Number: X-KRŽ-06/243
Sarajevo, 22 September 2010

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, in the Panel of the Appellate Division of Section I for War Crimes composed of Judges: Mirza Jusufović as the President of the Panel and Tihomir Lukes and Phillip Weiner as the Panel members, with the participation of legal advisor-assistant Medina Džerahović as the Record-Taker, in the criminal case against the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić, upon the Fourth Amended Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-154/06, dated 22 July 2010, under which the accused have been charged with the commission of the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) in conjunction with Articles 29, 30 and 31 of the CC BiH, in conjunction with Article 180(2) of the CC BiH in relation to the accused Sreten Lazarević, following the public main trial, in the presence of the accused Sreten Lazarević and his defense counsel, Attorney Radivoje Lazarević, the accused Dragan Stanojević and his defense counsel, Attorney Miloš Perić, the accused Mile Marković and his defense counsel, Attorney Nenad Rubež, the accused Slobodan Ostojić and his defense counsel, Attorney Miodrag Lj. Stojanović, and the Prosecutor of the Prosecutor's Office of BiH Adnan Gulamović, substituting for Božidarka Dodik, has rendered and on 22 September 2010 publicly announced the following:

V E R D I C T

The Accused:

1. **SRETEN LAZAREVIĆ,** son of Žarko and Savka nee Jokić, born on 31 March 1953 in the village of Ročević, Zvornik Municipality, where he resides, Serb, BiH citizen, qualified car-body mechanic by profession, married, father of two, **at liberty,**

2. **DRAGAN STANOJEVIĆ, aka Janjić,** son of Drago and Ruža, nee Jović, born on 13 March 1962 in the village of Ročević, Zvornik Municipality, residing in the village of Ročević – Kozluk, Serb, BiH citizen, married, father of three, **at liberty,**

3. **SLOBODAN OSTOJIĆ,** son of Dušan and Dragica, nee Bogičević, born on 8 August 1966 in the village of Padžine, Zvornik Municipality, residing in Padžine bb /no number/, Zvornik Municipality, Serb, BiH citizen, married, father of two, surveyor by profession, **at liberty**,

ARE GUILTY

Of the following:

In the period from May 1992 until the end of summer of 1992, in Zvornik, during the armed conflict and war in BiH, as members of the reserve police forces of the Zvornik Public Security Station, acting contrary to the provisions set forth in Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, they inhumanely treated the civilians unlawfully detained in the Misdemeanor Court building in Zvornik and the DP *Novi izvor* building in Zvornik, in the manner that:

I SRETEN LAZAREVIĆ, as a guard and *de facto* deputy warden in the prison located in the Misdemeanor Court building and subsequently in the DP Novi Izvor building, perpetrated and failed to prevent the inhuman treatment of the unlawfully detained civilians, because:

1. In mid-May 1992, in the Misdemeanor Court building, he enabled the inhuman treatment of the prisoner Ramis Smajlović, in the way that he agreed that Ramis Smajlović be brought from the detention room to the guards' room where an unidentified person beat him with a police baton, inflicting on him immense suffering while the accused was present there all the time, and although it was his duty to prevent such treatment of the prisoner, he failed to do so,

2. In June 1992, in the DP Novi Izvor building, he entered the detention room and, having asked the prisoners who of them was from Bratunac, he singled out the prisoner Sejfo Omerović, who had responded, and took him out of the room and handed him over to a group of unidentified persons, thus enabling them to treat Sejfo Omerović inhumanely, as they brought him into a nearby garage and beat him up, inflicting on him immense suffering, after which they threw him into the trunk of the vehicle they had previously arrived by and drove off in an unknown direction; Sejfo Omerović has been unaccounted for ever since.

3. In July 1992, in the DP Novi Izvor building, he treated the prisoner Nurija Nuhanović inhumanely because he beat him up inflicting on him immense suffering, and as a result Nurija Nuhanović lost consciousness,

4. In summer 1992, in the DP Novi Izvor building, he was present when a group of guards, including Slobodan Ostojić, inhumanely treated the prisoners Ramis Smajlović and Admir Hadžiavdić, in the manner that they beat them up because of an alleged attempt of flight, inflicting on them immense suffering, when he failed to prevent it in any way whatsoever, but rather went along with such treatment,

II DRAGAN STANOJEVIĆ, as a guard in the prison located in the Misdemeanor Court building and subsequently in the DP Novi Izvor building, inhumanely treated the unlawfully detained civilians, because:

1. On several occasions he unlocked the prison premises and thus enabled groups of Serb soldiers to inhumanely treat the prisoners and Fahrudin Memić in particular, saying he was a person who had wounded a Serb, due to which the unidentified soldiers beat up Fahrudin Memić on several occasions, inflicting on him immense suffering, and in June 1992, in the DP Novi Izvor building, in the same way he enabled a group of soldiers led by a certain *Saša* to beat the prisoner Fahrudin Memić, which they did by knocking him down and jumping all over his back, inflicting on him immense suffering,

III SLOBODAN OSTOJIĆ, as a guard in the prison located in the Misdemeanor Court building and subsequently in the DP Novi Izvor building, inhumanely treated the unlawfully detained civilians, because:

1. In the summer of 1992, in the DP Novi Izvor building, he took the prisoners Ramis Smajlović and Admir Hadžiavdić out of the detention room and brought them into another room where, together with a group of guards, he took part in their beatings because of an alleged attempt of flight, inflicting on them immense suffering.

Therefore, during the war in Bosnia and Herzegovina and at the time of the armed conflict between the units of the Army of the Serb Republic of BiH and the Army of R BiH, in violation of the rules of international humanitarian law, they treated the prisoners inhumanely,

Whereby they committed:

- **Sreten Lazarević,** under Section I – 1, 2, 3 and 4, the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) of the Criminal Code of Bosnia and Herzegovina, with sub-sections 1, 2 and 4 being in conjunction with Article 29 of the CC of BiH,
- **Dragan Stanojević**, under Section II – 1, the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction with Article 29 of the Criminal Code of Bosnia and Herzegovina,
- **Slobodan Ostojić,** under Section III – 2, the criminal offence of War Crimes against Civilians referred to in Article 173(1) c) in conjunction with Article 29 of the Criminal Code of Bosnia and Herzegovina.

Therefore, applying Articles 39, 42, 48 and 50 of the CC of BiH, the Court hereby

SENTENCES the first accused Sreten Lazarević TO IMPRISONMENT FOR A TERM OF 9 (nine) YEARS

for the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction with Article 29 of the CC of BiH.

Applying Articles 39, 42, 48 and 50 of the CC of BiH, the Court hereby

SENTENCES the second accused Dragan Stanojević TO IMPRISONMENT FOR A TERM OF 7 (seven) YEARS

for the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction with Article 29 of the CC of BiH.

Applying Article 39, 42, 48 and 50 of the CC of BiH, the Court hereby

SENTENCES the fourth accused, Slobodan Ostojić TO IMPRISONMENT FOR A TERM OF 5 (five) YEARS

for the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction with Article 29 of the CC of BiH

…

Pursuant to Article 284c) of the CPC of BiH

THE ACCUSED ARE ACQUITTED OF THE FOLLOWING CHARGES

I SRETEN LAZAREVIĆ is acquitted of the charges that:

In the period from May 1992 until March 1993, on several occasions he permitted unauthorized persons – groups of Serb soldiers known as *Gogićevci* and others to enter prison premises by unlocking the doors for them or by allowing other guards to do so without being punished, thus enabling these persons to inhumanely treat the prisoners, inflict on them immense mental and physical suffering and seriously impinge on their

human dignity, so in that way, on undetermined days, unidentified soldiers physically abused the prisoners Fahrudin Memić, Edin Skurlić and Fadil Handžić and carved crosses with knives on their foreheads, and forced the prisoners to put their sexual organs into one another's mouth, including Ramis Smajlović who was forced to do that with another unidentified prisoner – a Romany by ethnicity,

whereby he would have committed: the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) of the CC of BiH in conjunction with Article 180(2) of the CC of BiH.

II MILE MARKOVIĆ, aka Cigo, son of Teodor and Jovanka, nee Ristić, born on 27 September 1952 in Donji Lokanj, Zvornik Municipality, residing in Zvornik at 83 Sime Perića Street, Serb, BiH citizen, waiter-cook by profession, widower, father of two, **currently at liberty,**

is acquitted of the charges that:

as a guard in the prison located in the Misdemeanor Court building and subsequently in the DP Novi Izvor building, he inhumanely treated the unlawfully detained civilians, because in July 1992 in the DP Novi Izvor building, together with the deputy warden Sreten Lazarević, he beat up the prisoner Nurija Nuhanović and thus inflicted on him immense suffering, as a result of which Nurija Nuhanović lost consciousness,

whereby he would have committed the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) of the CC of BiH in conjunction with Article 29 of the CC of BiH.

Pursuant to Article 188(4) and 189(1) of the CPC of BiH, the accused are relieved of the obligation to reimburse the costs of the criminal proceedings incurred during the appellate procedure.

R e a s o n i n g

1. Charges

1. On 17 September 2008, the Prosecutor's Office of BiH filed the Third Amended Indictment charging the accused with committing the criminal offence of War Crimes against Civilians referred to in Article 173(1) c) in conjunction with Articles 29, 30 and 31 of the Criminal Code of Bosnia and Herzegovina, and in relation to the accused Sreten Lazarević also in conjunction with Article 180(2) of the CC of BiH, which was deliberated on during the first instance proceedings or on rendering the

First Instance Verdict. During the proceedings before the Appellate Panel, on 22 July 2010, pursuant to Article 275 of the CPC of BiH, the Prosecution submitted the Fourth Amended Indictment, by which the previous Indictment was amended concerning some details of the factual description and the legal qualification of those actions. Specifically, by the Third Amended Indictment, the acts of commission of all the Accused are legally qualified as intentional inflicting of severe physical pain and suffering upon the unlawfully detained civilians, and in relation to the first accused Sreten Lazarević also as pillaging of those civilians, while in the state of facts and the legal qualification of the relevant acts the Fourth Amended Indictment qualified these acts as inhumane treatment of the unlawfully detained civilians. The amendments were also made by dropping all charges from the previous Indictment that were resolved by the First Instance Verdict (of which the Accused were acquitted or the charges were dismissed), as they were not appealed, so the First Instance Verdict was already final and binding in that part.

2. Procedural background

2. By the Verdict of the Court of Bosnia and Herzegovina (the Court of BiH), No. X-KR-06/243 of 29 September 2008, the accused Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić were found guilty that by the actions described in the operative part of the above mentioned Verdict they committed the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction with Article 29 of the CC of BiH, and in relation to Sreten Lazarević also in conjunction with Article 31 of the CC of BiH as well as Article 180(2) of the CC of BiH.

3. Pursuant to Article 285 of the Criminal Procedure Code of BiH (the CPC of BiH), and applying Articles 39, 42 and 48 of the CC of BiH, the First Instance Panel of the Court of BiH sentenced the accused Sreten Lazarević to 10 (ten) years in prison, and applying Articles 39, 42, 48 and 50 of the CC of BiH it sentenced the accused Dragan Stanojević to 7 (seven) years in prison and the accused Mile Marković and Slobodan Ostojić to 5 years in prison respectively.

4. By the same Verdict the accused Sreten Lazarević was acquitted of the charges that he committed the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) of the CC of BiH, in the manner described under Sections 1, 1.5 of the acquitting part of the Verdict; the accused Mile Marković was acquitted of the charges that he committed the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction with Article 29 of the CC of BiH, in the manner described under Section 2, 3.2 of the acquitting part of the Verdict, while the accused Slobodan Ostojić was acquitted of the charges that he committed the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) in conjunction

with Article 29 of the CC of BiH, in the manner described under Section 3, 4.1 of the acquitting part of the Verdict.

5. Pursuant to Article 283(1)b) of the CPC of BiH, the charges were dismissed concerning the acts described under Section I, sub-sections 3 and 7.c), Section II, sub-sections 2 and 3, because the Prosecutor withdrew the above mentioned charges during the main trail.

6. Pursuant to Article 188(4) of the CPC of BiH, the accused were relieved of their obligation to reimburse the costs of the criminal proceedings, while, pursuant to Article 198(2) of the same Code, the injured parties were instructed to take civil action to pursue their claims under property law.

7. By the Decision of the Appellate Panel No. X-KRŽ-06/243 of 21 June 2009, the appeals filed by Attorney Radivoje Lazarević, the defense counsel for the accused Sreten Lazarević, Attorney Miloš Perić, the defense counsel for the accused Dragan Stanojević, Attorney Nenad Rubež, the defense counsel for the accused Mile Marković and Attorney Miodrag Lj. Stojanović, the defense counsel for the accused Slobodan Ostojić were upheld, and the above mentioned Verdict was revoked in its convicting part, and a hearing was ordered with respect to that part before the Panel of the Appellate Division of Section I for War Crimes of the Court of BiH.

3. Closing arguments

a) Prosecution

8. In his closing argument before the Court, the Prosecutor gave a summary and analysis of the presented evidence, both the documentary evidence and the witness testimonies, explaining the existence of the essential elements of the underlying crime the accused were charged with, as well as their criminal responsibility for the commission of that crime. Within that context, the role of Sreten Lazarević in the incriminated events was particularly reviewed, and the Prosecutor held that during the proceedings he succeeded to prove the thesis that the role of this accused was not limited to only carrying out the guard duties but that he *de facto* had the role of Deputy of Sredo Vuković.

9. The Prosecutor elaborated on the testimonies of the witnesses heard with respect to each individual incrimination each of the fourth accused were charged with, and concluded that the witnesses-victims did not come to seek revenge but to give their contribution to the process of establishing a system of liability. According to the Prosecution, it undoubtedly followed from the presented evidence that the accused Sreten Lazarević, who was in the service for the longest period of time, carried out the guard duties in the prison in the critical period of time just like the other accused,

committing, in their capacities, the relevant offences reflected in the physical and mental abuse of the detained civilians.

b) Defense

10. The Defense Counsel for the first accused Lazarević, in its closing argument, predominately commented on the analysis of evidence related to the responsibility of this accused, giving special emphasis on the command responsibility concept and the lack of possibility to carry out effective control in relation to the other accused during the relevant period of time. Furthermore, the Defense also pointed to the witness statements based on which one could not with certainty establish that the accused Lazarević was the Deputy Warden, as well as the fact that many witnesses did not recognize him in the courtroom, particularly contesting the credibility of the witnesses Nurija Nuhanović and Ramis Smajlović with respect to incriminating the accused. Finally, the Defense pointed to the existence of paramilitary formations in the relevant period which the accused were not able to control, which was confirmed during the entire evidentiary proceedings, and it in the end referred to Articles 275 and 307 of the CPC of BiH, involving the ban on modification to the detriment of the accused since the Prosecution did not object.

11. The accused Lazarević fully agreed with the closing argument of his Defense Counsel.

12. The Defense Counsel for the second accused commented on the presented evidence, pointing out the essential fact that his client did not hate the prisoners of his own accord and did not want to inflict any evil deeds on them, while his role related to the events concerning the victim Memić was incidental and did not constitute sufficient incrimination for the criminal offence of War Crimes he was charged with. According to the Defense, the state of facts at the time of the relevant incidents should have been considered more broadly exactly because of the presence of a large number of paramilitary formations. The Defense argues that the Prosecution referred to a rather small number of pieces of evidence, which were imprecise and undefined concerning the accused Stanojević, and taking into account the above mentioned, a conclusion was made that the Prosecution did not succeed to prove the Indictment allegations beyond a reasonable doubt.

13. The accused Stanojević fully agreed with the closing argument of his Defense Counsel.

14. The Defense Counsel for Mile Marković argues that this accused did not commit the criminal offence he was charged with, stating that the Indictment was based on the allegations that were not corroborated by the Prosecution witnesses. The Defense also

pointed to the testimony of Nurija Nuhanović, holding that it was contradictory in relation to other testimonies or that there existed no logical explanation in relation to other pieces of evidence and the witness testimonies. The Defense stated that 22 witnesses were heard during the evidentiary proceedings and none of them saw or heard that the accused Mile Marković beat or maltreated anybody, indicating that the Indictment allegations were not proved and that most testimonies of the witnesses, both for the Prosecution and for the Defense, was identical in the parts concerning the incidents the accused was charged with.

15. The accused Marković fully agreed with the closing argument of his Defense Counsel.

16. The Defense Counsel for the accused Slobodan Ostojić, in its closing argument, mainly commented on the witness testimonies given before this Court, arguing that the witness testimonies were not consistent and definite. Considering all the evidence and taking into account the heard witnesses, the Defense argues that the accused did not satisfy the elements of this offense by his actions. Due to these reasons, the Defense proposed that he be acquitted of the charges.

17. The accused Ostojić fully agreed with the closing argument of his Defense Counsel.

4. Evidentiary proceedings before the Appellate Division Panel

Procedural Decisions

18. Firstly, the Appellate Panel considered entirely unfounded the Defense's objections regarding the lack of jurisdiction of the Court of BiH to act in this criminal case. The issues related to the jurisdiction and transfer of the proceedings to the lower court with territorial jurisdiction were decided in the course of the first instance proceedings, when by the final Decision No. X-KRN-06/243 dated 18 August 2006, and No. X-KR-06/243 dated 31 January 2008 the exclusive jurisdiction of the Court of BiH was established in this case, that is, when the Motion by the Prosecutor's Office of BiH to transfer the case to the District Court in Bijeljina was refused.

19. This Panel also supports the positions taken on this issue, and it reiterates that the provisions of the Criminal Code of BiH and Article 7 of the Law on Court of Bosnia and Herzegovina strictly defined the criminal offences which fall under the jurisdiction of the Court of BiH, and that it undoubtedly ensues that the criminal offence which is the subject of the Indictment in this criminal matter falls under the jurisdiction of this Court, about which the Court did not have any dilemma.

