica enclave.

The Preamble also stated that all four Accused were knowing participants of a joint criminal enterprise and that they were responsible for their own acts and omissions as

⁶⁰ Prosecutor's Appeal Brief, p. 23, para. 73

⁶¹ Prosecutor's Appeal Brief, p. 23, para. 72

⁶² Prosecutor's Appeal Brief, p. 15, para. 36

well as those which were natural and foreseeable consequences of the common purpose or plan or operation.⁶³ The Appellate Panel will address this part of the Preamble in the next section which discusses whether or not the Prosecutor properly pleaded the JCE liability.

121. As for the existence and parameters of the alleged JCE, the Trial Panel found, and the Appellate Panel agrees, that the Amended Indictment alleged an existence of a state plan to persecute Bosniak civilians in the Srebrenica enclave, which resulted in the death of Bosniak civilian men and expulsion of thousands of Bosniak civilians from the enclave on a massive scale. It also alleged that the parameters of the alleged JCE were confined to the period between 11 and 18 July 1995 and that it was executed by the VRS and RS MUP members.

122. Having considered the scope of the alleged JCE, the Appellate Panel expresses the same concern that the Trial Panel articulated in the trial verdict, namely, the incredibly broad standard with respect to both the characterization of the joint criminal conduct and the corresponding criminal liability. The sheer enormity of the alleged JCE is beyond comprehension. The Prosecutor essentially alleged that hundreds, perhaps even thousands, of military and police members who happened to be in the Srebrenica enclave from 11 to 18 July 1995 were member of a single JCE, the common purpose of which was to persecute Bosniak civilians. Thus, sprawling horizontally as well vertically, the alleged JCE morphed into a gigantic octopus encompassing and interlocking every person from the highest ranking officers to the lowest foot soldiers of the VRS and RS MUP, thus attributing totality of crimes to the group as a whole.

123. Using this overbroad JCE theory, the Prosecutor set a net large enough to catch all possible offenders, and left it to the Court to step inside and determine who should be rightfully convicted and who should be set free. Such sanguine reliance on judicial discretion is, however, dangerous and inconsistent with the principles of legality since judicial discretion is not a proper substitute for getting the rule right in the first place.

⁶³ Amended Indictment, p. 2

124. In *Krnojelac*, the Appeals Chamber restricted the potential scope of JCE liability by requiring a high degree of precision in describing the membership and activities of the enterprise. The Appeals Chamber stated that, regardless of the category of JCE alleged, using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of a common purpose, and the relevant principal perpetrators should also be identified as precisely as possible.⁶⁴

125. Similarly, this Court has previously dismissed the Prosecutor's ambitious use of JCE in the strongest terms when it stated that "neither case law nor the literature supports a proposition that a single basic JCE can stretch from the highest echelons of the military leadership to the lowliest foot soldier, including persons with such disparate roles and parts and assigning them all the same level of criminal responsibility".⁶⁵

126. Since JCE theory focuses on collective activity, it allows for criminal responsibility as a co-perpetrator to be attributed to individuals who are not principle perpetrators. The principle effect of JCE is to make the accused persons responsible for the crimes of other people, i.e. the doctrine takes the crimes of others and attributes them to the accused person, as if he had committed them himself. Thus, the danger of applying JCE broadly is that it has a potential to encompass individuals who should not be held individually responsible under widely accepted limits of criminal law. Accordingly, the Courts must exercise their utmost diligence in order to avoid assignment of criminal liability for mere membership in, or association with, a particular group when utilizing the JCE doctrine.

127. Perhaps, the most troubling aspect of the case is the Prosecutor's failure to prove an existence of the pleaded JCE. The trial record indicates that the Prosecutor spent little or no effort whatsoever to proving the existence of the alleged JCE. The Prosecutor simply assumed that given the scale of the events and the evidence of crimes committed

⁶⁴ *Prosecutor v. Krnojelac*, IT-97-25-A, Appeals Judgement, para. 116.

⁶⁵ *Prosecutor v. Petar Mitrović*, Trial Verdict, p. 124 (this part of the verdict was upheld on appeal).

in the enclave during the Indictment period, there must have been a JCE and that the named Accused must have been members of that JCE by virtue of their presence there.

128. If the Prosecutor insists that the Accused acted pursuant to a single JCE, he must prove it as well as the membership of the Accused and their concerted action. The mere existence of a parameter fence is not a sufficient substitute for proof. Furthermore, it contradicts personal culpability to convict a person for committing crimes when he or she satisfies neither the objective nor subjective elements of the offence charged.

129. For the reasons stated above, the Appellate Panel finds that the Trial Panel did not err in fact when it found that the alleged JCE was too broad and over-extended. Accordingly, this sub-ground of appeal is dismissed.

Pleading of the JCE -- Ground III, Item 3(b) and Ground II, Item 3(c)

130. The Appellate Panel will join two sub-grounds of appeal related to the question of identification and adequate pleading of JCE under this subsection. First, the Prosecutor argued that the Trial Panel erred in fact when it found that the Prosecution failed to adequately plead a specific form of JCE even though the Amended Indictment clearly stated that all Accused are "individually responsible for their own acts and omissions and those of others, including those that were natural and foreseeable consequences of the common purpose or plan or operation".⁶⁶ Second, the Prosecutor argues that the Trial Panel erred in law by finding that it would contravene the rights of the Accused for the Trial Panel to identify a particular form of JCE liability.⁶⁷

131. The Prosecutor charged the Accused with knowing participation in the joint criminal enterprise and argued that they are criminally responsible, as knowing

⁶⁶ Prosecutor's Appeal Brief, p. 5 (Ground III, Item 3(b))

⁶⁷ Prosecutor's Appeal Brief, p. 4 and p. 14 (Ground II, Item 3(c))

participants, for their own acts and omissions as well as those which were natural and foreseeable consequences of the common purpose or plan or operation.⁶⁸

132. The Trial Panel found that the Prosecutor “inconsistently incorporated and refer to legal elements of different forms of JCE liability without specifying clearly which form of liability is being alleged”⁶⁹ in the Amended Indictment. The Trial Panel also outlined a legal standard of pleading of JCE liability pursuant to various articles of the CPC of BiH as well as ICTY jurisprudence which require a certain level of precision to ensure a fair trial and found that the Prosecutor failed in his duty to do so. The Trial Panel then concluded that it would contravene the rights of the Accused for the Trial Panel to cure the Prosecutor’s mistake and find a suitable form of JCE liability in order to convict the Accused. Accordingly, the Trial Panel stated that the Prosecutor’s failure constitutes *one of the grounds* for the Panel’s rejection of JCE.

133. Having reviewed the Amended Indictment as well as the trial verdict, the Appellate Panel agrees and upholds the Trial Panel’s decision. The Prosecutor must adequately plead and specify the basis on which it considers responsibility of the Accused may be incurred. It would also contravene the rights of the defense if the Trial Panel, seized of a valid but partially defective indictment, chose a theory not clearly or defectively pleaded by the Prosecution.

134. When the Prosecution seek to allege an accused’s participation in a joint criminal enterprise, they must clearly state in the Indictment: 1) the nature of the joint criminal enterprise; 2) the time at which or the period over which the enterprise is said to have existed; 3) the identity of those engaged in the enterprise (or at least by reference to their category as a group), and 4) the nature of the participation by the accused in that enterprise.⁷⁰

⁶⁸ Amended Indictment, p. 2

⁶⁹ Trial Verdict, p. 65

⁷⁰ Decision on Form of Second Amended Indictment, *Krnojelac*, IT-97-25, Trial Chamber, 11 May 2000, para. 16.

135. Furthermore, in order for an accused charged with joint criminal enterprise to fully understand the acts he is allegedly responsible for, the indictment should also clearly indicate which form of joint criminal enterprise is being alleged.⁷¹ If any of the matters are to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference sought to be drawn.⁷²

136. Finally, the Prosecution must also expressly plead in its case whether each of the crimes alleged is said to have fallen within the object and purpose of the joint criminal enterprise or to have gone beyond that object.⁷³ If any of the crimes charged are alleged to fall within the object of the enterprise, then the Prosecution must plead that the Accused had the state of mind required for that crime. If the crimes charged are alleged to go beyond the object of the enterprise, then the prosecution must identify in the indictment the agreed object of the enterprise upon which it relies.⁷⁴

137. The specificity of these descriptions turns on the degree of notice required for the Accused to receive a fair trial, which is predicated on a vigorous defense of the Accused's interests. If the form of the indictment does not give the accused sufficient notice of the legal and factual reasons for the charges against him, then no conviction may result because the accused's right to a fair trial is compromised.