20. Pursuant to Article 317 of the CPC of BiH, a hearing was held before the Appellate Panel of the Court of BiH. During the evidentiary proceedings, upon request of the Court, the Prosecution and the Defense submitted their motions to present evidence in these proceedings. The Prosecutor's Office proposed to once again listen through or replay the audio and video recordings of the testimonies given during the first instance proceedings by the following witnesses: Ramis Smajlović, Fadil Smajlović, Ahmet Omerović, Alija Buljubašić, Fahrudin Memić, Mustafa Halilović, Nurija Nuhanović, Sredo Vuković, Dragan Petrović, Fahrudin Memić, Mirsad Omerović, Admir Hadžiavdić, and the protected witness „A“. In the context of new evidence, the Prosecution proposed that the witness Ramo Ibrahimović be heard by video link due to the fact that his place of residence is in the USA, as well as the witness Nurija Nuhanović concerning the attempted influence on him to change his testimony in the second instance proceedings.

21. In its written submission, the Defense for the first accused Lazarević *inter alia* commented on the Prosecutor's proposal to hear new witnesses: Ramo Ibrahimović, Sredo Vuković and Dragan Petrović, specifically pointing to the fact that the witness Ibrahimović did not testify in the first instance proceedings, nor was he proposed by the confirmed Indictment, while the witnesses Vuković and Petrović were Defense witnesses in the first instance proceedings, which, in the opinion of the Defense, constituted an unlawful action of the Prosecutor. In other words, the Defense held that such proposing of the witnesses together with stating the circumstances they were supposed to testify about was a selective and subjective choice of the facts by the Prosecution. The Defense proposed that the following new witnesses be summoned: Jovan Perić and Miko Miljanović, and it maintained the witnesses proposed and heard in the first instance proceedings.

22. The Defense for the second accused Stanojević submitted its response to the above mentioned proposal of the Prosecution, opposing the presentation and evaluation of the testimony of the witness Ramis Smajlović concerning his client, due to the fact that it was not evaluated in the relevant part of the First Instance Verdict, while the Prosecution did not file an appeal, thus it would, in this specific situation, be tantamount to the presentation of new evidence. The Defense Counsel proposed to listen through or state that the testimonies of the following witnesses were listened through: Jusuf Omerović, Samir Pezerović, Ahmet Bošnjaković, Ismet Ibrahimović, Adem Hamzić, Mehmed Redžić, Spomenka Stojkić, Sredo Vuković, Nenad Jeremić, Draginja Aćimović, Dobrivoje Ristić, Neđo Vidović, Vlado Delić and the expert witnesses Dr. Vidak Simić and Dr. Mile Matijević, and finally to hear the new witness Sanija Taletović concerning the personality of the accused Dragan Stanojević.

23. In its written submission, the Defense for the third accused Marković proposed that the evidence be presented by listening through replay of the testimonies of the heard

witnesses and expert witnesses or to, upon the Court's evaluation, hear once again the following witnesses: Mustafa Halilović, witness „A“, Ramis Smajlović, Admir Hadžiavdić, Spomenka Stojkić, Samir Pezerović, Ahmet Omerović, Mirsad Omerović and the medical expert witness Vidak Simić.

24. Having considered all the mentioned proposals, the Appellate Panel, guided by Article 317(2) of the CPC of BiH, established that a repeated listening through or replaying of the testimonies of all the witnesses heard during the first instance proceedings was not necessary as it would result in an unnecessary delay of the proceedings, and in accordance therewith it decided to replay the testimonies of only certain witnesses that were, in the opinion of the Panel, decisive to clarify certain essential circumstances, and to solve the dilemma ensuing from the defense appeals, specifically the testimonies of: Sredo Vuković, Dragan Petrović, Ramis Smajlović, Nurija Nuhanović, Admir Hadžiavdić, Fahrudin Memić, Vidak Simić, Džemail Isić, Alija Buljubašić, Mustafa Halilović. At the same time, the Panel accepted as evidence without presenting them again and replaying, the testimonies of all other witnesses and expert witnesses heard during the first instance proceedings, including all documentary evidence presented during the first instance proceedings.

25. Having analyzed in detail all the relevant evidence, both individually and collectively, and having applied Article 263(2) of the CPC of BiH, the Panel concluded that the proposed evidence, both of the Prosecution and of the Defense in terms of repeated hearing of certain witnesses in the courtroom, as well as hearing the new witnesses, was unnecessary and useless. This was even more so with respect to hearing the new witnesses, specifically Ramo Ibrahimović who was proposed by the Prosecution to testify about the acts committed by the accused Mile Marković, and Senija Taletović who was proposed by the Defense to testify about the personality of the accused Stanojević.

26. Specifically, the Panel holds that a sufficient number of relevant pieces of evidence concerning the relevant circumstances was offered, not leaving any space for a doubt with respect to these factual circumstances, and as a result their presentation would not essentially contribute to the clarification of this criminal matter. All the proposed evidence could have been presented by both the Prosecution and the Defense in earlier phases of the proceedings, for there did not exist an objective inability to present it.

27. Consequently, the Appellate Panel decided that all the evidence presented in the first instance proceedings would not be presented during the retrial but only some of the above mentioned pieces of evidence, fully accepting the remaining pieces of evidence, both the objective and subjective ones, without reading them out again or replaying them. Therefore, all the evidence, both of the Prosecution and of the Defense, presented during the first instance proceedings before this Court, was accepted. Due to

the fact that all the evidence was presented with respect to the same criminal offences, the Panel, irrespective of the fact that the First Instance Verdict became final in its acquitting and dismissing parts concerning specific incriminations, could not separate only those pieces of evidence related specifically to those parts as in that case the evidentiary material would be insufficient. Thus the Panel accepted the following evidence:

a) Prosecution evidence

28. The testimonies of the following witnesses: Nurija Nuhanović, Alija Buljubašić, Samir Pezerović, Admir Hadžiavdić, Ramis Smajlović, Fahrudin Memić, Fadil Smajlović, Ahmet Omerović, Mirsad Omerović, the witness „A", Mustafa Halilović, Jusuf Omerović, and the expert witness Omer Čemalović.

29. Furthermore, the following documentary evidence was accepted: Medical finding of the Surgical Clinic Tuzla for Fahrudin Memić and the biochemical finding of the Institute for Medical Biochemistry Tuzla, dated 15 July 1992; Decision on the proclamation of the imminent threat of war, Official Gazette of the Republic of Bosnia and Herzegovina number 1/92, dated 9 April 1992; Order regarding the declaration of general public mobilization in the territory of the Republic of Bosnia and Herzegovina, Official Gazette of R BiH number 7/92 of 20 June 1992; Order issued by the commander of the brigade SV *Birač*, Major Svetozar Andrić, sent to the Zvornik Territorial Defense Staff, dated 28 May 1992; Letter from the Cantonal Prosecutor's Office of the Tuzla Canton number 12-1/01-1-207-4037/06, dated 7 June 2006, delivering records of members of the reserve police forces of the Zvornik Public Security Station during 1992; Excerpt from the page of the Red Cross Committee for the missing person Sejfo Omerović, dated 3 July 2006; Excerpt from the page of the Red Cross Committee for the missing person Murat Kuduzović, dated 3 July 2006; List of prisoners from the municipal prison Zvornik who went for an exchange on 1 January 1993; List of prisoners in the municipal prison Zvornik on 21 January 1993; List of prisoners in the municipal prison Zvornik on 2 February 1993; List of persons handed over to the collection centre Batković, made on 12 February 1993; Letter from the State Investigation and Protection Agency number 17-15/3-1-04-2-129/07, dated 16 April 2008, delivering the medical documentation for Nurija Nuhanović, namely: certified photocopy of the X-ray of both hips dated 17 May 2007, certified photocopy of the X-ray of L/S spine dated 17 May 2007, certified photocopy of the X-ray of L/S spine dated 3 April 2008 and the certified photocopy of the finding of the liver and pancreas dated 4 April 2008; Diary kept by the detainee Mustafa Halilović; Record of the examination of the witness Sredo Vuković, made in the Cantonal Prosecutor's Office of the Tuzla Canton, number KT 2273/05, dated 6 December 2005; Record of the examination of the witness Sredo Vuković, made in the Cantonal Prosecutor's Office of the Tuzla Canton, number KT 586/96, dated 13 February 2006; Prison Employees Payroll for August 1992; Excerpt from the brochure of the population of Bosnia and Herzegovina issued by the State Statistics Institute of the Republic of Croatia; Decision of the Ministry of National Defense Sarajevo sent to the Governments of AR /Autonomous Region/ and SAO /Serb Autonomous Region/ of

the Serb Republic of Bosnia and Herzegovina, that is, to all Serb municipalities, No. 1/92, dated 16 April 1992; Order of the Crisis Staff of the Serb Municipality of Zvornik; Excerpt from *Srpski glas* dated 14 May 1992; Decision of the Crisis Staff proclaiming the state of war in the territory of the Serb Municipality of Zvornik, No. 01-2/92, dated 6 April 1992; Decision of the Crisis Staff to impose curfew in the territory of the Serb Municipality of Zvornik, dated 8 April 1992; Decision of the Crisis Staff to establish the Interim Government of the Serb Municipality of Zvornik, No. 01-1/92, dated 10 April 1992; Crisis Staff Order on general mobilization, No. 02-1/92, dated 8 April 1992; Decision of the Interim Government of the Serb Municipality of Zvornik to establish the Territorial Defense Command of the Serb Municipality of Zvornik, No. 01-023-44/92, dated 28 April 1992; Decision of the Interim Government of the Serb Municipality of Zvornik to appoint the Interim Management Board in the Primary School *Ivo Lola Ribar* Petkovci, No. 03-023-3/92, dated 5 May 1992; Order of the Ministry of the Interior Sarajevo, strictly confidential: 01-1/92, dated 15 May 1992; Request of the Interim Government of the Serb Municipality of Zvornik, with the invoice in the amount of 80,000 dinars attached; Information of the Interim Government of the Serb Municipality of Zvornik, dated 6 June 1992; Payroll of the Serb Municipality of Zvornik Territorial Defense for May; Payroll of the Serb Municipality of Zvornik Territorial Defense; Certificate of the Interim Government of the Serb Municipality of Zvornik, dated 10 June 1992, and Payroll for May of the Military Territorial Command of the Serb Municipality of Zvornik No. 1880/92, dated 28 June 2008; Payroll for May of the Serb Municipality of Zvornik Territorial Defense and the List of members of the Serb Municipality of Zvornik Territorial Defense No. 02-9-1/92, dated 15 May 1992; Payment of a salary to members of the *Beli orlovi* formation by the Municipality of Zvornik; Payment Order of the Interim Government of the Serb Municipality of Zvornik, dated 4 May 1992; Document of the Serb Municipality of Zvornik with a list of volunteers, persons from Loznica, signed by the Territorial Defense Staff Commander; Order of the Commander Dragan Petković on the transfer of soldiers from the Zvornik Brigade to the Birač Brigade, No. 701-2/92, dated 13 October 1992; Delivery of the Daily Operations Report by the commander Major General Savo Janković to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 20/27-101/1, dated 9 April 1992; Request for support-operation by the commander Major General Savo Janković to the 2nd Military District Command, Operations Centre, strictly confidential No. 11/43-477, dated 10 April 1992; Delivery of the Daily Operations Report by the Colonel Božo Milohanović to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 20/27-105/1, dated 13 April 1992; Delivery of the Daily Operations Report by the commander Major General Savo Janković to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 11/2-17, dated 18 April 1992; Video record *Death of Yugoslavia*, episode 4; Report of the Zvornik Municipality Police for 1992; Order of the commander Colonel Dragutin Ilić to rename Territorial Defense headquarters and units, dated 6 June 1992; Decision of the Drina Corps Command concerning further operations sent to the Command of the Bratunac Light Infantry Brigade, strictly confidential No. 2-126, dated 24 November 1992; Decision on further operations issued by the Drina Corps Command, strictly confidential No. 2-126, dated 24 November 1992, sent to the Bratunac Brigade Command; Decision on the proclamation of the imminent threat of war published in the Official Gazette of RBiH,

No. 1/92, dated 9 April 1992; Excerpt from the daily newspaper *Oslobođenje* of 11 April 1992, article entitled "Oružane snage pod jedinstvenom komandom" /"Armed Forces under a Single Command"/, Decree Law on the Armed Forces of RBiH, published in the Official Gazette of RBiH, No. 4, dated 20 May 1992.

b) Defense evidence

30. The testimonies of the following Defense witnesses: Vladimir Pisić, Neđo Lukić, Ismet Ibrahimović, Asim Banjanović, Spomenka Stojkić, Ismet Rahmanović, Sredo Vuković, Nenad Jeremić, Sekula Ostojić, Vlado Delić, Ahmet Bošnjaković, Dragan Petrović, Draginja Aćimović, Dobrivoje Ristić, Sejfo Suljić, Mehmed Suljić, Asim Hodžić, Neđo Vidović, Radivoje Ristanović, Radivoje Mičić, Adem Hamzić, Vehid Kadrić, Rajko Gligorević, Slavko Bogičević, Miloš Batić, Mehmed Redžić, Mirzet Hamzić, Džemail Isić, Dejan Bogdanović, and medical expert witness Dr. Vidak Simić and legal expert witness Dr. Mile Matijević.

31. The following documentary evidence was accepted: Record of the examination of the witness Mustafa Halilović made at the Prosecutor's Office of BiH, No. KT-RZ-154/06, dated 24 May 2007; Certificate of the Ministry of the Interior, Public Security Center Zvornik – Police Station Zvornik, No. 13-01/1-142-16/96, dated 25 January 1996; Temporary weapon permit for the accused Sreten Lazarević; Report of the Ministry of the Interior Sarajevo on supervision and inspection of the situation at the Public Security Station Brčko, Public Security Station Zvornik and partially the situation at the Public Security Station Bijeljina, dated 17 June 1992; Excerpt from the newspaper "Crni petak" /"Black Friday"/; Information of the Ministry of the Interior – Crime Prevention Administration Pale pertaining to the activities of the Ministry of the Interior in the investigation of criminal operations of the paramilitary formation *Žute ose* /eng. yellow wasps/ in the territory of the Serb Municipality of Zvornik, No. 02-16/92, dated 4 August 1992; Information of the Ministry of the Interior - Security Services Centre Bijeljina pertaining to the security situation in the territory of the Serb Municipality of Zvornik, dated 20 July 1992; Daily events bulletin No. 78, dated 29 July 1992; Letter from the Ministry of the Interior Bijeljina – Public Security Station Zvornik sent to the Ministry of the Interior Pale, Security Services Centre Bijeljina and Sarajevo; Letter from the Ministry of the Interior - Crime Prevention Administration Pale sent to the police detachment, Public Security Station and the Public Security Station Bijeljina; Information of the Ministry of the Interior – National Security Service /SNB/ Sarajevo, dated 22 September 1992; Information of the Head of the RO SNB Birač sent to the Ministry of the Interior of the Serb Republic – SNB Vice Secretary, Security Services Centre Sarajevo - SNB Sector, No. 03/92, dated 5 September 1992; Excerpt from the book *Zvornik - od izbora do Dejtona* /eng. Zvornik – from the Elections to Dayton/, page 130; Analysis, Dr. Mile Matijević, dated 28 August 2008; Delivery of information from the record by the

sector for records from the field of compulsory military service, signed by the Secretary of the Ministry Zdravko Skočibušić, sent to the Criminal Defense Section, confidential number 07-03-52-1/08, dated 20 August 2008; Delivery of documentation by the Federal Ministry of Veterans and Disabled Servicemen of the Homeland War, No. 07-03-52-2/08, dated 11 September 2008, pertaining to the recognition of participation in the BiH Army units for the persons in question; Certificate of the Ministry of the Interior, Public Security Center Bijeljina, Public Security Station Zvornik, No. 10-1-5/04-127-4118/08, dated 16 September 2008, certifying that Sreten Lazarević did not occupy management posts in the Public Security Station Zvornik; Motion to accept established facts (excerpt from the Judgment *Prosecutor v. Hadžihasanović*) No. IT-01-47-T, dated 15 March 2006; Indictment of the Prosecutor's Office for War Crimes of the Republic of Serbia - Belgrade against Goran Savić and Saša Ćilerdžić, KTRZ number 8/07, dated 13 March 2008, submitted to the District Court in Belgrade – War Crimes Chamber; Indictment of the Prosecutor's Office for War Crimes of the Republic of Serbia – Belgrade against Branko Grujić, Branko Popović, Duško Vučković, Dragan Slavković, Ivan Korać, Siniša Filipović and Dragutin Dragičević, KTRZ number 17/04, dated 12 August 2005, submitted to the District Court in Belgrade – War Crimes Chamber; Copy of the military ID booklet of the accused Dragan Stanojević, series AV, No. 173975; Copy of the ID card of the accused Dragan Stanojević and Findings, assessment and opinion of the First Instance Medical Board, Council 10 in Zvornik, No. 1740/08, dated 22 April 2008; Findings of the specialized doctor's office *Viva*, Zvornik, Kozluk bb, for Dragan Stanojević, dated 6 December 2000; Information from the Pension and Disability Insurance Fund of Republika Srpska, Branch Office Bijeljina, pertaining to the stage of the proceedings initiated at the request of Dragan Stanojević from Ročević, LBO: 8028923567, JMBG /personal identification number/: 1302962183944, dated 29 April 2008; Decision of the Alumina Plant *Birač* AD Zvornik to terminate employment contract number 04-230508/07, dated 23 May 2008; Evidence on professional qualifications for the accused Dragan Stanojević; Certificate of the Basic Court in Zvornik No. 1530/96, dated 5 April 1996; Certificate of the Administrative Service of the Zvornik Municipality – local office Roćević pertaining to the common household and providing support to family members, No. 07-34/2008, dated 13 February 2008, and the Certificate of the Alumina Plant *Birač* AD Zvornik, No. 111, dated 14 February 2008; Operative part of the Verdict of the District Court in Belgrade – War Crimes Chamber, No. k.v. 5/2005, dated 12 June 2008, sent by fax; Certificate of the Ministry of the Interior of Republika Srpska – Public Security Center Bijeljina – Public Security Station Zvornik, No. 12-1/01-1-118/08, dated 5 March 2008; Record of the examination of Witness A, made by the State Investigation and Protection Agency, War Crimes Investigation Centre, No. 17-15/3-1-04-2-129/07, dated 18 May 2007; Findings and opinion of the certified court expert witness in medicine, Dr. Vidak Simić, dated 22 August 2008; Record of the examination of the witness Admir

Hadžiavdić, made in the Canton Prosecutor's Office of the Tuzla Canton, No. Kt. 586/96, dated 24 January 2006; Record of the examination of the witness Ramiz Smajlović, made in the Cantonal Prosecutor's Office of the Tuzla Canton, No. Kt. 2273/05, dated 16 January 2006; Excerpt from the book *Zvornička sirat ćuprija,* pages 87, 88 and 92; Decision of the Director of the Zvornik Municipal Institute of Urbanism and Town Planning pertaining to the assignment to compulsory work service; Decision of the Assembly of the Serb Municipality of Zvornik pertaining to the establishment of a municipal prison in Zvornik, No. 01-023-220/92, dated 19 August 1992; Copy of the military ID booklet for Slobodan Ostojić, series BC, No. 153896; Church calendar for the leap year of 1992; Report on the health condition of the accused Slobodan Ostojić; Excerpt from the book of rules and the list of employees of municipal administrative bodies performing compulsory work on 26 December 1992, signed by the Secretary of the Assembly of the Serb Municipality of Zvornik, Mitar Vasić; Statement of the witness Mustafa Jahić given to the investigator in the law firm – lawyer Miodrag Stojanović on 9 July 2007.