138. The Appellate Panel notes that the Prosecutor did allege JCE in the Preamble of the Amended Indictment. But in the counts where the Amended Indictment detailed the factual allegations on which the crimes charged were based, JCE was not specified as a form of commission. Instead, each count specified that the Accused participated in the alleged crimes. In these circumstances, the Appellate Panel considers that the Accused

⁷¹ *Ntagerura et al. (ICTR) Appeal Judgment*, para. 24; *Kvočka et al. Appeal Judgment*, para. 28, referring to *Krnojelac Appeal Judgment*, para. 138

⁷² Decision on Form of Second Amended Indictment, *Krnojelac*, IT-97-25, Trial Chamber, 11 May 2000, para. 16

⁷³ Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Brđanin and Talić, IT-99-36, Trial Chamber, 26 June 2001, paras. 39-41

⁷⁴ Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Brđanin and Talić, IT-99-36, Trial Chamber, 26 June 2001, paras. 39-41

did not have adequate notice that their responsibility for any event would depend on their participation in a joint criminal enterprise.⁷⁵

139. In addition, the Appellate Panel, like the Trial Panel, is unsure how the Prosecutor came to a conclusion that “knowing participation” in the joint criminal enterprise is a sufficient notice to the Accused of a specific form of JCE being alleged. Knowing participation is not a legal element of either basic or extended JCE. The Appellate Panel is also uncertain how “unidentified members of VRS” meet the specificity and clarity requirement to establish identity of those engaged in criminal enterprise. Therefore, the Appellate Panel finds that the Prosecutor failed to properly inform the Accused as to which form of joint criminal enterprise was being alleged. The defect, however, became moot as no JCE was proven.

140. When the Prosecution intends to rely upon an allegation of JCE, it must do so with great care and accuracy. This is not the case at hand. It may be considered that rejecting JCE liability based on defective pleadings runs contrary to the interests of justice. However, the Appellate Panel strongly believes that the ultimate interest of justice and proper application of the rule of law, may be achieved only by respecting the basic rights of an accused to a fair trial and due process. Even when trying cases involving the most serious crimes, this Court is responsible for ensuring a fair trial in order to achieve any lasting justice.

141. Aside from the issue of inadequate pleading of JCE, the Appellate Panel is bound to establish, based on factual findings whether the Amended Indictment was vague and therefore defective.

142. The Prosecutor must plead only those modes of responsibility which he intends to rely on. The Amended Indictment relied on all modes of individual criminal responsibility found in Article 180(1) of the CC of BiH. The Appellate Panel finds that

⁷⁵ See *Prosecutor v. Gacumbitsi*, (ICTR Appeals Chamber), paras. 172-73 (finding JCE not clearly pled in the indictment); *Prosecutor v. Nchamihigo* (ICTR Trial Chamber), para. 328

143. Furthermore, the Appellate Panel finds that the Trial Panel did not err in law when it found that it would contravene the rights of the Accused for the Panel itself to cure the defective Indictment. The scope of a trial is fixed by the indictment and it must tell the accused exactly what he is charged with to ensure the fairness of the proceedings. Any involvement of the Trial Panel after the trial to cure the defect in the Indictment to secure conviction of the Accused would have seriously prejudiced and impaired the right of the Accused to a fair trial by denying them an opportunity to prepare and present their defence.

144. For the reasons stated above, the Appellate Panel finds that the Trial Panel did not err in fact when it found that the Prosecutor failed to adequately plead the alleged JCE. The Appellate Panel also finds that the Trial Panel did not err in law when it held that it would violate the Accused's rights to a fair trial if the Trial Panel itself cured the defective Indictment.

145. Accordingly, these sub-grounds of the Prosecutor's appeal are dismissed.

**GROUND II – ITEM 3 – JOINT CRIMINAL ENTERPRISE LIABILITY –
ERROR OF LAW**

Forged Links

146. The Prosecutor argues that the Trial Panel misdirected itself on the law by requiring an additional element to be proved which is not required, namely that an Accused share the alleged common criminal purpose, i.e. that the Accused forged links with other members of JCE in pursuit of the common objectives.⁷⁶ The Prosecutor further argues that the Trial Panel did not explain why this is necessary and or which element of JCE liability it relates. Instead, the Prosecutor argues the Trial Panel should have considered two important elements. Firstly, whether the Accused shared the intent of others in the JCE to further the common purpose and plan. Secondly, whether the criminal acts of others were part of the common purpose and plan – either committed by members of the JCE or were acts imputable to members of the JCE.

147. Before the Appellate Panel responds to the Prosecutor's question about a requirement of a shared common purpose, the Appellate Panel briefly recalls the classic definition of the basic and extended varieties of the JCE doctrine found in the Tadić Appeal Judgment. The *mens rea* required for the first type is that the JCE participants, including the accused, had a "common state of mind". The *actus reus* is that the accused acted in some way which furthered the common objective. The third type of JCE holds the accused responsible for the conduct of a co-perpetrator who commits an act which, while outside the common objective of the JCE, is a natural and foreseeable consequence of the implementation of that objective.

148. It is quite obvious that the classic definition of JCE provides no explanation of what it is for the enterprise to be "joint", and what it is for it to be a distinct enterprise, except for the existence of a "common state of mind". It is rather strange that a doctrine that is all about group action offered no understanding of the concept of the group.

149. The ICTY Trial Chamber in the Krajišnik case tried to compensate this oversight when they held that the Prosecutor must prove the existence of a group acting jointly. They held that a "common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is

⁷⁶ Prosecutor's Appeal Brief, p. 4 and p. 14

the interaction or cooperation among persons – their joint action – in addition to their common objectives, that makes those persons a group. The persons in a criminal enterprise must be shown to act together, or in concert with each other in the implementation of a common objective, if they are to share responsibility for the crimes committed through the JCE”.⁷⁷

150. The notion of “joint action” which was promoted by the trial judges in the Krajišnik case, was upheld on appeal ultimately resulting in an additional element that the prosecutor must prove. Thus, the prosecutor must prove that a group of people were in fact acting jointly rather than just appearing acting jointly at a time when people all over the country were engaged in similar activities. Similarly, this Court has previously held that joint action requires some degree of reciprocity, mutuality or bi-directionality.⁷⁸

151. As an illustration, the Appellate Panel considers the following hypothetical example. If two criminal groups in Sarajevo coincidentally but separately decide to rob the same bank, these two gangs therefore have a “common state of mind”. But this does not change the fact these two gangs are unrelated to each other. Thus, no member of one gang can be held responsible for a crime committed by a member of the other. It is simply not sufficient that these two groups have identical criminal aims. To hold all gangsters responsible for the crimes committed by both groups, it must be proved that their actions are tightly linked and that they were operating effectively in unison. As this Court has previously held, “it is not sufficient for the Prosecutor to demonstrate that a plurality of persons has identical criminal purposes. The relevant inquiry is whether the persons shared that criminal purpose in common, that they, in effect, had joined together to realize that criminal purpose”.⁷⁹

152. For the reasons stated above, the Appellate Panel finds that the Trial Panel was correct in requiring a proof of shared criminal purpose as well as a joint or a concerted

⁷⁷ *Prosecutor v. Momčilo Krajišnik*, Trial Judgment, para. 884 (this part of the judgment was upheld on appeal).

⁷⁸ *Prosecutor v. Petar Mitrović*, Trial Verdict, pp. 125-126 (this part of the verdict was upheld on appeal).

⁷⁹ *Prosecutor v. Petar Mitrović*, Trial Verdict, pp. 125-126 (this part of the verdict was upheld on appeal).

action between the Accused and other members of JCE in the implementation of a common objective if they were to share responsibility for the crimes committed through the JCE.

153. Accordingly, this sub-ground of the Prosecutor's appeal is dismissed.

Agreement and Understanding

154. The Prosecutor argues that the Trial Panel misdirected itself on the law by requiring an additional element to be proved which is not required, namely that there must be an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed.⁸⁰

155. A review of the trial verdict indicates that the Trial Panel outlined the basic tenets of the JCE doctrine pursuant to the current international jurisprudence, citing findings of the ICTY Trial and Appeal Chambers with respect to the scope, limits of and legal requirements for various forms of JCE. The Trial Panel also cited the findings of the ICTY jurisprudence with respect to the existence of an arrangement or understanding, either express or tacit, between two or more persons to commit a particular crime.

156. The ICTY jurisprudence on this issue is clear. Joint criminal enterprise requires an existence of a common purpose, plan or design, which necessarily had to amount to, or involve and understanding or an agreement between two or more persons that they will commit a crime.⁸¹ Differentiating between joint criminal enterprise and conspiracy, the Appeals Chamber stated that "a joint criminal enterprise requires, in addition to such a showing {a showing that several individuals have agreed to commit a certain crime or set of crimes}, that the parties to that agreement took action in furtherance of that

⁸⁰ Prosecutor's Appeal Brief, p. 4 and p. 14

⁸¹ *Brđanin*, Trial Judgment, para. 342; *Simic, Tadic and Zaric*, Trial Judgment, para. 158, *Vasiljevic* Appeal Judgment, para. 108-109; *Blagojević and Jokić*, Trial Judgment, para. 699.

agreement.⁸² In other words while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise”.⁸³

157. The Appellate Panel is familiar with the 2007 *Brđanin* Appeal Chamber verdict and its interpretation of the JCE doctrine since the Prosecutor has based this ground of appeal on the findings of the *Brđanin* Appeals Chamber. The ICTY jurisprudence is a persuasive authority but the findings of that tribunal are based on the interpretation of legal principles contained in the ICTY Statute. Just like ICTY, the Court of BiH has a duty to follow its own constitutive statute, i.e. the Criminal Code of the Bosnia and Herzegovina and must resolve the cases in accordance with the legal provisions of the CC of BiH. The cornerstone of our national criminal system is the principle of *nulla poena sine culpa*, i.e. that criminal punishment must be based on individual wrongdoing. Accordingly, the Appellate Panel must reject any application of legal principles that are inconsistent with the criminal law of Bosnia and Herzegovina even if those legal principles are adhered to in other national jurisdictions.

158. JCE theory is soundly premised on the sharing of a criminal intent by all who take part in the criminal enterprise. This premise is the sine qua non condition for the possible additional liability arising in the III (third) category of JCE. To extend criminal liability to instances where there was no agreement or common plan between the perpetrators would excessively broaden the JCE theory lapsing it into a theory of “guilt by association” in violation of the fundamental principles of the criminal law.

159. For the reasons stated above, the Appellate Panel finds that the Trial Panel did not err in law by requiring that there must be an arrangement or understanding amounting to an agreement between two or more persons to commit a particular crime.

⁸² *Prosecutor v. Milutinović*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ICTY Appeal Chamber, IT-99-37-AR72, para. 23, citing XV Law Reports of Trials of War Criminals, pp. 95 and 97.

⁸³ *Prosecutor v. Milutinović*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ICTY Appeal Chamber, IT-99-37-AR72, para. 23

160. Recalling the applicable standard of review, the Appellate Panel also finds that the Prosecutor failed to demonstrate how the alleged error of law invalidates the Trial Panel's findings. The Trial Panel did not consider any evidence and did not make any findings with respect to that particular legal element. The Trial Panel rejected an application of the JCE doctrine in the present case on the grounds of JCE's over-breadth, lack of evidence with respect to the existence of JCE and lack of evidence that the Accused were members of the alleged JCE. The Appellate Panel has already reviewed and confirmed the Trial Panel's findings with respect to the first two grounds. The Prosecutor did not appeal the Trial Panel's findings with respect to the lack of evidence that the Accused were members of the alleged JCE.

161. For the reasons stated above, this sub-ground of appeal is dismissed.

Rank of the Accused and Military Orders

162. Finally, the Appellate Panel turns to the issue of whether JCE liability is a doctrine that applies to low-ranking soldiers such as the Accused in the present case and whether their conduct pursuant to military orders gives rise to the JCE liability.

163. The Prosecutor argues that the Trial Panel misdirected itself on the law when it found that JCE liability does not apply to common soldiers such as the Accused in the case and that they are only responsible for the crimes they perpetrated directly.⁸⁴ The Prosecutor also argues that the Trial Panel misdirected itself on the law when it found that the Accused acted pursuant to the military orders they received from their superiors, which as a matter of law does not entail the JCE responsibility.⁸⁵

164. At the outset, the Appellate Panel notes the Prosecutor's argument with respect to whether or not JCE theory applies to common soldiers who act pursuant to military

⁸⁴ Prosecutor's Appeal Brief, p. 4 and p. 14

⁸⁵ Prosecutor's Appeal Brief, p. 4

orders is misguided. The Trial Panel's conclusions are tied to specific factual findings in the present case, specifically, to the findings that the alleged JCE was too broad and over-extended and that the Prosecutor failed to prove the guilty intent of the Accused

165. The Appellate Panel emphasizes the importance of respecting the basic criminal law principle of individual culpability. It has previously stated that the Accused "cannot be considered criminally responsible for those crimes committed pursuant to the design of his ultimate superiors to which he did not contribute, simply on the grounds that those superiors also considered the Accused's acts as part of their design...the common soldiers of the VRS and the MUP...are responsible for the crimes they participate in, and no more. To conclude otherwise would be to assign collective responsibility to all soldiers for the crimes of their superiors".⁸⁶

166. The Appellate Panel agrees with the Trial Panel that guilty intent and criminal conduct of others to which the Accused did not substantially contribute cannot be basis for their criminal responsibility even under the JCE theory.

167. There is no doubt that the alleged JCE invokes criminal responsibility of the masterminds behind Srebrenica mass violations. They conceived the criminal plan and orchestrated the crimes even though they were not physically involved and/or were far removed from their physical commission. However, the JCE liability does not and should not rise and extend to common soldiers, such as the Accused in the present case, in the absence of proof that they knew of the criminal plan concocted by the high echelon leaders, and intended to join in that plan. Therefore, they are responsible only for the crimes they perpetrate directly.

168. Even at the ICTY, cases that deal with JCE liability for membership in vast criminal enterprises are leadership cases where the Accused are high-ranking Bosnian

⁸⁶ *Prosecutor v. Petar Mitrović*, Trial Verdict, p. 124 (this part of the verdict was upheld on appeal).

Serb political and military leaders.⁸⁷ Thus, although vast in scope, those JCEs remain small in membership and that membership is strictly limited to the elites.

169. The Appellate Panel also agrees with the Trial Panel's findings that the Accused's mere presence in the vicinity of the Vuk Karadžić primary school pursuant to orders of their superior Mirko Janković, does not entail the JCE liability. In other words, the Accused cannot be considered to be members of the alleged JCE by virtue of their presence in the area in the absence of the evidence that they intended to commit the alleged crimes and/or shared the alleged criminal purpose.

170. Accordingly, for the reasons stated above, these sub-grounds of appeal are dismissed.

**V 2ND GROUND OF THE PROSECUTOR'S APPEAL: ALLEGED VIOLATIONS OF
THE CRIMINAL CODE UNDER ARTICLE 298**

A. Standard of Review

171. An appellant alleging an error of substantive law must identify, at least, the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.

172. Where the Appellate Panel finds that there is an error of substantive law in the Verdict arising from the application of the wrong legal standard by the Trial Panel, it is open to the Appellate Panel to articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but applies the correct substantive legal standard to the evidence contained in the trial record. In such circumstances, the Appellate Panel must determine whether it is itself convinced beyond reasonable doubt as to the challenged factual finding before that finding is confirmed on appeal.