5. Findings of the Court

5.1. General Findings (chapeau elements of the criminal offense)

32. By evaluation of all the presented evidence, both individually and collectively, the Court examined the factual substratum of the charges concerning the existence of the cumulatively defined elements of the criminal offence of War Crimes against Civilians referred to in Article 173(1) of the CC of BiH.

33. Specifically, according to the Fourth Amended Indictment of the Prosecution, the accused were charged with the commission of the criminal offence of War Crimes against Civilians referred to in Article 173(1)c) of the CC of BiH, that reads:

> *„Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts*:
>
> *c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture),* ***inhuman treatment****, biological, medical or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health; shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.“*

34. The following **general** (*chapeau*) **elements of the criminal offense** of War Crimes against Civilians, which had to be established, followed from the quoted legal definition:

- The act must be committed contrary to the rules of international law in the manner that the commission of the act is directed against civilians or the persons taking no active part in the hostilities including those that have laid down their arms and those placed *hors de combat*, and who are protected by the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949;
- The violation must be committed in time of war, armed conflict or occupation;
- There must be a nexus between the act of the perpetrator and the war, armed conflict or occupation;
- The perpetrator must order or commit the act.

35. Essential characteristics of this criminal offense, predominantly the variety of the acts of commission, confirm that the legislator has made provisions for the protection of the values protected by international law on a large scale. It is for the above mentioned reasons that, within the War Crimes against Civilians, no classification of armed conflicts into international and internal armed conflicts has been made, nor have the violations of international law been classified into serious violations of the Geneva Conventions and other violations that are not serious.

36. For the existence of this criminal offence it is required that the acts of commission of the offence constitute the violation of the rules of international law, which points to the blanket character of the criminal offence.

37. In connection therewith, this provision, *inter alia*, is also based on the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Convention). The Indictment charges the accused that they acted contrary to Article 3 of the Convention. The rules stipulated in Article 3 of the Convention are considered as customary law and they constitute a minimum standard that the parties to the conflict should never depart from, stipulating that:

„In the case of armed conflict not of an international character occurring in the territory of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.“

38. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and physical integrity of a person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

39. Consequently, it is predominantly necessary to establish the application of international rules in the period covered by the charges. It is stated in the ICTY Case of *Prosecutor vs. Tadić* No. IT-94-1 (Appeals Chamber) that: „International humanitarian law shall be applied from the beginning of armed conflicts until the end of hostilities....“

40. By interpreting the provision set forth in Article 173 of the CC of BiH itself, it is clear that it is not required (it is not a condition for the existence of the offence itself) that a perpetrator knows or intends to violate an international norm (it is not necessary that the violation of blanket regulations be included in the perpetrator's knowledge), but it is sufficient that his conduct objectively constitutes the violation of the rules of international law, while in undertaking particular individual actions the subjective attitude of the perpetrator towards the offense must in any case be evaluated.

- Civilian status of victims

41. In order to establish the violation of the rules of international law it is necessary to establish against whom the act of commission of the offence has been directed or whether the act has been directed against a special category of population protected by Article 3(1) of the Geneva Convention applicable in BiH pursuant to Annex 6 of the Dayton Peace Agreement for BiH, which is regarded, according to the ICTY jurisprudence, as being part of customary international law (Kunarac, Kovač and Vuković – Appeals Chamber, Judgment of 12 June 2002, Paragraph 68).

42. According to the definition under Article 3(1) of the Geneva Convention, **the notion of protected category** includes under the notion of a civilian all the persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and/or those placed *hors de combat* (the ICTY, Blagojević and Jokić – Trial Chamber, 17 January 2005, Paragraph 544), including the persons that became disabled to fight.

43. Based on the presented evidence, in particular the witness testimonies, this Panel has undoubtedly established that all the persons that were deprived of liberty and detained on the premises of the Misdemeanor Court and the DP Novi Izvor building, including the victims: Ramis Smajlović, Nurija Nuhanović, Sejfo Omerović, Admir Hadžiavdić, Fahrudin Memić, Edin Skurlić and Fadil Handžić, at the moment of their arrest and detention, enjoyed protection pursuant to the provisions of Common Article 3 of the Conventions. This is so for the reason that these persons were arrested while carrying out their daily affairs or while being in flight together with other villagers. None of the arrested persons was uniformed or armed, and none of them took, in any way, an active part in the hostilities that existed between the parties to the conflict.

44. The Court has come to this conclusion on the basis of the testimonies of several witnesses. Based on the testimony of the witness Admir Hadžiavdić it was found that he was arrested at the moment when he was trying, together with four other Muslim men, to reach the free territory in the direction of Tuzla, on the occasion of which none of the arrested men was uniformed or a member of military personnel, and one of the men was under age. The witness Ramis Smajlović was arrested on 15 May 1992 at the time when he was preparing to perform the Muslim prayer (*džuma namaz)*. He was arrested by a certain Simić and other uniformed persons – members of the JNA and reserve forces, which is when he was asked whether he had any arms and was told that he would be taken away for interrogation. Similar things happened to the witness Mirsad Omerović who was hiding together with his father and brother in his uncle's house, when members of the paramilitary formations encircled and arrested them, and took them to the kindergarten building. It was only one day prior to

this event that the three brothers of the witness were taken away, while the female members of his family had fled to Mali Zvornik. Nurija Nuhanović was arrested after he had been hiding out of fear in the woods with a few unarmed and non-uniformed neighbors.

45. The Panel does not have any dilemmas concerning the status of Fahrudin Memić, Alija Buljubašić, Fadil Smajlović and Samir Pezerović, finding that none of the above mentioned persons was uniformed, armed or in the area of combat activities at the moment of his arrest. The witness Memić did possess a pistol with a permit for it, so when the armed and uniformed members of the paramilitary unit *Bijeli orlovi* came in front of his house he did fire a bullet at random in the direction of the entrance door. However, this does not in any way mean that he was performing combat activities at the time of his arrest. Specifically, taking into regard the circumstances of his arrest or that the witness wore civilian clothes, that he returned home to get some food for his family and the villagers who stayed in the woods, and that as a result of all the events and fear for his own life he reacted by firing a bullet, can be considered only and solely as an act of self-defense and a logic reaction under such circumstances. On around 3 May 1992, the witness Buljubašić arrived together with his cousin in front of the hotel in Zvornik where their identity cards were seized, and soon after that the police arrived and called out the witness among many other civilians. He then had to sit in a car, and they drove him away towards Karakaj.

46. Consequently, all the witnesses who testified about the circumstances of their arrest and capture agreed that none of the detained persons had any arms with them or any piece of clothes indicating that they were members of military or police formations. These persons were absolutely not able to offer any resistance to the armed persons of the regular and paramilitary formations of the Army of Republika Srpska, and they did not possess any means of defense. In addition, all the civilians were Muslims and at the time of this incident they were in the territory controlled by the Bosnian Serb forces.

47. In this specific case, the Panel has established that the accused Lazarević, Stanojević and Ostojić, by the actions they were found guilty of, also acted with intent with respect to the rules of international law, as their actions were directed against some of the most important protected values or against the psychophysical integrity and human dignity of victims – the detained civilians, therefore there is no doubt that at the time of perpetration of the criminal offense they knew that their acts were unlawful in all legal systems, for the reason of which it is unquestionable that the accused, by their actions, knowingly violated the rules of international law. Consequently, inflicting injuries upon the lives and bodily integrity of this category of population is particularly forbidden. Thus it is obvious that the criminal acts of the

accused, which they were found guilty of, are in complete contravention of international law.

48. In the opinion of the Court, the persons taking no part in the hostilities or those placed *hors de combat* have the right to have their physical and mental integrity respected. Such persons must be protected under all circumstances and should be treated humanely without any discrimination.

- Existence of an armed conflict

49. The following element of the underlying crime is that **the violation of international rules must occur in time of war, armed conflict or occupation**. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. In terms of Common Article 3, the nature of this armed conflict is irrelevant. Namely, it is irrelevant whether a serious violation occurred in the context of international or internal armed conflict, if the following conditions are met: the violation must constitute an infringement of the rules of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim, and the violation of the rule must entail the individual responsibility of the person breaching the rule. Also, the Criminal Code of Bosnia and Herzegovina does not classify armed conflicts into international and non-international conflicts, and as a result international law is directly applicable to the full extent.

50. The existence of the armed conflict between the VRS on one side and the Army of BiH on the other side, in the Municipality of Zvornik during the state of war in BiH, as one of the general elements of this criminal offence, has been *inter alia* established by the Court in this specific case based on documentary evidence of the court records such as: the Decision of the Presidency of the Republic of Bosnia and Herzegovina (R BiH) declaring the imminent threat of war, dated 9 April 1992, and the Decision declaring the state of war, dated 20 June 1992, the Order declaring general public mobilization in the territory of the Republic of Bosnia and Herzegovina, Official Gazette of R BiH, number 7/92, dated 20 June 1992, Delivery of the Daily Operations Report by the commander Major General Savo Janković to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 20/27-101/1, dated 9 April 1992, Request for support-operation by the commander Major General Savo Janković to the 2nd Military District Command, Operations Centre, strictly confidential No. 11/43-477, dated 10 April 1992, Delivery of the Daily Operations Report by the Colonel Božo Milovanović to the 2nd Military District Command, Duty

Operations Team, strictly confidential No. 20/27-105/1 of 13 April 1992, Delivery of the Daily Operations Report by the commander Major General Savo Janković to the 2nd Military District Command, Duty Operations Team, strictly confidential No. 11/2-17, dated 18 April 1992, Report of the Zvornik Municipality Police for 1992, Order of the commander Colonel Dragutin Ilić to rename Territorial Defense headquarters and units, dated 6 June 1992, as well as other documents, reports and testimonies of the witnesses, both of the Prosecution and of the Defense. Therefore, it follows from this evidence beyond any reasonable doubt that there was an armed conflict in the territory of BiH as well as in the area of the Municipality of Zvornik in the time covered by the charges, more precisely from May 1992 until the end of the summer of the same year.

51. In support of the existence of the armed conflict, the Court has also taken into account the established facts number 1-8 from the ICTY Judgments in the cases of Tadić, Orić and Čelebići[1], as well as the testimonies of the Prosecution witnesses: Ahmet Omerović, Ramis Smajlović, Samir Pezerović, Nurija Nuhanović, Admir Hadžiavdić, the protected witness A, as well as the Defense witnesses: Neđo Lukić, Spomenka Stojkić, Sredo Vuković, Vlado Delić, Ismet Ibrahimović, Asim Banjanović.

52. It is evident from the testimonies of the above mentioned witnesses that in early April 1992, the Bosnian Serbs started erecting road barricades around Zvornik, effectively isolating it, and there were rumors among the Muslim population that an attack on Zvornik was being prepared. In early April of that year, as the general political and security situation worsened, the BiH Presidency declared a ″state of imminent war danger″. According to the testimony of Ramis Smajlović, who lived in Zvornik in the beginning of the war, the majority of the Muslim population from the town and surrounding villages started to move out in that period, which was followed by the capturing of Zvornik by the JNA forces and paramilitary units.

53. Otherwise, the Panel has unquestionably established that, apart from the regular and reserve police and JNA forces (subsequently the Army of RS), various paramilitary units had an important role in the armed conflict in this area. Among the most notorious units in the Zvornik municipality were members of the *Gogić* unit, so-called *Gogićevci,* from Loznica, the *Šešelj* people from Niš, and members of *Žute ose*. These units were mainly ″composed of criminals, persons without character and morals, people who had no positive characteristics", as they were described by the defense witnesses Neđo Lukić, Sredo Vuković and Vlado Delić, in a word persons without any scruples and ready to commit any possible evil deed. The Panel will explain the participation of the members of the paramilitary formations in arresting and abusing the prisoners on the premises of the Misdemeanor Court and the *Novi izvor* building in the part of the Verdict discussing the guilt of the accused.

[1] All Judgments of Trial Panels.

54. Pursuant to all the above mentioned, it follows beyond any doubt that there existed an armed conflict in the territory of BiH and in the area of the Municipality of Zvornik in the period of time covered by the charges, or from May 1992 until the end of summer 1992.

55. The Panel points out that it specifically defined the end of the period in question, as it follows from the established state of facts that all the criminal acts that were established to have been committed by the accused occurred by the end of summer 1992, not March 1993 as it was stated in the Indictment.

56. Consequently, having also in mind the fact that the Defense did not deny the existence of an armed conflict either during the proceedings or in its closing argument, the Panel found that it was undoubtedly established that there was an armed conflict between the members of the Army of Republika Srpska and the Army of BiH, as a result of which another element of the underlying crime the accused are charged with has been established.

- Link between the perpetrator's offence and armed conflict

57. It is important to consider the status of the Accused in the relevant time from the aspect of yet another condition required for the existence of a criminal offence, which is **that the offence must be linked to a war, armed conflict or occupation**.

58. What is important here is "*that the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.*" (*Prosecutor v. Kunarac et al.*, case No. IT-96-23 i IT -96-23/1 –A, Judgment dated 12 June 2002, para. 58).

59. In other words, in the case at hand it was necessary to establish **the status of the Accused** at the time of commission of the criminal offence, that is, at the time of the armed conflict between the Republika Srpska Army and Army of BiH in the area of the municipality of Zvornik.

60. This Panel finds it incontestable that at the time of commission of the criminal offences all four Accused, Sreten Lazarević, Dragan Stanojević, Mile Marković and Slobodan Ostojić, were members of the reserve police forces of the Public Security Station in Zvornik, and that in that capacity they were engaged as guards in the Misdemeanor Court building and later on in the DP Novi Izvor, which even before the

decision on establishing the prison was made had been detention facilities for the non-Serb civilians from the municipality of Zvornik.

61. The foregoing ensues from the documents, particularly from: Receipt of the Provisional Government of the Serb Municipality of Zvornik on the reception of money for the Special Purpose Unit dated 10 June 1992, and the Payroll of the employees in prison for August 1992, as well as the witness statements.

62. Among others, Sredo Vuković, the Prison Warden and immediate supervisor of the Accused at the relevant time, corroborated this fact in his testimony. According to his testimony, the Accused Lazarević, Stanojević and Ostojić were guards back at the *Ekonomija* Prison, and they continued performing that duty also after the prisoners were transferred to the Misdemeanor Court and *Novi Izvor*, where the Accused Mile Marković joined them as a guard.

63. The witnesses-prisoners had no dilemma about the identification of the Accused. Some confusion was created by the fact that there were three guards in prison with the same name Dragan (Dragan Stanojević, Dragan Petrović, Dragan Stjepanović). However, the prisoners called and addressed the two of those persons by their nicknames "Veliki Dragan" and "Mali Dragan." Based on the testimonies of the aggrieved persons, which were corroborated by the testimony of the witness Sredo Vuković, the Court found that Dragan Stanojević, son of Drago, was called "Veliki Dragan" while Dragan Stjepanović, son of Vojo, was called "Mali Dragan", and both of them were from Ročevići.

64. In any case, all the accused were engaged in the functioning of the detention facility, while the offences they are charged with were committed at the time when they performed their official duties as guards in the prison. Finally, not even the Accused themselves contested this important fact.

65. Specifically, due to the existence of the armed conflict, these persons were engaged in the police forces of the newly-formed Srpska Republika BiH. More specifically, they were members of the police reserve forces with the Public Security Station in Zvornik, and due to such status they were able to cause fear and establish control over the detained civilians. Precisely, they were in the position, as guards, to use their positions to force those persons to follow their orders without resistance, to maltreat them and treat them inhumanely, and to enable also other persons - members of various paramilitary formations to do the same, and by doing so, cause great suffering to the prisoners.

66. It is clear from the foregoing that the existence of an armed conflict significantly affected the ability and decision of the perpetrators to commit the crime as well as the

mode of commission of the crime. Namely, the Accused, as members of the police formations of the armed forces which were dominant in that area, being in the position of guards in prison, developed a feeling of supremacy and to a great extent of absence of any responsibility in the treatment of prisoners, given that they had the power and control over the civilian victims. In that manner they were in the position to commit the given crimes without fear from the consequences and responsibility which they would surely bear in the absence of the state of war.

- Perpetrator must order or commit the offence

67. Finally, apart from the incontestable existence of three of four general elements (*chapeau*) of the criminal offence of War Crimes against Civilians under Article 173 of the CPC of BiH, as it has been explained above in detail, the Panel also found grounds for the fourth element, too, which was contested throughout the proceedings, (that the perpetrator must commit the act of perpetration of the offence, which includes the commission or ordering of some acts alternatively mentioned under subparagraphs of this Article) with regard to the Accused Lazarević, Stanojević and Ostojić. It was found beyond a reasonable doubt, based on the presented evidence, that the Accused Sreten Lazarević, as a guard and *de facto* Deputy Prison Warden in the mentioned facilities, and the Accused Dragan Stanojević and Slobodan Ostojić, as guards, committed acts of perpetration of individual crimes at the time, in the place and in the mode described in the operative part of the Verdict as follows: the Accused Lazarević committed the criminal acts under the number I.1-I.4. of the operative part, the Accused Stanojević under the number II.1. and the Accused Ostojić under the number III.1. of the operative part of the Verdict, thus these specific acts satisfied the essential elements of the criminal offence of Inhuman Treatment under Article 173(1)(c) of the CC of BiH.