⁸⁷ *Krstić* Trial Judgment, para. 645, *Stakić* Appeal Judgment, para. 68-70, *Brđanin*, Appeal Judgment, para. 425

173. Where the Appellate Panel concludes that the Trial Panel committed an error of substantive law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the substantive law as properly applied and independently determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.⁸⁸

B. Prosecutor's Appeal

1. Forcible Transfer

174. The Prosecutor argues that the Trial Panel erred in law when it misdirected itself on the law and misapplied it with respect to the crime of forcible transfer of population under Article 172(1)(d) of the CC of BiH.

175. The Prosecutor submits that the Trial Panel erred in law regarding the crime of forcible transfer when it held that the actus reus of the offence had been completed once the detained Bosniak men had arrived to Bratunac.⁸⁹ According to the Prosecutor, the crime of forcible transfer is a continuous act and the process of transfer is continuing, despite the interim measures and intermediate holding awaiting posts, until the persons reach their ultimate destinations.⁹⁰ Where detained people are transferred in stages from an area where they previously lawfully stayed, any further or secondary transportation other than the initial movement are still considered to be forcible transfer of population as defined by law. Therefore, the Trial Panel erred in law when it held that the actus reus of forcible transfer was completed after the initial displacement of population.

176. The Prosecutor further argues that the Trial Panel erred in law when it held that the Prosecutor had to prove that the Accused knew the purpose and destination of

⁸⁸ See, e.g., *Todorović and Radić* Appeal Judgment, paras. 155-179.

⁸⁹ Prosecutor's Appeal Brief, p. 10, paras. 13 and 16.

⁹⁰ Prosecutor's Appeal Brief, pp. 11-12, para. 22

transport to establish the necessary intent.⁹¹ The Prosecutor acknowledged that the Accused's knowledge of purpose and destination of the transfer was a factual allegation in Count 5 of the Indictment. However, the Prosecutor argued that the Trial Panel should have altered the wording of the Indictment in the Verdict and that such altering would have not prejudiced the fairness of the proceedings.⁹²

177. Therefore, the Prosecutor submits that the knowledge of the actual destination of transport is not a necessary element of the criminal offence of forcible transfer. What is required is the showing that the Accused intended that the victims are removed.⁹³

2. Responses of the defense

178. In response, the Defense for all four Accused submits that the Trial Panel interpreted and applied the applicable substantive law in an adequate manner and that the Prosecution's appeal must be dismissed as unfounded.

3. Findings of the Appeal Panel

179. The Appellate Panel finds this ground of appeal to be unfounded.

180. The Prosecutor argues that forcible transfer is a continuous crime and that the Trial Panel erred in law when it held the actus reus of the offence had been completed once the detained Bosniak men had arrived to Bratunac.

181. The Appellate Panel also emphasizes that the continuous actus reus of the offense requires a corresponding continuous *mens rea*.

182. The Appellate Panel could agree, in theory, with the Prosecutor's argument that the crime of forcible transfer is a continuous crime, provided that there is relevant *mens*

⁹¹ Prosecutor's Appeal Brief, p. 3 and p. 10.

⁹² Prosecutor's Appeal Brief, p. 10, para. 12

⁹³ Prosecutor's Appeal Brief, p. 10, para. 12.

rea. However, a review of the impugned findings in the present case reveals that the Prosecutor misread and misunderstood the reasoning behind the Trial Panel's holding. Count 5 charged all four Accused with forcible transfer of detainees. Accordingly, the Trial Panel considered factual allegations of "the situation in which the detained people were ... further transported to other locations {other detention centers}", and thus, reached its conclusion that transfer of detainees may not be considered as Forcible Transfer of Population, as it is defined by the law"⁹⁴.

183. The prosecutor in his appeal alleges continuous *actus reus*, which is insufficient to apply the notion of a continued criminal offence, as defined in our criminal law theory. A continued criminal offence (*delictum continuatum*) is a notion of the criminal law applied when the perpetrator commits several identical or similar criminal offences over a continuous period of time. Those offences are combined, due to their circumstances, to make a whole which is then qualified as one criminal offence. Unlike earlier criminal legislation, CC BiH provides for this notion under Article 54. Under that provision, a continued criminal offence requires that the perpetrator intentionally perpetrates a number of identical criminal offences or offences of the same kind which, in terms of the manner of perpetration, temporal connection and other material circumstances connecting them, constitute a whole.

184. In other words, a continued criminal offence requires that the perpetrator commits with intent several identical or similar criminal offences in their subjective and objective unity. Therefore, the Prosecutor is wrong in trying to equate in this case the continuity of the consequence of the criminal offence with the continuity of the commission of the offence. Accordingly, the Trial Panel correctly concluded that the *actus reus* of the criminal offence charged was finalized when the detained Bosniak men arrived in the school in Bratunac.

⁹⁴ Trial Verdict, p. 73

185. A general impression after the analysis of the Prosecutor's appeal is that the Prosecutor attempts to interpret the Indictment and remove its defects and flaws in the Appeal. The Prosecutor actually tries to transfer the burden of proof onto the Court, which is in utter contravention of the principles of the CPC. It is not up to the Court to establish matters that the Prosecutor failed to prove.

186. The Appellate Panel notes that the law provides for a limited exceptions to justify proven acts of forcible transfer of civilians.⁹⁵ The law also absolves a defendant of criminal responsibility for forcible transfer of prisoners from one detention center to another unless it is proven that the Accused had the intent that the victims did not return.⁹⁶

187. In the present case, the Trial Panel found, in accordance with the Prosecutor's allegation, that the Bosniak men were detained at the Vuk Karadžić primary school and that the Accused were ordered to secure the transport of the detained Bosniak men to another detention center located in Orahovac on the morning of 14 July 1995. In the absence of any evidence that the Accused knew about the criminal plan of forcible transfer, it was reasonable for the Trial Panel to conclude that as far as the Accused knew they were to transport detainees from one detention center to another as ordered by their superiors. This issue, however, became moot since the Prosecutor failed to prove that the Accused took any part in securing the transport.

188. By law, the Trial Panel must resolve the factual allegations of the Indictment. The Prosecutor alleged a forcible transfer of detainees. Accordingly, the Trial Panel reviewed the evidence in light of the Prosecutor's factual allegations as well as applicable legal norms with respect to the transfer of detainees and made its findings accordingly.

⁹⁵ Article 49(2) of the IV Geneva Convention; Article 17(1) of Additional Protocol II to Geneva Convention; *Prosecutor v. Blagojević and Jokić*, Trial Judgment, paras. 597-598

⁹⁶ *Prosecutor v. Simić, Tadić and Zarić*, Trial Judgment, para. 974 (this finding was not challenged by the Prosecutor on Appeal).

189. Accordingly, the Appellate Panel finds that the Trial Panel did not err in law when it held that the Prosecutor failed to prove essential elements of the crime of forcible transfer of population pursuant to Article 172(1)(d) of the CC of BiH.

190. With respect to the *mens rea* necessary to establish forcible transfer, the Appellate Panel again notes that the Trial Panels are bound to resolve factual allegations of the Indictment. In international jurisprudence the subjective element of this criminal offence is considered to be the intention to transfer people permanently.

191. This matter is further complicated by the fact deriving from the evidence in the case record according to which Bosniak civilians, among whom there were captured members of the Army of RBiH, were supposed to be exchanged. We know today of the tragic events that undoubtedly ensued. However, current knowledge cannot be retrospectively applied to the relevant period of time in order to determine the *mens rea* of the Accused.

192. The Prosecutor alleged the Accused's knowledge of the purpose and the destination of transfer and contended that the Accused's actions in light of that knowledge constituted forcible transfer of detainees. Accordingly, the Trial Panel had to consider the evidence with respect to this submission and resolve it in the light of the presented evidence. After careful review of the evidence, the Trial Panel concluded that the Prosecutor failed to prove that the Accused knew the purpose and destination of the transport.⁹⁷

193. The Appellate Panel agrees with the Prosecutor's submission that knowledge of purpose and destination is not a separate element of the crime of forcible transfer. Having said that, the Appellate Panel emphasizes that a finding of forcible transfer requires an element of permanency in relation to the *mens rea* of the Accused. Therefore, an important consideration in this context is the intended goal of the relocation as well as the

⁹⁷ Trial Verdict, p. 72

location to which victims are displaced.⁹⁸ This must be considered, in order to prove beyond reasonable doubt that the Accused intended to permanently relocate the victims.

194. Furthermore, the Appellate Panel notes that the legal values protected by forcible transfer are the right of the victim to stay in his or her home and community and the right not be deprived of his or her property by being forcibly displaced to another location. Accordingly, a destination to which the victims are forcibly displaced is an important factor in determining the intention of the Accused since a finding whether the victims are deprived from effectively exercising their protected rights is crucial to the finding of a forcible displacement.

195. For these reasons, the Appellate Panel finds that the Trial Panel did not err in law in considering the purpose and destination of the forced displacement in its evaluation of the evidence under Count 5 of the Amended Indictment.

196. Accordingly, the Appellate Panel dismisses this sub-ground of appeal.

4. Deprivation of Liberty

197. The Prosecutor argues that the Trial Panel committed an error of law when it misdirected itself on the law with respect to the crime of imprisonment under Article 172(1)(e) of the CC of BiH.

198. The Prosecutor submits that the Trial Panel erred in law when it held that holding already captured persons in detention does not constitute a severe deprivation of liberty in violation of international law.⁹⁹ It also erred when it held that the offense of imprisonment is completed once people are detained.¹⁰⁰ The Prosecutor argues that the

⁹⁸ *Prosecutor v. Simic, Tadic and Zaric*, Trial Verdict, paras. 130, 134

⁹⁹ Prosecutor's Appeal Brief, p. 3.

¹⁰⁰ Prosecutor's Appeal Brief, p. 4 and p. 12, para. 26

actus reus of the offence is the continued confinement of the detainees and that their confinement was arbitrary and in violation of fundamental rules of international law.¹⁰¹

5. Responses of the Accused

199. In response, the Defense for all four Accused submits that the Trial Panel interpreted and applied the applicable substantive law in an adequate manner and that the Prosecution's appeal must be dismissed as unfounded.

6. Findings of the Appeal Panel

200. The Appellate Panel finds this ground of appeal as unfounded.

201. The Trial Panel held that the holding of previously captured persons in detention cannot correspond to the situation of severe deprivation of liberty, contrary to international humanitarian law, because the criminal offence of imprisonment and deprivation of liberty has already been completed by the time these people were detained or given the status of prisoners or detainees. Therefore, according to the factual findings in this case the Accused did not have any connection with the people who deprived the detained Bosniaks of liberty prior to the incident charged and at another location.

202. The international prosecutor of the Prosecutor's Office of BiH submitted in his appeal that such findings of the Trial Panel were incorrect. The Prosecutor submits that such transfer constitutes, at least, an objective act of aiding in the transfer and that therefore there is a continuous actus reus of the criminal offence of forcible transfer of detainees by the Accused.¹⁰²

¹⁰¹ Prosecutor's Appeal Brief, p. 13, para. 31.

¹⁰² The international prosecutor in this case referred to solutions rooted in precedent law and applied in proceedings before *ad hoc* tribunals. They are based on a broad concept of conspiracy, that is, one of its forms, namely the JCE. These solutions basically avoid theoretical and practical analysis of the issues of complicity. Rather, they establish in practice a unique notion of the perpetrator of the criminal offence, who represented the subject contributing to the commission of the criminal offence in any manner, either by committing the offence directly, or as an inciter, aider or abettor, etc. In order to treat the subject as a perpetrator, it was sufficient to have any causal relationship, even a remote one, between an act or

203. With reference to the prosecutor's appellate claims, the Appellate Panel considered them to be unfounded for the following reasons. The interpretation of the criminal law in this country does not allow for the splitting of the subject matter of the criminal offence. Criminal law theory here defines that subject matter as a union of objective and subjective aspects. Accordingly, the theory of a continuous actus reus was refused as inapplicable in the national criminal justice system. The national criminal law only recognizes the notion of a continued criminal offence.

204. Besides, the fundamental principle of American criminal justice system is the theory that any criminal offence consists of two elements – the criminal act and criminal intent. Thus none of the two can constitute the criminal offence alone.¹⁰³

205. The Appellate Panel did, however, note *obiter dictum* that it cannot agree with the conclusion of the Trial Panel to the effect that the offence was finalized by the time the Bosniaks were deprived of liberty. The reason for that is that imprisonment or unlawful deprivation of freedom is a continuous criminal offence. That implies that the offence lasts up until the moment when the consequence ceases to exist, or when the unlawfully created situation ends.

206. The fact that such unlawful condition was caused by completely different people, of whom the Accused were unaware, is a different matter. The prosecutor did not submit any evidence in that regard. According to the factual findings in this case, the Accused guarded the detained civilians on a different location than that where the detainees were initially arrested. Thus they cannot be held liable, because the act of commission must always have a corresponding subjective element in the criminal offence, in order for the perpetrator(s) to be held liable.

punishable omission of that person and the consequence thereof. On this see Đorđe No. Lopičić, Ph.D., page 173.

¹⁰³ H. Von hebel and M. Kelt, ICC Elements of Crimes, in : H. Fisher and McDonald (Ed.), *Yearbook of International Humanitarian Law*, Volume 3, T.M.C. Asser Press, The Hague, 2000, p. 277.

207. The prosecutor in this case tried to compensate for the insufficient evidence of *mens rea* of the Accused by referring to JCE. The act of participation in the JCE always implies “furtherance” of the joint criminal enterprise. That is not an act of commission foreseen in the Statute nor a classic form of complicity, or an act of a superior. Rather, this term is only “a cover for the lack of causal relationship between the act of an alleged perpetrator and consequences that clearly have been caused by other people and factors”.¹⁰⁴ The Appellate Panel in this case finds that the Trial Panel correctly concluded that the Accused did not participate in the commission of imprisonment, nor did the Prosecution officially inform the Accused of the identity of other members for whose acts or omissions they are held liable.

208. The Appellate Panel reviewed the impugned part of the verdict and concludes that the Prosecutor misread and misunderstood the context and the reasoning behind the Trial Panel’s findings. The Trial Panel held that “the mere securing of the area around the temporary detention facility...does not mean, in the Court’s opinion, a severe deprivation of liberty in violation of international law”.¹⁰⁵ The Trial Panel, however, reached this conclusion after it determined that the Prosecutor failed to introduce a single piece of evidence showing that the Accused took any action in detaining the Bosniak men.¹⁰⁶

209. Specifically, the Trial Panel examined evidence provided by Mile Babić, Nenad Đokić, Mile Janić, Slobodan Mijatović, the witness P3, Milovan Đokić and determined that the Accused and other members of the Bratunac Military police unit were dispatched to the Vuk Karadžić school to secure the area and were seen there on the night in question in that area. For example, Slobodan Mijatović testified he and other of his colleagues were dispatched to the school and that he saw the Accused Zarić standing at the corner opposite the school when he arrived there. Nenad Đokić testified about seeing the Accused Zdravko Bozić half way between the school and the Caesar bar. Mile Janić stated that he saw the Accused Živanovic and Zarić in the bakery near the school while Milovan Đokić recalled seeing the Accused Blagojević standing by Pintzgauer.

¹⁰⁴ See Slobodan Stojanović, M.A., *Joint Criminal Enterprise*, p. 219.

¹⁰⁵ Trial verdict, p. 58

¹⁰⁶ Trial Verdict, p. 56.

210. The Trial Panel found, and this Panel agrees, that the Prosecutor extensively used legal terminology and general terms to describe the crimes committed without specifying “the acts committed by each defendant...which would be necessary to determine whether they are responsible for the charged crime”.¹⁰⁷ Consequently, the Trial Panel held that mere showing of the Accused’s presence around the school, without any concrete evidence of their criminal behavior, does not constitute the crime of imprisonment or severe deprivation of liberty in violation of international law.

211. The Appellate Panel agrees with the reasoning of the Trial Panel. Accordingly, the Appellate Panel dismisses this sub-ground of appeal.