68. As for the Accused Mile Marković, apart from the fact that the previous three general elements of the offence have been satisfied on the part of the Accused, this Panel has not been able to find beyond a reasonable doubt the existence of the fourth element, that is, his guilt of the commission of the specific crimes described in detail under Section II.1. of the acquitting part of the Verdict, which, for the purpose of systematicity and better layout of the verdict, will be reasoned under Section I.3. of the convicting part regarding the Accused Lazarević, given that this is one and the same criminal incident.

5.2. Factual findings and legal conclusions

5.2.1. General considerations

Criminal Offence of Inhuman Treatment under Article 173(1)(c) of the CPC of BiH

69. Given that the Accused are charged with the criminal offence of War Crimes against Civilians under Article 173 of the CC of BiH committed through inhuman treatment under subparagraph (c) of the same Article, the Panel had to evaluate if this particular criminal act was part of the underlying crime. Thus, starting from the principle that each criminal act, because of the specific nature and complexity of the war crimes, is a separate criminal offence within the *genus* offence, therefore, while evaluating the existence of an offence, it is necessary to establish the essential elements of the offence, both objective and subjective ones, and then evaluate if they are satisfied or not on the basis of the facts found.

70. The CC of BiH does not define "inhuman treatment" under Article 173 (c) of the CC of BiH. However, the ICTY jurisprudence offers a number of examples of these offences as follows: mutilation or inflicting severe bodily injuries[2]; beatings and **other acts of violence**[3]; inflicting serious or severe injuries[4]; **severe damaging of physical or mental integrity**[5]; **serious attack on human dignity**[6]; forced labor which caused serious mental harm or physical suffering or injury or the act constituted a serious attack on human dignity[7]; deportation and forcible transfer of groups of civilians[8]; forced prostitution[9] and forced disappearance of people.[10]

71. The First Instance Panel of the International Criminal Tribunal for the Former Yugoslavia in the *Delalić et al. case* offered also an acceptable definition of the term "inhuman treatment", which reads: „ ... intentional act or omission, that is, the act or omission that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity", and which therefore implies the following essential elements of this criminal offence:

- the act or omission caused serious mental or physical suffering or injury or

[2] See *Kvočka et al. case, ICTY Trial Judgment No.* IT-98-30/1, para. 208.
[3] Ibid, para. 208.
[4] See *Kordić and Čerkez case*, ICTY Appeals Judgment, No. IT-95-14/2, para. 117.
[5] See *Blaškić case*, ICTY Appeals Judgment, No. IT-95-14, para. 239; *Krstić case, ICTY Trial Judgment, No.* IT-98-33 para. 523;
[6] See *Vasiljević case,* ICTY Trial Judgement, para. 239-240;
[7] See *Naletilić and Martinović case,* ICTY Trial Judgment, para. 271, 289, 303;
[8] See *Kupreškić et al. case*, ICTY Trial Judgment, para. 566;
[9] Ibid, para. 566;
[10] Ibid, para. 566;

constituted a serious attack on human dignity;

- the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.

72. 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[11].

73. There are a number of examples as to what "inhuman treatment" implies as prohibited by Article 3 of the ECHR and in the jurisprudence of the European Court and the European Commission on Human Rights.

74. For example, in the case of *Tomasi v. France*, the European Court found that it was explicitly inhuman treatment which violates Article 3 in the case when the appellant was subjected to slapping, kicking, punching and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on. The European Court considered that a great number of blows which Mr. Tomasi received and their intensity constitute two elements which are sufficiently serious to consider such treatment inhuman and degrading.[12] The Court also considered the treatment "inhuman" if it is planned in advance, if it is done for hours without interruption and if it causes physical injuries and intensive physical and mental pain.[13]

75. In addition, the Commission for Human Rights ("the Commission") found that being forced to stand for 35 hours blindfolded and with hands tied while she was listening to cries of other detainees being tortured and being threatened that she would be punished. She was allegedly kept sitting on a mattress, blindfolded, not allowed to move, for many days, which is inhuman treatment.[14] Also when a person in detention is subjected to maltreatment such as hits with batons in the knees, threats with knives, kicks while lying on the ground, repeated blows with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to head and hands, it is considered to be cruel and inhuman treatment.[15]

[11] See the Vasiljević case, ICTY Trial Judgment, para. 235 then see the *Blaškić case, the ICTY Trial Judgment,* para. 243.
[12] *Tomasi v. France*, 13 EHRR 1, 1993, para. 115.
[13] *Lorse et al. v. The Netherlands*, Judgment, Appeal No. 52750/99, 4 May 2003, para. 60.
[14] *Soriano de Bouton v. Uruguay*, No. 37/1978. mentioned in the footnote 12, pg. 163.
[15] *Leslie v. Jamaica, No.*. 564/1993, para. 9.2.; *Bailey v. Jamaica*, No. 759/1997, para. 9.3.

76. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious [16]. Many detainees were exposed to the beatings and other forms of maltreatment to the extent that at any time a number of detainees had visible traces of beatings. It is therefore clear that in the detention facilities the atmosphere of fear prevailed, caused by constant maltreatment of detainees. The former prisoners who testified before the Trial Panel described in detail the acts of physical violence and mental maltreatment they suffered or saw while being detained in prison. Many of them still suffer from the physical and mental traumas caused by these experiences.

77. The Appellate Panel infers that the acts of the Accused who had the dominant position and power at the time towards the victims, inflicted on the victims serious suffering, both physical and mental, and that they satisfy the standard required by the definition of the given offence. The victims were beyond any doubt in the state of despair, subordination, hopelessness, fear for own life, which are well outside of common human experiences. There were the guards-the Accused who beat them in person or enabled other wild members of the paramilitary formations to take it out on prisoners. All the foregoing is an arbitrary act by a person who is in the position to make decision about their destiny, who holds the keys of detention premises as a symbol of their freedom or suffering, which surely, in the opinion of this Panel, is a heinous act in the context of the inhuman offence and treatment.

78. Evaluated within this context was the Defense exhibit, the Findings and Opinion of the forensic expert witness, Vidak Simić, as well as his verbal explanation thereof at the main hearing.

79. Based on this expert finding the Defense claimed that the acts of the Accused did not constitute the elements of any war crime, given that in the opinion of the expert witness not a single aggrieved person suffered great mental and physical pains or suffering. The expert witness noted in his findings that the prisoners during their detention suffered such injuries which based on the forensic rules may be qualified as minor bodily injuries, which according to him caused a less serious level of pain based on the Visual Analogue Pain Scale used as a common parameter in judicial practice, where the pain intensity is measured within the range 1-10. With regard to all the victims, the expert witness found that as a result of the injuries inflicted the life activities have not been diminished, and the beating did not leave traces in the form of damage to the physical appearance of the aggrieved persons. The inflicted injuries, in the period immediately after the injury, in his opinion, reached the threshold of pain 5.

80. The Panel assessed the mentioned allegations, however it did not find them decisively relevant to assess the gravity of the specific suffering. Namely, as the expert witness himself stated, these are objectively established measures, where it is very possible

[16] See *Krnojelac case*, ICTY Trial Judgment, para. 131.

that the pain the Accused felt at that moment was surely greater than the pain he assessed, because the threshold of tolerance of each person is different, and these are subjective impressions, which may be the subject only of a neuropsychiatric evaluation. In addition, the expert evaluation was done on the basis of the scarce medical documents and descriptive statements of the aggrieved persons, without direct examination by the expert witness, and 18 years after the fact, thus the Court finds it imprecise and generalized, and mostly based on assumptions. This is why the Court could not accept only on the basis of the opinion of the expert witness the Defense's theory that the standard required for the existence of inhuman treatment was not satisfied.

81. According to this Panel, to establish the level of mental and physical suffering and whether it amounts to the level of inhuman treatment as a war crime, it is not sufficient to separately evaluate individual beatings, but to take into account all factual circumstances including the nature of the act or omission, the context in which the offence was committed, its duration or repetition, physical, mental and moral consequences of the offence for the victim and the personal situation of the victim, including the age, gender and health. Accordingly, this Panel considered all circumstances of the given situations, including the personal situation of the victim.

82. According to the Panel, the pain scale based on which the expert witness concluded that the bodily injuries inflicted were minor is applicable in normal life situations, where there are no traumatic incidents of physical or mental nature prior to inflicting the given injury. In other words, while assessing the gravity of the specific suffering it was necessary to take into account the frequency of beatings, the inhumane conditions where the prisoners were held, without adequate medical treatment of the injuries, and constant fear, traumatic states and uncertainty for their lives which they suffered on a daily basis, expecting new maltreatments. An example of the subjective traumatic experience is the statement of the witness Ahmet Omerović who says that he was afraid because he expected his death, and added: "My blood froze in my veins every time those persons entered the room."

83. The required *mens rea* subjective element is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or 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 omission[17].

[17] Ibid, para. 132.

Evaluation of Evidence

84. First of all, this Panel, before it drew a final conclusion that the guilt of the Accused exists, analyzed all relevant evidence, giving particular attention to the evidence of the relevant witnesses in terms of assessment of their probative value, credibility and consistency.

85. While analyzing and evaluating the evidence, the Panel started from the position that a panel which renders a final ruling, *in concreto* the Appellate Panel, has discretion to "*accept any relevant evidence it considers as having evidentiary value"*[18] and *to disqualify* evidence "*if the need to ensure a fair trial significantly exceeds its evidentiary value"*[19]. As a principal trier of facts, the Panel resolves the issue of possible inconsistencies within the statement and/or between the witnesses statements. The Panel is surely authorized to, on its own accord, assess if the inconsistencies exist, how important they are, if the evidence viewed as a whole is reliable and authentic, and to admit or to reject the evidence. The inconsistencies in the testimonies of the witnesses do not by themselves mean that the Trial Panel which acts reasonably has to reject the testimony as unreliable. Similarly, the factors such as the time between the incidents and testimonies, possible influence by the third persons, inconsistencies or stressful circumstances at the time of incident do not automatically rule out the possibility for the Panel to rely on such testimony. However, the Panel will in every specific case evaluate the reliability and authenticity of the relevant testimonies, and the range of that discretion is relativized by the obligation to reason its decision.

86. The Panel finds it necessary to note that with such gravest criminal offences against the values protected by the domestic and international law it is realistic to expect dual and seemingly adverse reactions in terms that the witness-victim focuses his attention on the relevant situation, viewing each and smallest detail, but also it is realistic to expect that the high level of stress and fear is reflected on the ability of the victim to, notwithstanding the whole and main course of the incident, exactly note and memorize details of the sequence of incidents. Thus, the reactions in the perceptive sense must be analyzed individually on a case-by-case basis.

87. Thus, and this will be analyzed in detail and through the individual incriminations, some differences between the oral testimony and the statement given in the investigation phase do not necessarily imply that the witness does not speak the truth. The Panel noted that eighteen years have passed since the incidents mentioned in the

[18] *Kupreškić, Appeals Judgment*, No. IT-95-16-A of 23 October 2001, para.31; rule 89(C) and (D).
[19] *Kupreškić, Appeals Judgment*, No.IT-95-16-A of 23 October 2001, para.31, taken from the Second Instance Verdict in the *Čelebići case*, para. 485 and 496-498.

Indictment took place, so it is entirely logical and normal that the lapse of time affected the correctness and the authenticity of the memory of the witnesses. However, it does not mean that the evidence that is timewise closer to the incident is more complete and correct. It is entirely normal that at the trial the witness is asked different questions than those asked during the previous interviews, that is, that they are formulated differently, and that based on such questions he recalls some additional details, in particular when he is asked some specific questions at the trial which were not asked before. It is also entirely normal for the witness "to have flash-backs and refresh his memory", about which many witnesses-victims spoke. All the foregoing required that the testimony of every witness be carefully considered and analysed, taking into account the specific nature of each individual, the level of his education, the circumstances in which he happened to find himself and all other factors relevant to the evaluation of the authenticity of his testimony and his credibility.

88. This is particularly so having in mind that a number of witnesses are direct witnesses of the incidents which occurred in the Misdemeanor Court building and the *DP Novi Izvor* and who, while being in detention and bearing witness of many daily incidents and Golgotha, for them in a timeless state, saw and experienced a number of beatings. Also it had to be taken into account that due to all that it is quite realistic to expect that in such testimonies persons and situations may get confused.

89. The Panel evaluated with particular attention the situations when some charges were based mainly on the testimony of only one witness. In that regard it is noteworthy that pursuant to Article 15 of the CPC of BiH, the right of the Court in the criminal proceedings to evaluate the existence or non-existence of facts is not bound by or limited to special formal evidentiary rules. In the opinion of the Panel, if some evidence is lawful and valid, and if it is authentic and credible, such evidence may be sufficient to establish the commission of the criminal offence even if such evidence ensues from the testimony of only one witness. In such cases (Sections I.1. and I.3. of the Verdict) paying due attention the Panel concluded that the testimonies of the given witnesses are not inconsistent with regard to what happened to them or with regard to the actions of the Accused, so the Court, based on this evidence, found beyond any reasonable doubt that the Accused, especially Lazarević, committed the criminal offence as it was found.

90. The Appellate Panel will primarily deal with the evidence necessary for the purposes of this Verdict, considering that it was not necessary to discuss every single piece of evidence.[20] In other words, this Panel finds it sufficient to focus on the review and

[20] See the ICTY Trial Judgment in the Prosecutor v. *Darijo Kordić and Marijo Čerkez, the case No.*T-95-14/2-T dated 26 February 2001 (hereinafter: citation from the ICTY First Instance Judgment), para.20, Appeals Judgment in the same case No. IT-95-14/2-A of 17-12-2004, para.382. (hereinafter: citation from the ICTY Second Instance Judgment).

evaluation of the evidence on which the criminal offence with which the Accused are charged was based.

91. In that regard, some witnesses, in particular the witnesses for the Defense, testified on the personality and character of the Accused, including Ismet Ibrahimović, Asim Banjanović, Spomenka Stojkić, Sekula Ostojić, Dobrivoje Ristić, Neđo Vidović and others. Although some of the witnesses, more specifically the first three, were in prison in the *Novi Izvor* building, they themselves testified that they were not eyewitnesses of the mentioned beatings, so they could not testify about the specific circumstances. The witnesses Ibrahimović and Banjanović were in prison only briefly, while the witness Stojkić was detained in a separate room for women, and according to her testimony was not maltreated, which by automatism does not mean that other prisoners, too, were not maltreated. The Panel evaluated many other testimonies of the direct victims who testified about the specific sufferings.

92. The testimonies of these, as well as other mentioned witnesses, have been evaluated within the context of mitigating factors while meting out the punishment to the Accused (see the reasoning in this part), while the Panel found them irrelevant when the criminal offence and guilt of the Accused were being established for the above mentioned reasons.

Unlawful imprisonment

93. Almost all witnesses testified about the unlawful imprisonment of civilians, both for the Prosecution and for the Defense, and they are all consistent that it was an arbitrary and unlawful deprivation of liberty with no legal grounds. Even the witness Sredo Vuković, who was the Prison Warden, did not know who arrested those persons, exactly how many of them were in prison, who were the persons who were brought there, and for what reasons they were arrested.

94. The witness Sredo Vuković also claims that the establishment of prison, and arrest and bringing in the persons, as well as their interrogation, were coordinated by the leaders of the Public Security Station in Zvornik. However, he stated that at the time not a single decision was made on the apprehension of any person. He personally never saw any document of that kind, and persons who brought in the prisoners never handed over to the guards any supporting documents, nor did they say anything about it. More specifically, written documents did not exist stating the reasons as to why a person was deprived of liberty. Being a professional police officer he is aware of the procedure which has to be observed when a person was held in custody under the normal circumstances, but he believed that at the time of conflict those rules of procedure do not apply to the persons deprived of liberty.

95. The mode of bringing the persons into the prison was confirmed also by the witness Dragan Petrović, who was one of the guards in prisons in the Misdemeanor Court and *Novi Izvor* buildings, who resolutely claimed that the persons were brought into prison from the police station, and while doing so the persons who brought in the prisoners did not hand over to the guards any written decisions justifying the holding of the persons in prison and they also did not give any verbal explanations of the reasons regarding the deprivation of liberty of those persons. He only assumed that they were interrogated in the Public Security Station in Zvornik, but did not know if they were presented any statements which they were supposed to sign. He also explained that taking the persons out of the premises or their transfer to another location could happen only following the MoI order and none among the guards was allowed to do that on his own initiative. He also maintains that the decision on detention of civilians or their release could be made only by the MoI leaders.

96. All witnesses-victims of the imprisonment stated clearly that the reasons of their arrest or holding in prison were never communicated to them, and that they were not presented any document as a legal ground for their deprivation of liberty. To that effect the witnesses Nurija Nuhanović, Admir Hadžiavdić and Samir Pezerović claimed that they were never informed about the reason of their detention, but they themselves concluded that it happened "because they were Muslims". Other witnesses detained in the Court building and *Novi Izvor* described that in the similar way. The Appellate Panel gives credence to all of them in this regard, and on the basis of the testimonies of all mentioned witnesses finds beyond any reasonable doubt that this was a truly unlawful imprisonment of civilians as alleged in the Indictment.

Prison in the Misdemeanor Court building and DP Novi Izvor

97. On the basis of the presented evidence, the Appellate Panel concluded that the conditions in the prison which was first located in the Misdemeanor Court building and then in the *DP Novi Izvor* building were inhuman and poor because they were overcrowded, lacking beds, blankets and adequate sanitary appliances, as found also by the First Instance Panel. The witnesses emphasized also the lack of food, and pointed out the fact that a number of them suffered a significant loss of weight, while according to the averments of the witness A one person even died from malnutrition. The witness Mustafa Halilović said that in the Misdemeanor Court there was only so much food to "keep you alive", and Admir Hadžiavdić said that they received food once a day and that he heard that those were soldiers' leftovers.