**VI 3RD GROUND OF THE PROSECUTOR’S APPEAL: INCORRECTLY OR
INCOMPLETELY ESTABLISHED FACTS UNDER ARTICLE 299**

A. Standard of Review

212. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.¹⁰⁸ When considering alleged errors of fact, the Appellate Panel will determine whether any reasonable trier of fact could have reached the contested factual finding. The Appellate Panel will only substitute its own finding for that of the Trial Panel when no reasonable trier of fact could have reached the contested factual finding.

213. The Appellate Panel shall bear in mind that in determining whether or not a Trial Panel’s conclusion was reasonable, it will not lightly disturb findings of fact by a Trial Panel. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Panel.

¹⁰⁷ Trial verdict, p. 58

¹⁰⁸ See generally *Todorović and Radić* Appeal Judgment, paras. 85-89; *Tanasković* Appeal Judgment, pgs. 4-5.

Thus, the Appellate Panel must always give a margin of deference to a finding of fact reached by a Trial Panel. Only where the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is “wholly erroneous” may the Appellate Panel substitute its own finding for that of the Trial Panel.

214. Moreover, it is not any error of fact that will cause the Appellate Panel to overturn a conviction or acquittal. Only where the error of fact caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime, will the Appellate Panel revise or revoke the contested Verdict.

215. The same standard of reasonableness and the same deference to factual findings applies when the Prosecutor appeals against an acquittal. Thus, when considering an appeal by the Prosecutor, the Appellate Panel will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the contested factual finding. Furthermore, the Prosecutor, like the accused, must demonstrate “an error of fact that occasioned a miscarriage of justice.” Considering that it is the Prosecutor that bears the burden at trial of proving the guilt of an accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a prosecution appeal against an acquittal than for a defense appeal against a conviction. An accused must show that the Trial Panel’s factual errors create a reasonable doubt as to his guilt. The Prosecutor must show that when the Trial Panel’s factual errors are corrected, all reasonable doubt of the accused’s guilt has been eliminated.

B. Prosecutor’s Appeal

216. The Prosecutor submits that the Trial Panel committed a number of factual errors resulting in the acquittal of the Accused. First, the Prosecutor argues that the Trial Panel erred when it held that the Prosecutor failed to prove that Bosniak men were unlawfully

killed while attempting to escape from the confines of Vuk Karadžić School under Count 3 of the Amended Indictment. The Prosecutor contends that the Trial Panel erroneously discounted the testimony of the witness P1 and wrongfully dismissed it for lack of corroboration. Specifically, the Prosecutor submits that the Trial Panel erred when it found a critical discrepancy in the evidence given by the witness P1 with respect to the location of a window from which the detainees attempted to escape and were unlawfully killed in the process. The Prosecutor submits that this material discrepancy did not exist and that the Panel's error led to a wrongful conclusion that the killings alleged in Count 3 did not occur.¹⁰⁹ The Prosecutor also submits that the Trial Panel erred when it compared testimony of the witness P1 to the testimony of Mile Babić pertaining to the killings. The Prosecutor argues that these witnesses testified about two different events. Therefore, the Trial Panel erred in comparing two different events and in using it to dismiss the testimony of the witness P1 for lack of corroboration.¹¹⁰

217. Secondly, the Prosecutor claims that the Trial Panel misinterpreted a factual allegation under Count 5 when it held that the Prosecutor charged the Accused with forcible transfer of detainees and not of population. Therefore, the Trial Panel erroneously concluded that the essential elements of the criminal offence of forced transfer of population were not alleged in the Count (Count 2).¹¹¹ Specifically, the Prosecutor submits that the term "detainees", in Count 5 of the Amended Indictment, was a factual allegation and not a legal qualification. The Prosecutor also submits that the Trial Panel failed to make a finding on a decisive fact regarding the actual status of the detained Bosniak men. Had the Trial Panel done so, it would have found that all four Accused knew that the Bosniak men were arbitrarily detained for purpose of forcible transfer and nonetheless carried out their acts knowing that they are making a significant contribution to the operation of forcible transfer of the civilian population from Srebrenica enclave.¹¹²

¹⁰⁹ Prosecutor's Appeal, pp. 21-22

¹¹⁰ Prosecutor's Appeal Brief, p. 21

¹¹¹ Prosecutor's Appeal Brief, p. 5

¹¹² Prosecutor's Appeal Brief, p. 22

218. Thirdly, the Prosecutor submits that the Trial Panel erred when it rejected the application of the JCE liability because it found that the alleged scope of JCE was too broad and that the Prosecutor failed to adequately plead a specific form of JCE. The Appellate Panel has already discussed all issues related to the JCE in the section above..

219. Fourthly, the Prosecutor submits that the Trial Panel erred when it found that there was no evidence that the Accused intended to commit the alleged crime of forcible transfer. Specifically, the Prosecutor argues that the Trial Panel failed to consider whether an omission to act to avert a consequence with a duty to do so was evidence of intent.¹¹³ According to the Prosecutor, an omission to intervene to prevent the killings and mistreatment of the detained Bosniak men can be regarded as an intentional act of participation in the JCE alleged.

220. Finally, the Prosecutor submits that the Trial Panel erred when it found that the Prosecutor failed to prove that the Accused Zoran Živanović participated in inhumane process of separating Bosniak men and Bosniak women and children and used force to load them on buses (Item 5). Specifically, the Prosecutor claims that the Trial Panel failed to consider that force can be applied by way of coercion and other non-violent acts and this failure resulted in erroneous and incomplete establishment state of facts.

C. Responses of the Accused

221. In response, the Defence for the Accused Zdravko Božić submits that the Trial Panel properly established facts pertaining to the crime of forcible transfer and imprisonment of the Bosniak men. It also submits that the Accused Božić lacked the necessary *mens rea* required by law to hold him responsible for the alleged crimes.¹¹⁴

222. In response, the Defence for the Accused Mladen Blagojević submits that the Prosecution failed to prove that the Accused Blagojević committed the alleged crime of

¹¹³ Prosecutor's Appeal Brief, p. 5 and pp. 31-32

¹¹⁴ Response of the Accused Zdravko Božić, pp. 1-3

forcible transfer. In support of its argument, the Defense submits that Article 49 of the IV Geneva Convention allows for the evacuation of the protected persons if the security of the population or imperative military reasons demand so. The Defence also submits that the evidence clearly indicates that the evacuation of the population from Potočari was undertaken for purely humanitarian reasons and that this decision was upheld by UNPROFOR, which actively participated in the evacuation.¹¹⁵

223. In response, the Defense for the Accused Željko Zarić submits that the Trial Panel correctly concluded that the Prosecutor failed to prove that the Accused Zarić participated in any plan to commit the alleged criminal offences or that he had intent to do so. The Defence also submits that the Prosecutor conceded that the Accused Zarić did not directly perpetrate the alleged crimes and only claims his criminal responsibility under the JCE theory. Finally, the Defence submits that the Trial Panel provided a detailed reasoning for not accepting JCE theory and urges the Appellate Panel to uphold the verdict.¹¹⁶

224. In response, the Defence for the Accused Zoran Živanović submits that the Court correctly assessed all relevant evidence and rightly acquitted the Accused Živanović on all counts of the Amended Indictment.

D. Findings of the Appeal Panel

225. The Prosecutor raises several issues concerning the Trial Panel's assessment of the evidence pertaining to the criminal liability of the accused Božić, Blagojević, Zarić and Živanović. These contentions will be dealt with in turn.

1. Killings at Vuk Karadžić Primary School

226. In view of the submissions tendered by the Prosecutor on this sub-ground of appeal, the issue before the Appellate Panel is that of determining whether or not the Trial Panel erred in rejecting the evidence provided by the witness P1.

¹¹⁵ Response of the Accused Mladen Blagojević, p. 6

¹¹⁶ Response of the Defence for the Accused Željko Zarić, pp. 3-4

227. The Appellate Panel recalls that the credibility of the witness P1 was heavily attacked by the Defense and that the Trial Panel had serious concerns about the reliability of his evidence. The Appellate Panel also recalls that the Trial Panel thoroughly discussed the inconsistencies between his testimony and prior statements and relied upon P1's evidence only where corroborated by other evidence. The Appellate Panel supports this cautious approach and treatment of P1's evidence.