98. According to the testimonies of Ahmet Omerović, Mirsad Omerović and Mustafa Halilović, in the Misdemeanor Court they were not provided even basic hygienic conditions. They could not shave, bathe or get any medical assistance. They were hardly allowed to ask to have some water to drink, or they had to go to the toilette to

get it but at the risk of being beaten. The non-Serb detainees in the Misdemeanor Court were locked in their premises, while some of them were taken for forced labor, which allegedly was voluntary, but they all stated that they expressed their interest in going to the forced labor, knowing that in that manner they would get additional and indispensable food, and sometimes a mattress or clothes, and that they would avoid daily maltreatment. This was also confirmed by the witness Mirsad Omerović adding that at the time nobody from the humanitarian organizations visited the prison.

99. The conditions in the *Novi Izvor* were somewhat better in terms of hygiene, because they were allowed to go to the toilette freely. The witnesses Nurija Nuhanović, Alija Buljubašić, Mustafa Halilović, Ramis Smajlović were consistent that in the *Novi Izvor* building there were at least 50-70 people detained on two premises on the top floor, while the witness Hadžiavdić added that they slept on the foam sponge mats on the floor, however the abuse and maltreatments by the members of the paramilitary formations continued and they were not prevented from entering in any way. The prisoners also received limited medical care, which was justified by the Defense as the lack of medical supplies in Zvornik at the time. The shortage of water in the prison was also justified by the poor water supply infrastructure in Zvornik.

100. As opposed to that, the Panel found that there were a number of detainees, including Spomenka Stojkić, who enjoyed "privileged status". Those were persons who received medical care, were allowed to contact their family members, receive parcels and go to labor escorted by guards. However, most of the other detainees had different experiences.

101. The Panel presented here some legal standards, general conclusions and contextual basis of incidents in the prisons in the Misdemeanor Court and *DP Novi Izvor* buildings, while in the text below it will discuss the extent to which the subjective and objective elements of inhuman treatment have been proven under individual charges.

5.2.2. Individual charges

102. At this point it is necessary to distinguish the acts taken by each of the three accused, as it was clearly differentiated also in the factual description of the operative part of the Verdict. The form of participation of each accused, the degree of contribution to the commission of the criminal offence and eventually their criminal responsibility directly depend on this factual issue.

103. While considering the extent to which the criminal actions have been proven with which the Accused were charged, and thereby their guilt, the Court made an in-depth analysis of the relevant evidence, thus in the continuation of this discussion it will

present the reasons which governed its ruling, as imperatively stipulated under Article 290(7) of the CPC of BiH.

Sreten Lazarević

Command responsibility

104. Count 1(5) of the Indictment charges the Accused Sreten Lazarević that he, as "the Deputy Warden" of the prison/detention facility located in the Misdemeanor Court and DP Novi Izvor buildings, committed the criminal offence of inhuman treatment of civilian prisoners based on the command responsibility theory.

105. According to the Appellate Panel, it is beyond doubt that horrible crimes were committed in the detention facilities which caused great suffering to the prisoners. The Panel accepted as credible the testimonies of the relevant witnesses-victims that these offences were indeed committed and it understands the suffering through which the witnesses had been through by testifying about them. However, the issue that the Court has to address is not only whether or not these actions had happened but also if the Accused Lazarević participated in them, or if he allowed for their commission by omitting to punish his subordinates (guards) who allowed and enabled the commission of these offences. To demonstrate that, the Prosecutor had to prove the command responsibility pursuant to Article 180(2) of the Criminal Code of BiH.

106. To prove command responsibility the Prosecutor was supposed to establish the following three elements:

(i) the existence of a superior-subordinate relationship between the commander or the superior and the alleged principal perpetrator;
(ii) the superior knew or had reason to know that a crime was about to be committed or had been committed, and
(iii) the superior did not take the necessary and reasonable measures to prevent such offences or to punish the perpetrator.[21]

107. In other words, the Prosecutor was supposed to prove that Lazarević was superior to the perpetrators of the offences at the time when those offences were committed, that is, that a superior-subordinate relationship existed. Such relationship exists when the superior has effective control over his subordinates. "Effective control" means that the superior has the material ability to prevent or punish his subordinates for their acts.[22]

[21] Prosecutor v. Ferid Hodžić, the case No. X-KR-07/430, Trial Verdict (29 June 2009), para. 68-69.
[22] Prosecutor v. Željko Mejakić, Momčilo Gruban, Duško Knežević, case No. X-KRZ-06/200, Appeals Judgement (16 July 2009), para 80.

The position of the ICTY is that effective control is "*the threshold to be reached in establishing a superior-subordinate relationship.*"[23]

108. Although, as reasoned below, the conclusion of the Appellate Panel is that a number of pieces of evidence existed that Lazarević was more than an ordinary guard, or *de facto* Deputy Warden, the Panel considers that there was not sufficient evidence to find a beyond reasonable doubt that he had effective control over the guards, that is, such power and authority over the guards that he was able to punish them for the actions they took (unlocking the door, allowing paramilitaries to enter the prison premises…) or for the actions they failed to take, and the duty of each guard was, as pointed out by the expert witness Matijević, to secure the prisoners inside and outside the prison premises, which means also to prevent the entrance of paramilitaries and their contacts with prisoners.

109. The fact that Lazarević was the Deputy Warden in both prisons, initially in the Misdemeanor Court and then in *DP Novi Izvor*, ensues from the testimonies of the witnesses who were detained in those facilities. Namely, the witnesses Mustafa Halilović, Ramis Smajlović, Mirsad Omerović and Nurija Nuhanović consistently testified toward the effect that the Accused was in the position of the Deputy Warden. These allegations are based on their direct observations of events in prison or on what they indirectly learned from other prisoners.

110. In his testimony Mustafa Halilović said that he knew Sredo Vuković who was a local police officer before the war. Halilović testified that after his arrival at the Misdemeanor Court he met Vuković who told him that he was the Prison Warden, and that Sreten Lazarević was his deputy.[24] In the statement he gave to the Prosecutor on 6 December 2005 (which was admitted as Exhibit No. Kt. 2273/05), Sredo Vuković said that while the prison was seated in the other building (before it was relocated to the Misdemeanor Court building) he was the Prison Commander, and his deputy was Sreten Lazarević, adding: "I was not the Commander, but as the only active policeman I had somewhat higher responsibility than reserve police officers who performed duties of guards. When I was absent, I authorized Sreten Lazarević to manage the prison."

111. Although according to the Defense the cited Vuković's statement referred to the two initial prison facilities, and those were the Technical Schooling Center in Karakaj and Ekonomija, having replayed the testimony of the witness Vuković, the Appellate Panel, having in mind the testimonies of the witnesses who were detained, found that the command hierarchy remained unchanged also after the prisoners had been

[23] Prosecutor v. Sefer Halilović, the case No. IT-01-48-A, Appeals Judgment (16 October 2007), para. 59

[24] We hereby note that the witness Halilović, to whom these persons did not do any harm during his detention, spoke positively about Vuković and the Accused, he stated that none of the two ever did any harm to any prisoner. This was confirmed in Halilović's diary, which was admitted into the evidence.

transferred to the Misdemeanor Court and then to the *DP Novi Izvor* building, that is, that the entire prison as an institution was transferred: both the detained persons and the staff. It was only the change of the prison location – the physical relocation of all from one facility to another, while all the rest remained the same, including the prison guard and command structure.

112. Some indicia-based evidence was also presented regarding Lazarević's command position and his responsibility for the acts and omissions of the guards. A number of witnesses, former prisoners, testified that the Accused was a responsible person based on his actions in the prisons. In that respect for example, the witness Nurija Nuhanović stated that the Accused carried a pistol, while other guards carried rifles.[25] The witness Alija Buljubašić believes that the Accused was a responsible person in the prison because after his arrival at the prison he took him into a room, since he was the one determining to which prison premises particular prisoners would be taken, because he knew who would be transferred to another building.[26] The witness Admir Hadžiavdić believes that the Accused was the Deputy Warden because on one occasion he heard him telling the guards to take him to another room and this order was carried out by the guards.[27] The witness Ramis Smajlović testified that, unlike other guards, Lazarević did not work the night shift.[28] These witnesses did not have any reason to lie so the Court considers their testimonies reliable.

113. The witness for the Defense Dragan Petrović testified about the duties the Accused had in the prison. Petrović, who performed the duty of a guard in the DP Novi Izvor Prison, testified that Sredo Vuković was the Prison Warden, and that in his absence the administrative duties would be taken over by the Accused.[29] To that effect, Petrović in his testimony stated that the Accused would assign a guard as a replacement for another who would be absent from duty that day; the Accused would intervene by phone if the food for the guards and prisoners was late.[30]

114. We note, however, that Dragan Petrović, as well as Sredo Vuković (at the main trial), claimed that the Accused was not exercising the duty of the Deputy Prison Warden, but that he was an ordinary guard, like the other Accused in this case. The Defense also presented the evidence according to which Lazarević received the same salary as other guards,[24] and argued that no document appointing him the Deputy Warden exists. Petrović testified that, officially, Vuković did not have any deputy, that all

[25] Testimony of Nurija Nuhanović, dated 19 March 2008.
[26] Testimony of Alija Buljubašić dated 19 March 2008.
[27] Testimony of Admir Hadžiavdić dated 17 April 2008.
[28] Testimony of Ramis Smajlović dated 17 April 2008.
[29] Testimony of Dragan Petrović dated 12 August 2008;
[30] Testimony Dragan Petrović dated 12 August 2008;

guards were on the same level, and that the Accused did not have any influence on the other guards, nor could he force them to do anything.[31]

115. The averment that no written document exists is well-founded and this fact is confirmed by the witness Sredo Vuković. As for the submitted payrolls, although they do not confirm by automatism who performed which duty, in particular who had the effective authority and control, it should be pointed out that it ensues from them that all of them were indicated as guards on the payrolls, even the warden Sredo Vuković, which additionally diminished the relevance of this evidence.

116. In contravention of the written statement given to the Prosecutor, the witness Sredo Vuković testified at the main trial before the First Instance Panel that he was only a liaison between the police station and the prison, not the Prison Warden, that the Accused did not replace him when he was absent from the prison, and that he rarely visited prisons. Vuković also testified that the Prosecutor did not give him the opportunity to read the statement given in the investigation and he contested the part of the statement related to Lazarević's position and the command over the prison..

117. The Court does not find the testimonies of Petrović and Vuković that the Accused was an ordinary guard as others credible, considering that that their testimony was motivated by the desire to diminish the criminal responsibility of the first Accused and possibly also their own. This conclusion is supported by the fact that Vuković claimed that he was only "a liaison with the police", although the witnesses for the Prosecution and for the Defense both testified that he was the Prison Warden, which he had personally told some of them.

118. Vuković's testimony according to which the Accused was only a guard in prison is in contravention of his previous statement he gave to the Prosecutor on 6 December 2005, according to which he and the Accused were in the positions of Prison Warden and the Deputy Prison Warden. The explanation which Vuković gave about this — that the Prosecutor did not allow him to review the statement — is not credible, particularly because the statement includes the note that the witness has the right to review the statement, and his signature is affixed below. Furthermore, if his statement has been tampered with it seems unbelievable that such tempering with evidence would have been reduced to only three sentences. For that reason, and having in mind that the witness Vuković himself pointed to his frequent absence and other obligations, and in that time someone had to be in charge, that is, somebody had to replace him at least in some duties and inform him thereof after his return, the Court gives higher credence to the statement Vuković gave to the Prosecutor than to his testimony before the Court. On that occasion, Vuković claimed before the Prosecutor that: "He selected Sreten as his deputy as the oldest and most responsible person,

[31] Testimony Dragan Petrović dated 12 August 2008;

whom he trusted", which is entirely logical and appropriate in the given situation, and consistent with his statement on the transfer of the entire prison from the previous locations to the new ones (without any changes in the command structure). The change of testimony at the main trial regarding Lazarević's role, according to this Panel, is a result of the wish to help and try to diminish the responsibility of the first accused, by placing him on the level of an ordinary guard.

119. For the mentioned reasons the Panel accepted the testimony of Vuković and Petrović to the extent in which they are consistent with the testimonies of witnesses-detainees, and who in the opinion of the Court did not have any reason to charge anyone with anything more than the person actually did, and who in their testimonies emphasized a number of positive gestures of the Accused, including Lazarević, thus demonstrating their objectivity, which is why the Panel gave them credence.

120. In spite of the abundant evidence (witness testimonies) that Lazarević was *de facto* the Deputy Warden (and the Panel did not have any dilemma that he was not the deputy warden officially, because he was never appointed to that position by an official document of an authorized body), the actual evidence supporting the allegations that he had the effective control over the subordinates was almost non-existent. The only evidence for this is that the Accused allegedly ordered a guard to relocate two prisoners from prison, Ramis Smajlović and Admir Hadžiavdić, because tools were allegedly found with them which might have facilitated their escape. Such order was not mentioned in the Amended Indictment, thus it remains unclear as to whether in this case it was an order or suggestion, assuming Lazarević said those words at all.

121. Apart from such evidence, the Court was not presented any other evidence, particularly not a written document, that would lead to the conclusion that Lazarević had effective control over other guards, or that he was authorized to issue orders and to ensure that they be carried out, to take disciplinary measures against guards, to promote and replace from duty those under his command. If we take all that into account, it ensues that Lazarević, in the absence of Vuković, was in charge, but without real, effective control, and that he had powers only in the domain of administrative duties, provision of food and rare medical interventions, to which the witness Petrović referred.

122. Taking into account the mentioned quality of evidence presented by the Prosecutor and absence of the direct evidence which would point to the existence of real authority and Lazarević's effective control over other guards, and as opposed to that the testimonies of the witnesses Petrović and Vuković regarding Lazarević's powers, the Panel did not have any other possibility but to conclude that Lazarević was *de facto* the deputy warden and in charge of the guards whenever Vuković was absent, but without real authority over them and without powers of the Warden. Therefore

Lazarević could not be considered responsible for failing to punish or initiate disciplinary proceedings against the prison guards for what they had done.

123. Having in mind the foregoing, and the requirement to respect the *in dubio pro reo* principle, the Panel did not have other possibility but to conclude that the command responsibility of the accused Lazarević was not proved. Therefore the Accused is acquitted of responsibility on this ground.

Section I.1.

124. Contrary to the foregoing, having analyzed all relevant evidence the Appellate Panel incontestably found the Accused Sreten Lazarević individually responsible for the commission of the offences as charged under Count 1.1. of the Indictment, by enabling an unidentified person in the Misdemeanor Court building to severely beat the prisoner Ramis Smajlović in mid May 1992, by giving consent that Ramis Smajlović be taken out of the prison cell and be brought to the room he used as a guard, where an unidentified person heavily beat up Ramis Smajlović in the presence of the Accused with a police baton, which the Accused did not prevent in any way, although he was obliged to do so. Thus, during the proceedings it was found beyond a reasonable doubt that the prisoner Ramis Smajlović was heavily beaten up by an unidentified person in the presence of the Accused Sreten Lazarević, and these actions were legally qualified as inhuman treatment under Article 173 (c) of the CC of BiH.

125. The key witness under this count of indictment and at the same time the direct victim is Ramis Smajlović himself, who consistently and reliably described the events on that occasion. According to his testimony, which the Panel accepted as true, after his arrest on 15 May 1992, he was brought in the Misdemeanor Court, and detained in one of the rooms. On the same day, the Accused Mile Marković opened the door and the witness was called out to the reception office, where already standing was the Accused Sreten Lazarević, whom he had known before as a colleague from the *Drinatrans* Company. The witness further testified that he was ordered to stand against the wall, facing the wall, and then he heard that a third person entered the room wearing a camouflage uniform who hit him several times with a police baton in the neck and shoulders, which is why his neck got rather swollen, thus, according to him *"his head was almost on the same level with his shoulders"*. After that person finished hitting him, he was ordered to remain facing the wall until the person who beat him left the room. After the beating up, he was not provided any medical care.

126. The witness recognized all the accused in the courtroom. The Panel found the testimony of this witness reliable and entirely consistent with respect to the essential facts, given that the witness's statement given in the course of the investigation is consistent with all he said in the course of the main trial about the incident concerned.

Namely, the witness described vividly the sequence of events and acts of beating up by an unidentified person, as well as the role of the Accused Lazarević on that occasion, as all the time while he was beaten up he was present in the room, not reacting or taking any actions to prevent that from happening. In finding the testimony of witness Ramiz Smajlović credible, the Court had in mind that his testimony was also corroborated by the testimony of other witnesses: Alija Buljubašić, Fadil Smajlović and Dragan Petrović.

127. The witness Fadil Smajlović affirmed the averments of the aggrieved person Smajlović, testifying at the main trail that on the given occasion a big fellow arrived, asking who worked in the *Drinatrans* Company, and after the aggrieved person responded, he was taken out. The aggrieved person returned to the room after a while with visible injuries on his neck, which is when the witness asked the Accused Marković to soak a towel which was then put on the aggrieved person's aching neck. The witness pointed out that Ramis told him later on that Sreten had told those persons to pick him up.

128. The witness Buljubašić mentioned an incident when, to his recollection, Fadil Smajlović was beaten up by a wooden axe handle, and the incident when Ramis Smajlović, who was working in *Drinatrans*, was taken out of the room by Major Pavlović. After a while Smajlović returned complaining that he had been beaten by Sreten. The Panel treated the testimony of this witness as corroborating evidence, having in mind, in the opinion of the Panel, certain less important departures from what was stated by the aggrieved person Smajlović. Namely, the aggrieved person stated that on the given occasion he was called out by Mile Marković, while the witness Buljubašić stated that the aggrieved person was taken out of the room by Major Pavlović. However, based on all other factual details presented by this witness, it is clear that this was one and the same incident, and that these minor inconsistencies are logical given the circumstances surrounding the incident, daily beatings of the prisoners over a short period of time, and by itself a traumatic experience, including the time of 16 years that lapsed since the incident occurred.

129. Finally, to establish the guilt of the Accused it is not relevant who took the aggrieved person Smajlović out of the room, but what followed, that is, what the Accused enabled and with which he agreed – inflicting serious suffering on the aggrieved person by an unidentified person, although his duty was, regardless of whether he was an ordinary guard or deputy warden, to prevent any unlawful treatment of a prisoner and to protect him from the assault of the third persons, and if he was not able to do it alone, then he should seek for help and do his best to protect the bodily integrity of the prisoner. The testimony of the witness Matijević implies such obligation. He clearly and precisely testified about the guards' responsibilities. In that regard the expert witness also underlined the proximity of the police station, the possibility to call for

help by phone, even to directly call for help, because those were buildings located within the compound of the police station.

130. There is no doubt that the inflicted injuries reached the threshold of heavy physical and mental suffering on the part of the aggrieved person Smajlović. The credibility of the testimony of the aggrieved Ramiz Smajlović and the seriousness of injuries, as he described them, is corroborated by the fact that even the Accused Mile Marković, who brought the aggrieved person back to the room, later on brought a wet towel to ease the pains he was enduring due to the inflicted injuries.

131. The Defense contested the responsibility of the Accused Lazarević for the commission of the given criminal action, pointing out that the aggrieved person Smajlović was beaten up by a third person who after that left the room. In that regard it is noteworthy that this is exactly what was alleged in the Indictment and that the same was claimed by the aggrieved person (that an unidentified person beat up the aggrieved person in the presence of the Accused), which is why the first accused was not charged with the very act of beating up Ramiz Smajlović, but the consenting to such acts of the unidentified person and failure to physically protect the prisoner, whereby he enabled the inhuman treatment. With such formulation of the Indictment, with respect to the evaluation of conduct and omission of the first accused, it is irrelevant who was the unidentified person who beat up Smajlović (Major Pavlović, his escort or a third person), and where he found a police baton (the Amended Indictment did not allege that the Accused gave it to the unidentified person).

132. However, contrary to the position of the Defense, the Appellate Panel finds that the beating of the aggrieved person was not only an unlawful and willful act of the third person, but also an expression of the will of the Accused Lazarević who did not himself beat Smajlović, but enabled the unidentified person to do so, being a person responsible not only to prevent the prisoners' escape, but also to protect their physical and any other integrity from any assaults by persons coming from the outside and from the unlawful treatment of the third persons, by consenting that Smajlović be brought from the detention premises and be subjected to the assault of the unidentified person. Instead of preventing the beating up, he was present there all the time, doing absolutely nothing to stop the unidentified person beating the prisoner, which he was obliged to do. Thus, in carrying out the specific criminal act the Accused acted as an accomplice, giving by his consent and not doing what he was obliged to do a decisive contribution to the inhuman treatment of the prisoner Ramiz Smajlović, or to the commission of the criminal offence under Article 173(1)(c) of the CC of BiH. In doing so, according to the Panel, the Accused was fully aware of his joint act with the unidentified person and wanted the commission of the act. He knew and was aware that without his action the unidentified person could not approach the prisoner at all and commit the offence. This means that he was aware that it was their joint act,

regardless of the fact that they had no prior, formal arrangement to that effect. As for the consequence of the actions taken by the unidentified person, the Accused was aware of the forbidden consequence (he watched it all), but he agreed that the consequence take place. Therefore, the awareness and willingness to commit the criminal offence existed on the part of the Accused under Article 173(1)(c) as read with Article 29 of the CC of BiH.

Section I.2.

133. Having replayed the testimonies of the examined witnesses and evaluated the presented documents, the Appellate Panel found that the Accused Sreten Lazarević also committed the criminal offence as charged under Count 1.2. of the Indictment. In June 1992 he came to the detention room in the *DP Novi Izvor* building, and asked the prisoners who among them was from Bratunac, and then when Sejfo Omerović stepped up he took him out of the room and handed him over to a group of unidentified persons, thus enabling them to treat Sejfo Omerović inhumanely, because they took him to the nearby garage where they beat him up, causing his serious physical suffering, and then they threw him into the trunk of the vehicle by which they had arrived and drove away in an unknown direction, and Sejfo Omerović has been missing ever since.

134. The conclusion about the responsibility of the Accused Sreten Lazarević for the mentioned incident ensues primarily from the testimony of Ahmet Omerović but also from the testimony of Mirsad Omerović and Ramis Smajlović, then of Alija Buljubašić, Jusuf Omerović, Fadil Smajlović who also testified that Sejfo Omerović was taken out of the room and severely beaten up.

135. It is incontestable for this Panel that the incriminating incident did happen, and that the aggrieved person Sejfo Omerović has been unaccounted for ever since, which suggests the only possible option - that he was killed, then or subsequently. However, what was contestable and to which the dismissal in the relevant part refers is the issue of reliability of Ahmet Omerović's testimony, who eye-witnessed the whole incident and was the only witness who described it, on which the guilt of the Accused Lazarević was solely based.

136. Namely, all mentioned witnesses who testified about the severe beating up of Sejfo Omerović consistently claimed that in June 1992 after the question "*Who is from Bratunac?"* Sejfo Omerović responded (although the majority of them speak about the moment when he was taken out of the room only from hearsay, while the only eye-witness was Ahmet Omerović) and was taken out of the room where he was held together with other prisoners, and was handed over to a group of unidentified persons,

who then took the aggrieved person to the garage opposite the *DP Novi Izvor* building.

137. Thus, among others, the witness Ramis Smajlović testified that among prisoners was also a man from Bratunac, who was taken to the garage and tortured. Then he was thrown into a yellow Mercedes and driven away, and the witness saw his legs in the trunk. The witness Buljubašić stated that after the aggrieved person was taken out, which he did not see, screaming and moaning was heard from the garage, and after a while they saw through the window the soldiers throwing him into the trunk of the yellow-green Mercedes.

138. All witnesses-prisoners, who observed the incident from their prison windows, consistently claim that a group of unidentified persons kicked the victim several times in front of the garage, before he was taken inside. The witnesses noticed that those men were wearing black outfit and black hats. According to them, the beating up of Sejfo Omerović continued even inside the garage because they could distinctly hear the sound of punches and "cries, screams and yelling" of the victim. Furthermore, the witnesses are consistent that after a while the cries ceased, and that Sejfo's "lifeless" body was thrown into the Mercedes trunk and driven in an unknown direction, and Sejfo Omerović has been missing ever since.

139. The witness Ahmet Omerović is the only one who testified that Sreten took the aggrieved person Sejfo Omerović out of the prison room, saying that he should go "downstairs" to give a statement. The aggrieved person immediately got up and went out, and after a while he was taken to the garage where he was beaten by three persons in black uniforms with black hats, whom the witness did not know. He eye-witnessed all the foregoing given that all present prisoners, after they heard a cry, peeped through the window on the detention room, and they watched it in turns. The witness added that those three men left and returned after a half an hour or one hour and threw him into the trunk of the car and drove away.

140. According to this Panel, the witness Ahmet Omerović consistently and convincingly testified about all details of the incident, and Mirsad Omerović corroborated his testimony about Sreten's role, saying that on the critical day he worked in *Ekonomija* and after their return "*all of them were silent and father* (referring to Ahmet Omerović) *told me that Sejfo had been tortured in the garage and then killed"*, and he added that it was Sreten who took him out of the room. This claim is fully complementary with the categorical claim by Mirsad Omerović that on that day "when they were coming back from work Sreten was on duty as a guard."

141. The Defense contested the credibility of the witness Ahmet Omerović, claiming that he did not know Sreten Lazarević, and that the witness Jusuf Omerović confirmed that

the guards were not involved in the incriminating act, thus following the presented facts the conviction cannot be based on his testimony.

142. It is exactly for these circumstances that the Panel undertook the analysis critically and extremely carefully, subjecting it to the control against other evidence, specifically linking it to the testimonies of other witnesses. Thus the Panel incontestably concluded that it corresponds with other testimonies in the key details, and in addition it includes the specific key fact – that it was the Accused Lazarević who took the victim Omerović out of the room. According to this Panel, the testimony of Ahmet Omerović has all necessary characteristics of a reliable testimony, as follows: truthfulness, objectivity, clarity, precision and completeness. The witness reliably presented what he really saw, expressly dissociating himself from the situations which he did not eye-witnessed, which suggests his veracity without a motive to unfoundedly accuse anyone.

143. Taking into account all the foregoing, and the fact that Ahmet Omerović himself was not a victim of this crime, which supports the conclusion about his objectivity and unwillingness to unfoundedly accuse anyone, the Panel did not have any reason not to believe this witness. This is particularly so because at the moment when Sejfo Omerović was taken out he was in the immediate vicinity, because he had known him before from the room where they were detained, he was in the position to clearly see who took him out of the room on that occasion, while he met the Accused Lazarević during his imprisonment, like most of the other prisoners. Apart from that, other witnesses, including those to whom the Defense refers, testified about the events following the incident, that is, what they saw through the window, which was taking place in the yard, in front of and inside the garage.

144. According to this Panel, while contesting the credibility of the witness Ahmet Omerović, the Defense unreasonably referred to the testimony of the witness Jusuf Omerović. The Panel concluded that the averments of this witness regarding the event are not in contravention of the testimony of the witness Ahmet Omerović. Namely, the witness Jusuf Omerović said that one Sunday four persons arrived by Mercedes and took Sejfo Omerović out of the building. Then he added that they saw through the window (meaning the prisoners) from the distance of about 15 meters how they killed him and put him into the trunk, and concluded "*the guards were not involved in this"*. In other words, what the witness Jusuf Omerović speaks about refers to the events happening outside the building, when unidentified persons were already taking the aggrieved person to the garage. As none among the guards were there, including the accused Sreten Lazarević, it is an entirely logical perception of the prisoners watching it, including the witness Jusuf Omerović, that the guards had nothing to do with the beating itself. This, however, is not in contravention of the claims of the witness Ahmet Omerović about what was happening prior to the arrival at the garage and the

role of the first Accused by that moment (he did not claim that Sreten or any other guard beat Sejfo Omerović). It was exactly the witness Ahmet Omerović who eye-witnessed that, while Jusuf Omerović did not testify about it at all.

145. More precisely, all the control circumstances confirmed the truthfulness of the contested testimony of the witness Ahmet Omerović, which is why it was accepted. Thus on the basis of that testimony and other already mentioned corroborating pieces of evidence the Panel drew an unquestionable conclusion about the role and liability of the Accused Lazarević.

146. On the basis of the mentioned evidence, the Appellate Panel found beyond any reasonable doubt that in the described acts – by taking the aggrieved Sejfo Omerović out of the room and by handing him over to the unidentified persons, the Accused enabled them to treat the aggrieved person inhumanely, which means that he acted in contravention of the duties he had also as a *de facto* Deputy Warden and as a guard. According to all the circumstances, the Accused could not but know what was to follow with regard to the aggrieved person Omerović after he handed him over to the persons concerned. Namely, he was well aware that those were not authorized persons who wanted Omerović for the purpose of lawful interrogation (based on the procedure defined by law), but for an entirely different type of interrogation (torture).

147. According to this Panel the First Accused was able to easily identify them as suspicious persons, that is, as unauthorized persons, primarily because of how they were dressed, which was common for the paramilitary units, not for authorized inspectors. Furthermore, as a mature and sufficiently educated man, and as a reserve police officer he knew that a lawful interrogation is not done in a garage, but in a room/office intended for such purposes in the presence of a recording clerk with a record made. In addition, the material time was already June 1992 precisely, when the beatings and inhuman treatments by members of paramilitary formations happened very often and were common knowledge (even the Defense itself underlined the problems with paramilitary units and their violence); therefore it was more than clear what was to follow after the prisoner was handed over to such unidentified persons, and how all that might end. Finally, the Accused Lazarević was able to see the unidentified persons beating the aggrieved person already on their way to the garage, and the beating then continued also in the garage followed with cries and screams, which was heard by all people present in prison, including the Accused, and then eventually the lifeless body of the aggrieved person was thrown into the trunk and driven away.

148. Based on the presented evidence, the Panel concluded that the degree of the maltreatment Sejfo Omerović suffered was aimed to cause, and it did cause, severe physical and mental pain and suffering.

149. More precisely, on the given occasion, when the unidentified persons-paramilitaries came to prison asking for a specific person from Bratunac to be handed over to them, the Accused was aware that the person would be subjected to maltreatment, but despite that he consented to it and took specific actions by which he showed his willingness to participate in that incident, which means to decisively contribute to the implementation of the unidentified persons' criminal plan. The first accused's objective contribution to the commission of the offence is that the Accused, having called the person from Bratunac, took him out and handed him over to the unidentified persons and thereby enabled his maltreatment and inhuman treatment in the nearby garage, which they did, and which he, as a guard, particularly as *de facto* deputy warden, was obliged to prevent and protect the bodily and any other integrity of the prisoner. In any case, had on the given occasion the Accused refused to hand over Sejfo Omerović to the unidentified persons, and had he performed his duty, the offence would not have been committed in the way it had been planned, or had during the commission of the offence he himself prevented the maltreatment of the aggrieved person or called for support of other members of the police station, which he was obliged to do.

150. The fact that the Accused Lazarević failed to inform the Prison Warden (which was confirmed also by the witness for the Defense Sredo Vuković) of the mentioned incident with such severe consequences, which he was obliged to prevent, although he knew that as a guard on duty that day, after taking him out of the room, he did not return the aggrieved person back to the room where he had taken him from, confirms that on the critical occasion he acted contrary to the duties he had as a guard and that he wanted the offence to be committed.

151. It ensues from the foregoing that the Accused Lazarević participated in the commission of the given offence as an accomplice, in the manner that by taking out and handing over the prisoner Sejfo Omerović he enabled the unidentified persons to beat him and treat him inhumanely, although his duty was to protect him from them, thus giving a decisive contribution to the commission of the criminal offence of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, being aware of the offence and willing its commission – inflicting severe physical suffering on the Accused Omerović, that is, inhuman treatment.

Section I.3. Sreten Lazarević and Section II.1. Mile Marković (Acquittal)

152. Under the relevant Counts, the Prosecutor's Office alleged that in July 1992 the accused Sreten Lazarević and Mile Marković inhumanely treated the prisoner Nurija

Nuhanović by beating him together, thus causing his severe physical suffering, as a result of which Nurija Nuhanović lost his consciousness.

153. The only direct witness who testified about this circumstance is the victim Nurija Nuhanović, who stated that on one occasion, following his arrest on 19 July 1992, in the building of *Novi Izvor*, he was beaten up by guards in their room. According to the witness, on the occasion concerned, Sreten came with guards Mile, Slobodan and he thinks that there was one more guard whose name was Dragan, who took him and three other prisoners to the guards room,[32] and ordered them to stand against the wall and press their hands against it, but since his face was not completely pressed against the wall he was able to see the person who gave him a blow in his right hip. That person's name was Mile, who was a waiter before the conflict.

154. The witness Nurija Nuhanović also claimed that he was able to see Sreten beating one of the three prisoners with a baton until he knocked him down. He was able to see this in spite of his facing the wall because it was happening on his left-hand side. After Mehmedalija fell down, Sreten turned toward him (the witness Nuhanović) and started beating him, and shortly afterwards the witness fainted. When he regained his consciousness, he was lying in another corner of the room, covered in blood, not knowing if the blood was running from his nose or from his mouth.

155. Apart from the aggrieved Nuhanović, the witness Ramis Smajlović was the only other witness who testified about the given incident, who confirmed that Nurija was taken out and beaten on one occasion, but when asked by the witness as to who had beaten him, Nurija said that he did not know, but later he pointed with his eyes to Sreten thus linking the name to the perpetrator. (Witness Smajlović knew the accused Lazarević well at the time, as a colleague from the same company).

156. Defence for both the accused questioned the credibility of victim Nuhanović, due to the alleged discrepancies and differences between his investigation statements and the testimony given at the main trial, whereas the Defence Attorney for the accused Marković, speaking in favour of his client's innocence, referred in detail to the testimonies of many witnesses, both the Defence and the Prosecution witnesses.

157. Following a thorough analysis of all presented evidence related to this circumstance, the Panel concluded beyond a doubt that the accused Lazarević was guilty of the actions concerned as described by the witness-the aggrieved Nurija Nuhanović. Taking into account the testimony of the witness Ramis Smajlović, the Panel had no dilemma about this part of the witness testimony related to his being beaten up by the

[32] In his testimony, the witness mentions Fethija Nuhanović, Mehmedalija Nuhanović and Ramo Ibrahimović, however, since these prisoners were not mentioned in the Indictment, this Panel did not analyse the accused's guilt in relation to the alleged beating of these persons.

accused Lazarević, whereas the conclusion was different with reference to the guilt of the accused Marković. This specific case does not involve an unprincipled application of double standards in terms of giving credence to one part or a witness statement and not giving credence to another part of the same witness statement. Instead, this involves the lack of other corroborating evidence in order to base a person's guilt merely on one witness testimony, which was not sufficiently certain in this part. Since the case involved a single witness – direct victim, in order to find the accused guilty, his statement needs to be convincing and clear enough, or at least corroborated with certain circumstantial evidence, which is the case with respect to the Accused Lazarević, but not with respect to Marković.

158. On the grounds of testimony of the victim Nuhanović and testimony of indirect witness Ramis Smajlović, having the weight of corroborating evidence, the Panel established beyond a doubt that the accused Sreten did beat the injured party on that occasion and inflicted serious suffering upon him. In this regard, the witness Smajlović's statements that this victim was actually beaten up, which was also disputed by the Defence, and that immediately after the beating he pointed at the accused Sreten as the perpetrator, had a decisive importance and are fully in accordance with his statement given during the investigation – that since he knew the guards, he arranged with people to point with their eyes at the person who had beaten them.

159. It is true that there are certain discrepancies in victim Nuhanović's statement which he gave in different phases of the proceedings. Namely, in his statement made before the Prosecutor's Office of BiH, dated 24 May 2007, the victim did not specify Lazarević as the perpetrator, but explained it by saying that nobody ever asked him about that and that he made his "main statement" at the main trial, which is totally natural and logical conduct of the witness in the given circumstances (it frequently occurs that witnesses truly speak only about what they are asked, and although they have much other information they do not find it appropriate to disclose it unless they are directly asked about it.) Bearing in mind the standard that *the inconsistencies in the testimonies of the witnesses do not mean that the Trial Panel which acts reasonably has to reject the testimony as unreliable,* the Panel established that the stated discrepancies are not of a crucial importance and thus cannot be taken as decisive differences.