228. The Appellate Panel notes that the Trial Panel carefully examined the evidence provided by P1 and at length discussed conditions surrounding the alleged incident. The Trial Panel also gave due consideration to the testimony of Mile Babić because P1 claimed that he and Mr. Babić were together at the time the alleged killing took place. Having considered the testimony of Mile Babić, the Trial Panel, however, concluded that his evidence did not corroborate P1's version of the incident on several points and especially with respect to the presence of the Accused during the critical time¹¹⁷. Accordingly, the Trial Panel held that the Prosecutor failed to prove beyond reasonable doubt that the incident took place or that the Accused were even present when the incident occurred.¹¹⁸

229. The Appellate Panel considers that the relevant findings of the Trial Panel were carefully and meticulously considered and that the correct conclusions were drawn in the Trial Verdict. This sub-ground of appeal is obviously ill-founded and is therefore dismissed.

2. Forcible Transfer

230. The Prosecutor argues that the Trial Panel erred when it found that the Prosecutor charged the Accused with transfer of detainees and not of population. The Prosecutor further argues that had the Trial Panel correctly evaluated the evidence pertaining to the status of the detained Bosniak men, it would have found that the Accused knew that the

¹¹⁷ Trial Verdict, p. 67

¹¹⁸ Trial Verdict, p. 68

Bosniak men were detained for the purpose of forcible transfer and carried out their acts knowing that they were making a significant contribution to the operation.

231. A review of the Trial Verdict indicates that the Prosecutor presented ample evidence, and the Trial Panel accepted it, that "the military policemen escorted the buses which transported detained Bosniaks"¹¹⁹ from Bratunac to Orahovac on 14 July 1995. The trial record also indicates that many Prosecution's witnesses, who were members of the Bratunac Brigade Military Police during the Indictment period, testified that they were assigned and personally participated in escorting the buses on the day in question. However, as the Trial Panel noted and this Panel agrees, none of those witnesses, with exception of the witness P1, mentioned the Accused or stated that the Accused escorted the buses.¹²⁰ The Trial Panel also noted that the Amended Indictment only generally alleged the Accused's participation in the forcible transfer of the detained Bosniak men and the evidence presented during the trial proceedings supported only that general allegation.¹²¹

232. Consistent with its cautious treatment of the impugned evidence provided by P1 and in the absence of any corroboration that the Accused participated or played any role in the transfer of the detained Bosniak men from Bratunac to Orahovac, the Trial Panel concluded that the Prosecutor failed to prove the Accused's participation in the alleged forcible transfer.

233. The Appellate Panel finds that on the basis of the evidence presented before it at the trial, the conclusions of the Trial Panel were reasonable and finds no reason to disturb those findings.

234. The Prosecutor did not challenge the accuracy of the evidence relied upon by the Trial Panel to acquit the Accused. The Prosecutor also failed to demonstrate how the assessment of the evidence and the Panel's ultimate finding, namely, lack of any credible

¹¹⁹ Trial Verdict, p. 70

¹²⁰ Trial Verdict, pp.71-72

¹²¹ Trial Verdict, p. 72

evidence that the Accused took part in the alleged forced displacement of the detained Bosniak men,¹²² led to a grossly unjust error, which resulted in the miscarriage of justice. The Trial Panel's alleged misinterpretation of the factual allegations pertaining to the status of the captured Bosniak men and its corresponding findings have no bearing, in these particular circumstances, on the acquittal of the Accused.

235. For these reasons, the Appellate Panel dismisses this sub-ground of appeal as unfounded.

3. Intent to Commit Alleged Crimes

236. The Prosecutor contends that the Trial Panel failed to consider evidence with respect to the omission of all four Accused to prevent the killings and mistreatment at the Vuk Kradžić primary school when they had a duty to do so and that their failure to intervene can be regarded as an intentional act of participation in the alleged JCE. In addition, the Prosecutor argues that the Accused are criminally liable for aiding and abetting the forced transfer.¹²³

237. Recalling its earlier finding that the JCE theory does not apply in the present case, the Appellate Panel declines to address the issue of participation or contribution to the JCE by omission.

238. In addition, the Appellate Panel declines to address the issue of aiding and abetting by omission. The Appellate Panel has already extensively reviewed the Trial Panel's findings pertaining to the crime of forcible transfer and the Accused's alleged participation in the section above. Recalling that the Prosecutor failed to introduce any reliable evidence pertaining to the presence of the accused Božić, Blagojević, Zarić and Živanović at the site when the detained Bosniak men were transported from Bratunac to Orahovac, the Appellate Panel considers a discussion of this issue to be moot.

¹²² Trial Verdict, p. 73

¹²³ Prosecutor's Appeal, p. 32, para. 105.

239. Accordingly, the Appellate Panel dismisses this sub-ground of appeal as unfounded.

4. Zoran Živanović's Participation in Separation

240. The Prosecutor submits that the Trial Panel erroneously held that the Prosecutor failed to prove that the Accused Živanović participated in inhumane process of separating Bosniak men and Bosniak women in Potočari using force to load them on buses.

241. A review of the trial verdict reveals that the Trial Panel considered and accepted the Prosecutor's evidence that the Accused Živanović was present in Potočari on the day in question.¹²⁴ The trial record also reveals that the Trial Panel carefully examined testimony of the several Prosecution witnesses who testified about the alleged incident. Although the witnesses amply testified about the general conditions and chaotic situation in Potočari, they provided very little or no evidence at all with respect to the whereabouts of the Accused or his actions during the critical time. Thus, Slobodan Mijatović stated that he saw the Accused Živanović standing by a bus¹²⁵ while others could not remember seeing the Accused in Potočari.¹²⁶

242. The Trial Panel noted that the only incriminating piece of evidence was a statement of witness P4 which he gave to SIPA on 28 November 2006.¹²⁷ The Panel however stated that it could not establish beyond the reasonable doubt the criminal responsibility of the Accused Živanović solely on the basis of that statement especially because P4 recanted his statement at the main trial and his prior statement was not corroborated by any other evidence during the main trial.¹²⁸

243. In addition, the Trial Panel found that the Prosecutor failed to introduce any evidence that the Accused Živanović used force or threat of force during the separation

¹²⁴ Trial Verdict, pp. 87-91

¹²⁵ Trial Verdict, pp. 88-89

¹²⁶ Trial Verdict, pp. 88-90

¹²⁷ Trial Verdict, p. 90

¹²⁸ Trial Verdict, p. 88

process. The Trial Panel noted that it was insufficient to use legal terms to describe the alleged criminal activity of the Accused and that the Prosecutor should have provided specific evidence demonstrating the criminality of the Accused's actions.¹²⁹

244. The Appellate Panel recalls its earlier finding that the Trial Panel, as the trier of fact, has discretion in evaluating the evidence and resolving evidential inconsistencies. The Appellate Panel finds that the Trial Panel's assessment of the overall evidence as well as credibility of witness P4 and reliability of his evidence was detailed and careful. The Appellate Panel also finds that the Trial Panel was reasonable in relying on the testimony of other witnesses to make its findings. Their accounts of the events in Potočari were cogent, consistent inter se, and supported by other circumstantial evidence in the case.

245. The Prosecutor has not shown that the Trial Panel committed a factual error or acted unreasonably in finding that there was no credible evidence of the Accused's participation in separation process or that he used any force or threat of force as alleged in the Amended Indictment.

246. Accordingly, the Appellate Panel dismisses this sub-ground of appeal as unfounded.

VII 4TH GROUND OF THE PROSECUTOR'S APPEAL: SENTENCING UNDER ARTICLE 300

247. The Trial Panel found Mladen BLAGOJEVIĆ guilty of persecution as a crime against humanity (Count 8/1), and sentenced him to a single sentence of 7 (seven) years of imprisonment.¹³⁰

A. Standard of Review

¹²⁹ Trial Verdict, p. 90

¹³⁰ Trial Verdict dated 6 November 2008, X-KR/06/236, pp. 1-2

248. The relevant provision on sentencing is Article 48 of the CC of BiH. Article 48 of the Code contains general factors that a Trial Panel is required to take into account: (i) the purpose of the punishment; (ii) the degree of criminal liability; (iii) the motives for perpetrating the offence; (iv) the individual circumstances of the convicted person (including aggravating and mitigating circumstances); (v) the degree of danger or injury to the protected object; (vi) the past conduct of the perpetrator; (vii) his conduct after the perpetration of the crime and other circumstances related to the personality of the perpetrator.¹³¹

249. Due to their obligation to individualize the penalties to fit the circumstance of an accused and the gravity of the crime, Trial Panels are vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances.¹³² As a general rule, the Appellate Panel will not revise a sentence unless the Trial Panel has committed a discernible error in exercising its discretion or has failed to follow the applicable law. It is for the appellant to demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

250. Pursuant to Article 300 of the CPC of BiH, the decision on sentence may be appealed on two distinct grounds.

251. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when determining the sentence.