160. The Panel made the foregoing conclusion since the witness said in the disputable statement made in the investigation that Sreten previously beat one of the three detainees who were taken out with him. In other words, even then the witness mentioned Sreten Lazarević and identified him as a participant in the beatings, however he did not specify that he himself was beaten, but afterwards, as it happens often in testimonies about incidents that happened a long time ago, he started thinking

about and analyzing the disputable situation, refreshing his memory with details. This is corroborated with the statement that a few days later Sreten asked Nurija and others if they wanted to go out to work, and said to the victim, "What happened, happened!", which the Accused surely would not have said if he had not participated in the incident (beating). On the contrary, this comment sounded as an indirect regret and apology to the witness Nuhanović, which he would not have had the reason to make had he not participated in the beating himself.

161. The mentioned comment of the Accused to the aggrieved Nuhanović and the conclusion of the Panel are corroborated by the statement of the victim that he was beaten only on that occasion and never again, which clearly suggests the purpose of comment made by Lazarević (expression of regret and apology). Nuhanović's statement also suggests his honesty and lack of motivation to point at the first accused as the person who beat him, and without having any reason to do so with respect to the actual incident.

162. The Appellate Panel finds that the testimony of witness Nurija Nuhanović does not contain discrepancies in relation to the two most important things: what he experienced and the role and actions of the Accused Lazarević , wherefore the Court finds it convincing and corroborated with other presented evidence pertaining to this circumstance. Thus the Court found beyond any reasonable doubt that the Accused Lazarević committed the criminal offense as stated in Section I.3. of the operative part of this Verdict.

163. The Panel finds that the beating experienced by Nurija Nuhanović was aimed at and resulted in his severe physical suffering, which is obvious given his physical injuries that he sustained on that day, that is, the only day when Nuhanović was beaten up while in the *Novi Izvor*. This conclusion of the Panel did not require the findings presented by the victim and disputed by the Defence. Therefore, even without these findings, the Panel had sufficient evidence to render this conclusion, whereby the duration of the suffering and the long term consequences thereof are not of major importance. The foregoing is corroborated with the conclusion of the ICTY Judgment, "the suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious"[33], which is what happened in this case (losing consciousness due to the blows sustained).

164. In this regard, the statement of the Prosecution witness Ismet Ibrahimović that Nurija came to Germany soon after he left the prison and that the witness found him a job at his cousin's, where he worked for a year or so, when the victim did not complain about the pain or inability to work, does not have a decisive importance in the conclusion that the beating indeed took place. Assuming that witness Ibrahimović's statements are entirely true, it is quite probable that the victim Nuhanović wanted to

[33] See *Krnojelac* case, ICTY Trial Judgment, paragraph 131.

bottle up everything that happened as soon as he left the prison, and continue a normal life, and a way to do that was not to talk about it or, if he had to mention that, not to go into detail at all. Such a psychological state is typical for numerous direct victims of abuse.

165. According to the Appellate Panel the perpetrator of this severe beating, Sreten Lazarević, acted with direct intent, because by his conduct, that is, beating a person unconscious, although he had a task to protect such person from the physical assault by anyone, and was fully aware that his actions could produce a forbidden consequence but he still wanted such consequence to occur, whereby he committed the criminal offense of Inhumane Treatment in violation of Article 173(1) subparagraph c).

166. As opposed to this finding, the Panel could not conclude beyond a reasonable doubt that Mile Marković was guilty of taking part in any way in the action concerned.

167. Therefore, the Panel could not give credence to the part of the victim Nuhanović's statement that on the occasion concerned the accused Marković too beat him by kicking him in the area of his right hip. This Nuhanović's averment could not be accepted because the victim did not say immediately after the incident took place that the accused had committed this act, which will be reasoned below, and that there is not a single corroborating evidence that the accused Marković committed this crime, on the basis of which Nuhanović's claims that the Accused Marković kicked him in the area of his hip would be confirmed.

168. Specifically, when asked by Ramiz Smajlović immediately after the incident, the victim as the only eyewitness of the incident said that he did not know who had beaten him, but a few days later he pointed with his eyes at Sreten Lazarević. Bearing in mind that the victim Nuhanović, as he states himself, knew well the accused Marković as a waiter from before, it is illogical that he did not immediately identify him as a perpetrator, if he was an actual perpetrator, wherefore his testimony is uncertain in that part. This does not mean that this part of the witness statement is automatically untrue; it just means that it is not certain enough and, given that there is no corroborating evidence, it is insufficient to find the accused guilty on the basis of this witness only.

169. The foregoing is also corroborated with testimonies of Defence witnesses, primarily of Mustafa Halilović, who kept a diary of the incidents in the prison, and there is a note that *„Mile, the waiter, did not beat people",* which he also confirmed during his testimony at the main trial, when he said that Nurija did not tell him that he was beaten by Mile. Witness Ahmet Bošnjaković stated at the main trial that Mile had never beaten Nuhanović. Also, many Prosecution witnesses, including Ahmet

Omerović, Mirsad Omerović, Samir Pezerović, Admir Hadžiavdić all say that they did not hear or see Mile beating or maltreating anyone, and that he was fair to everyone.

170. Bearing in mind all the foregoing, the Panel concluded that as regards the charge concerned, the evidence presented by the Prosecution by its quality is not sufficiently convincing for the Court to conclude beyond a reasonable doubt that the accused Mile Marković committed the act with which he is charged in the Indictment. Therefore, the Panel finds it justified to apply the *in dubio pro reo* principle, that is, the rule that "a doubt with respect to the existence of facts constituting elements of a criminal offense or on which the application of certain provisions of criminal legislation depends shall be decided by the Court verdict in the manner more favorable for the accused" (Article 3 of the CPC of BiH). This means that the facts to the detriment of the accused must be established with absolute certainty, that is, „beyond a reasonable doubt", and in case of a doubt about such facts – and this Panel found the existence of such doubt – then they cannot be considered established. On the other hand, the lower premise of the aforementioned rule states that the facts in favour of the accused are taken as established even if they are merely probable.

171. As the Panel could not find beyond a reasonable doubt the participation of the accused Marković in the beating, thus pursuant to Article 284 subparagraph c) of the CPC BiH it acquitted him of guilt regarding the given criminal offence.

Section I.4. Sreten Lazarević and III.1. Slobodan Ostojić

172. According to the Appellate Panel, during the trial the Prosecutor proved beyond a reasonable doubt that both prisoners, Ramis Smajlović and Admir Hadžiavdić, were severely beaten in *Novi Izvor* by the prison guards, including the accused Slobodan Ostojić, who took them out from the detention room to another room, where they were beaten while Sreten Lazarević was watching it. On the basis of the presented evidence, the Panel concluded that the incidents stated in the operative part of the Verdict did happen, and that they constitute War Crimes against the Civilian Population in violation of Article 173(1) subparagraph c) as read with Article 29 of the CC BiH.

173. Many witnesses, including Samir Pezerović, Ramis Smajlović, Admir Hadžiavdić, Mustafa Halilović and the protected witness A, testified about this incident and all agree that the incident indeed happened as described in the operative part of the Verdict.

174. Specifically, as the witness Admir Hadžiavdić stated himself, Ramis and he were beaten up due to an alleged attempt of escape and, after the disputable „key" that they were supposed to hand over as a proof of the attempted flight was not found, they took them to a big room opposite from the prisoners' room. There, they were ordered

to stand facing the fall, which is when he could observe that guards Sreten, Miloš, Mali and Veliki Dragan and Slobodan Ostojić were present. They beat them up with police batons. He was beaten by Dragan and Slobodan, whom this witness identified in the courtroom, but could not see who was beating Ramis, whereas Sreten was all the time present in the room but did not beat him.

175. According to the testimony of Hadžiavdić, he was able to see all the guards clearly, because several times he turned in their direction asking them to stop the beating, claiming that nobody had an intention to flee, but they responded with curses and swearwords. It seemed to him that the beating took forever, and every time he fell down they would tell him to stand up, and when he was no longer able to stand up they would kick him while on the floor. A few times he pretended that he fainted, but they would not stop beating him. He does not remember whether they stopped because they got tired or because someone ordered them to do so.

176. Witness Ramis Smajlović describes the incident in the same manner. He is sure that Mali Dragan and Slobodan beat him, while Sreten was present there all the time, but did not react at all in order to prevent or stop the beating. At the time of the beating he knew only Sreten, while he learned the names of the others later on when he talked to other prisoners. He was beaten with a police baton over his back and his low leg muscles, but he never fell down. He did not hear the guards talking, except that he thought he once heard Dragan Veliki saying that maybe they were not guilty.

177. Witness Ramis Smajlović also states that he could not see what was happening to Admir, that he knows that he was beaten and covered with bruises. This Panel finds this logical, because in such circumstances the victims, while being beaten, do not have time to observe what is happening in other parts of the room, that is, to see who is beating the other prisoners or how they are beaten.

178. The Defence for the accused Lazarević questioned the credibility of witness Smajlović and the truthfulness of his averments, whereas the Defence for the accused Ostojić points at certain crucial contradictions in witness statements in relation to this circumstance, and as the main argument states that the accused did intend to escape and that the establishment of this circumstance may be significant for the essential elements of the criminal offense with which he is charged.

179. However, the Panel gave full credence to the statements of the injured parties – direct victims of beating, and found their testimonies clear, concise and in line in terms of the decisive facts. The fact that they did not pay attention as to what was happening to other prisoners and did not see which guards beat them is fully logical in the given circumstances when they were subjected to severe physical suffering. Each of the two

was undoubtedly focused on his own suffering, and since they were in great pain and fear for their lives, they were trying to exert final efforts to make the beating stop.

180. The fact that the incident concerned undoubtedly took place is confirmed by witness Nurija Nuhanović who states that on one occasion the guard Slobodan entered the room asking that a pry-bar or key be handed over, for he had allegedly seen one of the prisoners bringing it in. Then he clearly set an ultimatum saying that the mentioned items should be thrown out under the bars, and that it was not necessary for him to know who had taken them. At that moment the witness Nuhanović did not know if any prisoner truly had the requested items.

181. The foregoing is also corroborated by protected witness A who was present in the same room. He testifies that it was none other than the guard Slobodan who took Admir and Ramis out of the room, having set a prior ultimatum, and later on he returned and said: "*Ramis, Admir, you did not bring it, the time is up!"*, and subsequently he took them to the room next door. It is this guard who after the beating brought Admir back to the prisoners' room, carrying him under his arm, because he was unable to walk due to the blows he had received. This witness also avers that the injuries on Ramis and Admir were rather visible, and while they were beaten up, he could hear the punches and cries from the room where they had been taken to.

182. Mustafa Halilović also testified about this, saying that Veliki Dragan beat the prisoners alone and in the room where they all were present, including the witness, and that he was telling them „This is because you tried to escape!". Mustafa Halilović testifies that he could clearly hear Slobodan asking the victims if they had wanted to escape.

183. The Panel took into consideration the testimony of the witness Halilović to the extent necessary to additionally corroborate the fact that the victims were beaten, noting that other details do not match the testimonies of other witnesses, and concluded that the other witnesses probably confused it with some other similar incidents, particularly the incident when Murat Kuduzović was beaten.

184. Witness Samir Pezerović also stated that he heard that Ramis and Admir had been beaten up.

185. Therefore, on the basis of all testimonies, the Panel established beyond a doubt that the accused Lazarević and Ostojić committed the criminal act described in detail in the operative part of the Verdict. The Panel did not engage in the analysis of the guilt of the accused Stanojević, although he too is mentioned in the witnesses' and victims' testimonies, since the Prosecutor's Office did not charge him with this act. The Prosecutor's Office disposes of the Indictment and decides whom to charge, so the

Court does not have competence to analyze the reasons why the Prosecutor's Office does not charge all those persons claimed by the witnesses to have participated in an event but only some participants, but even such fact (that a person is not accused) cannot be considered as evidence that the witness is not credible, which is what the Defence unfoundedly tries to emphasize.

186. There is no doubt that the beating in question caused great suffering, both mental and physical suffering of victims Smajlović and Hadžiavdić. Witness Hadžiavdić described that upon their return to the room he and Ramiz were "*black and blue from this beating"* and other prisoners helped them by putting on poultices. He felt the consequences of this beating even for the following three days, since he was unable to go to the toilette on his own because he could not stand on his feet, thus he was usually carried there. In that time period other prisoners even helped them by feeding them, which clearly indicates that Smajlović and Hadžiavdić did experience great suffering.

187. According to the Panel, there was no justification for such beating, so the Defence's arguments that the beating does not amount to a criminal offense, but only to the exceeding of official authority, considering the attempt of escape of these two prisoners, are absolutely unacceptable.

188. Specifically, since the detention of Admir and Ramis was unlawful, as both accused knew well, they cannot be faulted for even considering to escape. Their considering or possibly planning to escape could absolutely be expected in the given circumstances. Their imprisonment did not have any legal grounds. They were deprived of liberty, abused together with other prisoners just for being members of a different ethnic group and were every day afraid of the outcome of their detention. Apart from that, it was not at all the use of force in the course of escape, or the use of force necessary to prevent the escape.

189. In order to justify such actions of the guards, the Defence tendered into evidence an excerpt from the Rulebook on Performance of Public Security Duties – published in 1977, which, according to the expert witness Mile Matijević, was acted upon even in 1992. The Defence's arguments were thus contradictory. Specifically, in the part referring to guards' responsibilities to protect the prisoners they also speak of their ignorance of the Rulebook and procedures, and then suddenly, when they find it to be in their favour, they refer to the Rulebook.

190. Expert witness Mile Matijević, explaining the mentioned event, referred to Article 43 of the Rulebook, which defines the situations when it is justified to use force against prisoners; however, he too categorically stated that during the searches and finding the items which serve for the escape it is physical force that should be used first, while the

rubber baton should be used as the last resort. In addition, he firmly avers that it is justified to use the means of force only as long as the active or passive resistance lasts, and expressly states that in so doing a police officer must not use excessive force.

191. Regarding the given arguments by the Defense and the application of the Rulebook, it should be taken into account that all the persons in the Court and Novi Izvor buildings were unlawfully deprived of liberty and detained. Therefore, the legitimacy in acting was violated in the very beginning and the Defence refers to it only when the rights of the accused are violated. If the guards acted pursuant to the law and the Rulebook, how was it then possible that in a number of situations they neglected this basic duty, which the expert witness for the Defence pointed out several times in his testimony, relating to the safety of the detainees, that is, preventing the unauthorized personnel from entering the prison and maltreating the prisoners, which happened almost every day. Apart from that, even when the force is used, in the situations defined by the Rulebook, when active and passive resistance is put up, the force must not be excessive, and it must not be a retaliation or punishment to the prisoners, which the guards would use on their own accord. Therefore the conviction on the part of the guards about the intent of the prisoners Smajlović and Hadžiavdić to flee, could by no means be accepted as justification for the committed crimes.

192. The accused Sreten Lazarević and Slobodan Ostojić acted as co-perpetrators in the commission of the offenses under Count 4. Slobodan Ostojić is a direct perpetrator of the offense, but the Accused Sreten Lazarević gave decisive contribution to the commission of the offence. His contribution included not doing what he was obliged to do based on the Rulebook to which he referred – to protect the prisoner from any unlawful treatment, such as physical assaults of other persons, including the guards. Instead, he was in the room all the time, watching it all, and thereby he clearly supported the unlawful acts of other guards. He also consented to the bringing of the prisoners Smajlović and Hadžiavdić, which he was obliged to prevent. By such acts the Accused Lazarević clearly demonstrated that the beating is the expression of his will too, and that he too wanted the forbidden circumstances to occur, that is, that he too, as the Accused Ostojić, on the given occasion acted with intent in committing the criminal offence with which he is charged.

Count I.5.

193. Having analysed the presented evidence, the Panel however could not beyond any reasonable doubt establish the liability of the Accused Lazarević in relation to the charges as detailed under Count I.5. of the Indictment, or Section I.1. of the acquitting part of the Verdict.

194. To wit, under this Count of the Indictment the Accused was charged with multiple events, where in some of these the Accused acted as a direct perpetrator by personally unlocking the doors to the premises where civilians where detained, enabling members of paramilitary troops to inhumanly treat the prisoners, while in other instances his liability for the crimes committed derived from his command responsibility in that he allowed other guards to do so without being punished – enabling inhumane treatment by unidentified persons.

195. The Panel found it indisputable that the incidents indeed happened, that is, that unknown soldiers had abused prisoners on multiple occasions, one such instance being carving crosses on the foreheads of prisoners Fahrudin Memić, Edin Skurlić and Fadil Handžić, and sexual abuse of some of the prisoners by forcing them to put their sexual organs into one another's month, including Ramis Smajlović, who was forced to perform this act with another, unidentified prisoner of Roma ethnicity.

196. The foregoing ensues from the testimonies of witnesses Fahrudin Memić, Ramis Smajlović, Alija Buljubašić and Mirsad Omerović.

197. Witness Ramis Smajlović recalls that the incident involving the carving of crosses took place on an unidentified date, during the night. At the time, the prisoners had already been asleep when the paramilitaries entered the premises of DP Novi Izvor, and first took out and beat Fahrudin Memić and Kasim Pedžić, and thereafter one Saša came with his group, including a girl in a camouflage uniform in their company. One of the persons from the group carried a knife of special make and with a very sharp tip. The same witness, who is at the same time a victim of the sexual abuse, also confirmed that on one occasion soldiers led by one Saša came to the premises of DP Novi Izvor, and forced witness Smajlović and others to perform oral sex on each other. The witness was forced to perform the act with a person of Roma ethnicity, and Fadil Handžić with an elderly man.

198. Witness Alija Buljubašić recalls the incident on the premises of DP Novi Izvor, when on one occasion armed soldiers entered the detention premises and carved crosses on the foreheads of Skurlić, Fazlić and Fahrudin Memić. According to the witness "the men were later on ordered to lick their own blood off the floor". Buljubašić was an eyewitness to their carving crosses on the foreheads and chests of the named prisoners. He does not know how they entered the premises, considering that the door was locked, but assumes that the guards allowed them entrance. Further, Buljubašić claims that the guards did not enter together with the soldiers, so presumably they would have stayed in front of the door.

199. Witness Mirsad Omerović was not present during the incident, but on his return from labour he could see the scars on Skurlić and Fadil. He saw that their injuries were deep, and believes that Edin Skurlić still has a visible scar on his forehead, since they

used a bayonet to carve a cross on him, as the witness heard, and Omerović also heard that the act was committed by a certain Saša.