252. The Appellate Panel will not, however, revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate

¹³¹ *Prosecutor v. Mejakić*, X-KRŽ 06/200, Appeal verdict, dated 10 July 2009, para. 163.

¹³² *Prosecutor v. Stupar (Kravica)*, X-KRŽ-05/24, Appeal Verdict, dated 9 September 2009, paras. 577-578

Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will independently determine the correct sentence on the basis of the law correctly applied and the Trial Panel's factual findings.

253. The appellant may also challenge the decision on sentence on the grounds that the Trial Panel abused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

254. Specifically, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

255. The Appellate Panel reminds that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

B. Prosecutor's Appeal

256. Under the fourth ground of appeal, the Prosecution submits that the Trial Panel erred in law in imposing a sentence of 7 (seven) years imprisonment, which it argues was manifestly inadequate in the circumstances and is contrary to Article 300(1) of the CPC of BiH.¹³³ In its view, the sentence pronounced is grossly disproportionate to the seriousness of the offence and underestimates the gravity of Blagojević's criminal conduct.

257. It also argues that the Trial Panel failed to exercise its discretion properly by placing too much weight on unexceptional mitigating factors and failed to address other aggravating factors arising from the context in which the offence was perpetrated. The Prosecution submits that the Trial Panel disregarded its findings on the gravity of the crime perpetrated by the Accused and failed to give adequate weight to the form and degree of Blagojević's participation in the criminal act.

258. Finally, the Prosecution argues that the Trial Panel erred in finding that highly extenuating circumstances existed to justify the imposed sentence. It submits that the only sentence which accurately reflects Blagojević's responsibility is "a sentence of imprisonment much greater than the 7 (seven) years handed down by the Trial Panel"¹³⁴ and proposes a sentence of 40 (forty) years.¹³⁵

259. In response, the Defense for the Accused Mladen Blagojević submits that the Trial Panel incorrectly and incompletely established state of facts pertaining to the incriminating incident¹³⁶ and erred in law when it failed to establish beyond reasonable doubt the elements of the offence for which Blagojević has been convicted. Therefore, the Trial Panel should have acquitted him altogether.

C. Findings of the Appellate Panel

¹³³ Prosecution's Appeal Brief, p. 36, para. 120

¹³⁴ Prosecution's Appeal Brief, p. 37, para. 127

¹³⁵ Prosecutor's Appeal Brief, p. 38.

¹³⁶ Appeal Brief of Mladen Blagojević, pp. 5-11; *See also* Blagojević's Response to Appeal, p. 1

260. The Appellate Panel finds this ground of appeal as unfounded.

261. The gist of the Prosecutor's appeal is the weight to be given to the gravity of the Accused's offence. Consideration of the gravity of the conduct of the Accused is normally the starting point for consideration of an appropriate sentence and the practice of this Court provides no exception. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the Accused in the crime.

262. Contrary to the Prosecutor's argument, the Trial Panel gave sufficient regard to the gravity of the Accused's conduct in meting out his punishment. It held that the Accused committed a hideous and an inhumane act when he Browning-fired a round in the direction of the school where Bosniak men were detained. The Trial Panel took into consideration the immediate physical damage to the wall around the window and inferred that the shooting must have caused major anxiety and fear among the detainees.¹³⁷ The Trial Panel found that the Accused committed a single act of violence which was provoked by a prolonged exchange of cursing between the detainees and the VRS soldiers.

263. Furthermore, the Trial Panel discussed mitigating, extenuating and aggravating circumstances although the Prosecutor contends that it placed too much emphasis on mitigating circumstances and failed to consider aggravating factors such as the intent of the Accused to cause maximum terror and the encouragement his actions might have provided to perpetrate the crimes against the detainees.¹³⁸

264. As to the mitigating and extenuating circumstances, Article 48 of the CC of BiH requires the Trial Panels to take into account the individual circumstances of the Accused including his marriage, his family concerns, fatherhood, etc. The ICTY Appeal Chamber as well as practice of the Court of BiH considers these factors to be mitigating and/or

¹³⁷ Verdict, pp. 53-54

¹³⁸ Prosecutor's Appeal, p. 37, para. 126

extenuating factors. Accordingly, the Appellate Panel finds that the Trial Panel properly exercised its discretion in evaluating personal circumstances of the Accused and giving them due attention.

265. The Appellate Panel also finds that the Trial Panel gave due consideration to the aggravating circumstances when it thoroughly discussed the Accused's conduct and its duration, circumstances and motives that led the Accused to commit the crime, the gravity of consequences and his recent criminal record.

266. With respect to the Accused's intent to cause terror and encouragement he might have provided to others, the Appellate Panel finds a discriminatory state of mind may not constitute an aggravating factor when it is an element of the crime in question, namely persecution. It is an indispensable legal ingredient of the offense of persecution and cannot be taken into account in convicting and sentencing the Accused for those crimes that fall under the umbrella of persecution.¹³⁹

267. With respect to encouragement that the Accused might have provided to other VRS soldiers, the Appellate Panel finds this argument to be too hypothetical. Recalling its previous finding that the Trial Panel considered all evidence and gave sufficient weight to relevant considerations, the Appellate Panel is satisfied that the Trial Panel properly exercised its discretion in determining applicable aggravating circumstances.

268. Finally, the Prosecution submits that a manifestly disproportionate sentence defeats a purpose of sentencing for heinous crimes, namely to deter others from committing similar crimes.¹⁴⁰ The Appeal Panel accepts the general importance of deterrence as a consideration in sentencing and agrees that the crime of persecution perpetrated through the underlying crime of inhumane act poses a grave danger and threatens the fundamental value of non-discrimination on the basis of protected grounds.

¹³⁹ *Prosecutor v. Dragolub Kunarac et. al*, Appeal Judgment, IT-96-23-A para. 357; *Prosecutor v. Mitar Vasiljević*, Appeal Judgment, IT-98-32-A, para. 172.

¹⁴⁰ *Prosecutor's Appeal*, p. 36, para. 121

These crimes must be punished, and the punishment must be sufficient to deter individuals in similar positions in the future.

269. Having said that, the Appeal Panel also holds that this factor must not be accorded undue prominence in the overall assessment of sentences by this Court. Equally important factors are fairness and rehabilitation. The imposed sentence is not to be understood as a desire for revenge but as duly expressing a fair and proportionate punishment for the offence in question in accordance with Article 48 of the CC of BiH.

270. The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with general rehabilitation: an opportunity to be aware of the violated values, the effects of his actions on victims, to generate a sincere and deep sorrow on his past violations, and internalize the ways to improve his behavior when released so as not to return to commit other criminal offenses.

271. Therefore, in evaluating the relevant circumstances bearing on the magnitude of punishment set out in CC of BiH Article 48(1), for the reasons explained above, the Appellate Panel concludes that the Trial Panel did not err in its exercise of discretion and dismisses this ground of the Prosecutor's Appeal as unfounded.

272. Taking into account the particular circumstances of this case as well as the degree of participation and the consequences of the Accused's conduct, the Appellate Panel finds that a sentence of 7 (seven) years is appropriate.

273. In accordance with the foregoing and pursuant to Article 310(1) of the CPC BiH, it has been decided as stated in the operative part of this Verdict.

Record taker
Medina Džerahović

President of the Panel
Judge Mirza Jusufović

Intruction on legal remedy: No appeal lies from this Verdict.