200. The Panel holds that the foregoing indisputably happened, however, what remains disputable in this specific incident and conditions the liability of the Accused Lazarević in relation to the charges, is his presence or any form of contribution in the commission of the acts he is charged with as a direct perpetrator, that is, his knowledge about the commission of these acts by other guards, and accordingly, establishing his responsibility for failure to take reasonable measures to prevent, sanction or at least report their misconduct to the superiors.

201. Specifically, none of the witnesses, including the injured witnesses-victims Smajlović and Memić, mentioned that the Accused Lazarević was present there. According to witness Memić, in his description of the incident involving sexual abuse, Veliki Dragan opened the door, and Saša came after him, in the company of two men and a young woman, whereafter Saša ordered Ramis and another man to pull their pants down and perform oral sex. Smajlović too described this incident without mentioning the Accused Lazarević in any context.

202. The Indictment alleges that the Accused Lazarević, over the specified period, on several occasions unlocked the doors or allowed other guards to do so, **wherein** on undetermined days unidentified soldiers entered and committed the specific acts of inflicting severe physical and mental suffering upon the named victims, and violating their human dignity. All the foregoing falls short of the specific factual basis to reflect each of specific forms of participation on the part of the Accused, specifically **in what way** and **through which specifically undertaken acts** did the Accused enable soldiers to abuse the prisoners in the described instances of sexual abuse and carving crosses, whether taking part personally – by unlocking the door or allowing that to other guards.

203. None of the said witnesses could confirm with certainty that on the relevant occasions the Accused Lazarević would unlock the door or at least be present in the building, while they were all certain about the presence of the Accused Stanojević on the relevant occasions. In describing the beating of Memić on several different occasions, witness Mirsad Omerović was the only one who testified that guards were also present there during those incidents, mainly Veliki Dragan or Sreten. His claim is general, considering that the witness did not give any specifics or a detailed description of specific situations where the Accused Lazarević was also present, or what his participation comprised. Without that it could not be found whether those are the incriminating incidents or other similar ones, which are not covered by the Indictment.

204. Therefore, all the foregoing was insufficient for the Panel to make inferences beyond any reasonable doubt on any form of participation on the part of the Accused Lazarević in relation to these specific charges.

205. The Accused cannot be held liable on the grounds of command responsibility either, considering that it had already been found that he did not have effective control over other guards, so, given the lacking evidence that the Accused at least had knowledge about the commission of the acts charged, the Panel could not find him responsible for the omission, that is, failure to take any reasonable measure to prevent, sanction or at least report their misconduct to the superiors. Not even the mere presence of the Accused in the prison building at the time of commission of the given offences was proven during the proceedings.

206. Considering that the evidence proffered is insufficient for the Court to infer beyond any reasonable doubt that the Accused committed the act as charged by the Prosecution, in the application of the *in dubio pro reo* principle, the Court acquitted him of responsibility for the commission of the acts described under this Count of the Indictment.

Count II.1.

207. Unlike in the case of Lazarević, the Panel indisputably found that the Accused Dragan Stanojević on a number of occasions unlocked the prison premises and thus enabled Serb soldiers to beat the injured witness Fahrudin Memić, by pointing at him and telling the soldiers that he was the one who had wounded a Serb, including a beating by a group led by one Saša, in the manner as described under this Section of the operative part of the Verdict.

208. Victim Fahrudin Memić himself testified about these incidents, as well as witnesses Alija Buljubašić, Ahmet Omerović and Mirsad Omerović.

209. During the main trial, the victim Memić testified that the guard Dragan, on a number of occasions, opened the door for soldiers, pointing at him and telling them that he was a member of the Army of BiH, that he threw a hand grenade and wounded a Serb soldier, thus later on earning a nickname “the bomber”. This guard continually incited soldiers to beat him. The witness knows with certainty that it was exactly Veliki Dragan, as they called him, who opened the door and pointed at him, but he is not certain if he would stay in the room while others were beating him. This guard was sturdy and with darker complexion, and in the courtroom he identified him as the second accused Dragan Stanojević. His general conclusion is that he would be beaten every time when Dragan would open the door.

210. Witness Alija Buljubašić remembers one occasion when a solider came to the premises of Novi Izvor, accompanied by guard Dragan, and asked the witness if he knew Abdulah Buljubašić, and after the witness replied that the man was his cousin, he sustained a blow with a police baton. The Accused Dragan, who was still present there, told him that there was no need to ill-treat the witness Buljubašić, as he was wrongfully detained, so he pointed at *a lad from Sapna*, whom he would usually point to soldiers, claiming that he was a member of the Army of BiH, after which soldiers would abuse him. He personally believes that Dragan had a criterion for the selection of persons he would always point to. On multiple occasions, the witness brought sugar cubes and some drops and medicines he would come across in houses to this lad from Sapna, in order to calm him down. He did so each time he would be beaten, which was relatively frequent. This "*lad from Sapna*" was in fact Fahrudin Memić.

211. Witness Fadil Smajlović confirmed that *the lad from Sapna* was abused practically every time, sometimes he would see as they would throw him back inside the room after being beaten up, and a couple of times he was present when soldiers were beating him, while the guards were not present in the room.

212. The witness Mirsad Omerović claims that he was also present there a few times when soldiers were beating Fahrudin Memić, and he could observe that Dragan would open the door, and upon soldiers' entrance he would usually stay there, meaning he would not enter the room but would only watch, without taking any actions to prevent the soldiers from abusing this prisoner.

213. In addition to the daily abuse of Fahrudin Memić, the witnesses also confirmed the incident that Stanojević is charged with under the Indictment. To wit, this incident took place on the same day as did the sexual abuse of witness Ramis Smajlović. Specifically, victim Fahrudin Memić testified that on that day he saw guard Dragan opening the door, and Saša came inside the room after him, followed by two men and a girl. After abusing Ramis, they ordered the victim to lie down on the floor, with his hands closed in a fist, that he had to place under his stomach, and at least one of them jumped over his back, on which occasion he started bleeding from his ear, probably due to some pressure. The girl from this company addressed all those detained in the room saying that they would return the following day and repeat all that.

214. This was also confirmed by witness Ahmet Omerović, who was present in the room when a person in uniform, with a cockade on his hat, was jumping over Memić's back, as he was laying on the floor. In his evidence he confirmed that it was actually the guard Dragan, whom he identified in the courtroom as the second accused, who nicknamed Fahrudin Memić "the bomber", and every time pointed to the soldiers that it is Memić whom they should beat.

215. The Panel accepted beyond any reasonable doubt that Fahrudin Memić was frequently beaten during his incarceration, and that the injuries sustained were clearly visible, which was also confirmed by other witnesses who were staying together with him. In this regard, the Panel accepts the findings and the opinion of expert witness Vidak Simić, yet does not find it relevant to a sufficient extent for the purpose of these specific beatings.

216. In his own admission, the expert witness confirmed that he did not directly examine the witness and he testified generally based only on the evidence presented to him. Additionally, the scale of pain based on which the expert witness concluded that light bodily injuries were inflicted in the instance in question is applicable in ordinary life circumstances, free from traumatic incidents of physical or psychological nature before inflicting the specific injury, or untreated previous injuries. To wit, victim Memić was indisputably beaten frequently and continuously in the circumstances of helplessness and without being administered any medical assistance. In fear, the victim awaited every new day to bring new beatings and sadistic abuse by wanton individuals, whom he was pointed to by the Accused Stanojević. He knew that every arrival of soldiers for him would mean another beating until he becomes weary or faints, for the sole reason that a person arbitrarily and unfoundedly would choose him, deliberately and in a targeted manner, provoking anger in soldiers to beat him.

217. The arrival of the Accused in the company of soldiers and pointing at Memić was most certainly a scene which in itself, in addition to the routine beatings, was suitable to raise fear with the victim, and be almost a certain indication of what is sure to follow shortly thereafter. Due to the specified acts, the victim suffered severe mental and physical suffering required to meet the standard of inhumane treatment.

218. The Panel analysed the averments of the Defence that the Accused did not want to mistreat prisoners, in addition to the statements by some of the victims who stated that he perhaps pointed to Memić in order to save the rest of them.

219. In that regard, it is indisputable that the Accused did not treat all as he did with the injured witness Memić, however, from the perspective of the criminal law, this fact alone is insufficient to acquit the Accused of the unlawful treatment of Memić, and these circumstances (good treatment of others) will definitely be considered as mitigating while meting out the punishment. In this view, the Panel points to the part of the reasoning where the testimonies were analysed about the character and reputation of the Accused. However, through specific acts aimed at a particular individual, the Accused satisfied all chapeau elements of the criminal offence of inhumane treatment, hence his benevolence towards the other prisoners cannot

exculpate him of his guilt for the acts he indisputably committed with intent toward the aggrieved Memić.

220. In the opinion of this Panel, the Accused had the knowledge and volition to commit the act. He was well aware that paramilitaries who abused prisoners would come to the prison facilities, therefore he was aware of the consequence and through his participation he wanted the consequence to take place, that is, he acted with direct intent. His objective contribution in the acts of commission is that the Accused voluntarily opened the prison doors, allowing full access to members of paramilitary troops onto the premises where prisoners were detained. Had he not agreed on the relevant occasion to allow access to these persons or had he prevented the abuse of prisoners, or called the police for help, the planned commission by the paramilitaries would not have happened.

221. Therefore, in these acts, the Accused Dragan Stanojević gave a significant contribution to the act of beating Fahrudin Memić, who sustained severe physical and mental suffering due to the beating, and thus the Accused committed the criminal offence referred to in Article 173(1)(c) in conjunction with Article 29 of the CC of BiH.

6. Application of Substantive Law

222. In terms of substantive law to be applied given the time of commission of the criminal offence, the Court upheld the legal qualification of the Indictment, applying the provisions set forth in the Criminal Code of BiH, and convicted the accused for the criminal offence of War Crimes against Civilians in violation of Article 173(1)(c) of the CC of BiH.

223. The Court was mindful of the submissions of the defence in terms of the mandatory application of a more lenient law in relation to the perpetrator, which, according to the Defense, in this specific case would mean that the Criminal Code of SFRY should have been applied to the accused given that it was effective at the time of the commission and which, as the defence believes, is more lenient towards the accused.

224. When making this decision the Panel took into consideration the time of perpetration of the criminal offense and the provisions laid down in the substantive law applicable at the time and the provisions of the CC of BiH which was passed later, with respect to the legal imperative to apply the law more lenient to the perpetrator, and found that in the specific case the applicable Criminal Code of BiH is more lenient than the CC SFRY.

225. When making this decision the Court was guided by two relevant legal principles, namely the principle of legality and the principle of time constraints regarding applicability.

226. The principle of legality is prescribed by both national Criminal Code (Article 3 of the CC BiH) and Article 7(1) of the European Convention on Human Rights (ECHR), that has primacy over all other laws in BiH (Article 2.2 of the Constitution of BiH), and Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR).

227. Article 7(1) of the ECHR prescribes: ”No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed“.

228. On the other hand, Article 15(1) of the ICCPR prescribes: ”No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.“

229. In examining the related legal criteria for the establishment of the more lenient law *(lex mitior)* for the perpetrators *in concreto,* following the objections raised by the Defense in its closing argument, the Panel found that considering the punishment prescribed for the criminal offense at issue, the CC BiH is more lenient to the perpetrators in relation to the Criminal Code of the SFRY that was applicable at the time of the commission of the criminal offense, which also proscribed the criminal offense of War Crimes against Civilians in Article 142.

230. Pursuant to Article 142 of the CC SFRY, the criminal offense at issue was punishable by the sentence of imprisonment for a term of at least five years or death penalty, while according to the applicable Code the same criminal offense carries the punishment of at least 10 years imprisonment or a long-term imprisonment. Having compared the foregoing punishments, the Court concluded that the punishment prescribed by the applicable Code is in any case more lenient than the earlier prescribed punishment regardless of the fact that under the earlier law the minimum punishment was five years. This is so because pursuant to the customary international law it was determined that the death penalty was in any case more severe than long term imprisonment. Also, pursuant to the customary law, it is an absolute right of a

suspect not to be executed, while the state must ensure this right, as was done by the new law adoption.

231. Furthermore, with regard to all the accused persons, the Panel found that another criterion was satisfied which in this specific case renders the applicable CC of BiH more lenient in relation to the Code that was applicable at the time of the criminal offense commission. To this end, in evaluating the code in force at the time of perpetration and the code in force at the time of the trial, in the case at hand the Court found that in relation to complicity, that is, the complicity acts of this Accused, the CC BiH is the more lenient code. This clearly ensues from Article 29 of the CC BiH which defines this instrument more strictly and restrictively. Therefore, pursuant to Article 4(2) of the CC BiH, the Court applied this Code to the specific case, which is also in accordance with the referenced Article 15(1) of the ICCPR.

232. Article 29 of the CC BiH prescribes: "*If several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, they shall each be punished as prescribed for the criminal offence.*"

233. It ensues from the quoted legal provision that complicity is a form of perpetration which exists when a number of persons satisfying all the requirements needed for a perpetrator, based on a joint decision, knowingly and willingly, commit a certain criminal offense, in the manner that in doing so each accomplice gives his contribution which is important and without which the criminal offense would not have been realized, or would not have been realized in the planned manner. Accordingly, in addition to the joint participation of a number of persons in the commission of the offense concerned, it is necessary that the awareness also exists on their part that the committed offense represents a joint result of their actions.

234. However, the Criminal Code of the SFRY, that was applicable at the time of commission of this criminal offense, prescribed that: *„If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act"*.

235. It ensues from this legal provision that all the persons who by participating in the act of commission or in any other way jointly committed a criminal offense will be punished, and that each perpetrator will be punished by the sentence that is prescribed for the committed criminal offense. Therefore, it is sufficient for the Accused to only participate in the act of commission of the criminal offence, regardless of how much that participation contributed to the commission of the offence.

236. Pursuant to the foregoing, an essential difference can be observed between the two legal definitions of the term "complicity". The difference concerns the fact that

according to the CC of BiH, the notion of complicity is given in a narrower sense, because the participation that does not represent an action of execution is now restricted to those actions that in a **decisive manner** contribute to the criminal offense, which is a much stricter criterion and far more difficult to prove, and thereby more favourable to the accused charged as co-perpetrators, while the earlier code only required that a general contribution (not a decisive one) to a joint consequence of the offense be established. In this manner a far broader range of actions fell under the co-perpetration.

237. In any case, having in mind all the foregoing, the Panel holds that the mandatory principle of application of a more lenient law in relation to the perpetrator cannot be absolutely applicable in trying those types of criminal offences where at the very point of their commission it was evident that the offences are contrary to the fundamental rules of both international and national law. In the specific case, it is indisputable that the accused were fully aware that their actions targeted common values protected in all legal systems, and that by taking actions as outlined in the factual description of the Indictment they were directly violating both national regulations as well as the rules of international law, as they were aware of the prohibited fatal consequence resulting from their attack against the universal value of human life.

238. Further in support of the foregoing, the Court refers to the ruling of the Constitutional Court of Bosnia and Herzegovina in the Abduladhim Maktouf case[34], concluding that in the specific case the issue of application of the CC of BiH in the proceedings before the Court of BiH does not violate Article 7(1) of the ECHR, which is still accepted and applied in a number of other judgments of this Court.

7. Sentencing

239. In meting out the punishment, the Panel was guided by common rules for sentencing as laid down in Article 48 of the CC of BiH, as well as the purpose of criminal sanction under Article 39 of the CC of BiH, and holds that the imposed sanction of nine (9) years imprisonment in relation to the Accused Sreten Lazarević, seven (7) years imprisonment in relation to the Accused Dragan Stanojević and five (5) years imprisonment in relation to the Accused Slobodan Ostojić would meet the foreseen purpose of punishment, and that, given the circumstances of the case, it would not be met by other more lenient punishments, as argued by the Defense Counsels.

240. While rendering the decision the Panel was mindful of the legal framework for the sentence imposed for the criminal offence at hand. Accordingly, the offence for which the accused were convicted carries a term in prison of not less than 10 years or long-

[34] Ruling handed down on 30 March 2007.

term imprisonment, the degree of criminal liability of the accused, the circumstances under which the offence was committed, the intensity of the threat, that is, the violation of protected value, as well as the past conduct of the perpetrators, their personal situation, conduct after the fact and their motive for the commission.

241. Therefore, mindful of the provisions of the cited Article, in individualising the sentences the Panel considered both mitigating and aggravating circumstances, taking into account that the accused committed the offences as reserve police officers – guards in the prison, while aware of their position and power in relation to the prisoners whom they were obliged to protect, whereby the Accused Lazarević acted as *de facto* Deputy Prison Warden, meaning that he bore a higher degree of responsibility, although not having the effective authority over other guards and possibility to remove them, to initiate disciplinary proceedings against them or to sanction them, he still had the possibility and was bound to report their unlawful activity. Of course, the panel considered also the numerosity of acts, that is, the persistence that the accused Lazarević and Stanojević demonstrated in the commission of the offence.

242. However, despite the listed circumstances, in the exercise of its discretion in terms of meting out a sentence, the Panel reviewed a possibility to reduce the sentence, and concluded that mitigating circumstances have been found to exist in relation to all three accused, which in their quality and importance are suitable to be viewed in their totality as particularly mitigating circumstances.

243. Therefore, as for these circumstances in relation to all the accused, the Panel considered their past conduct and a proper conduct before the Court, as well as due summoning without any measures ordered to secure their appearance, the fact that they were not previously criminally prosecuted, that they are family men with children. The Panel also took into account that they acted at the time and under the circumstances when the paramilitary formations by their cruel conduct and violent actions made the performance of sentry duties rather difficult, as well as the conduct of the accused after the fact, in the sense that they restored good relations with a number of prisoners and neighbours and the former detainees.

244. Furthermore, the fact that a certain number of witnesses testified that the accused assisted some of the prisoners and were not violent to them, are both circumstances that the Panel found mitigating. Accordingly, the Panel accepted that the Accused Lazarević on several instances assisted the prisoners by ensuring medical assistance to them, while witness Ramis Smajlović testified specifically that one time, on his own will, the Accused brought him 20 cans of beef spread, knowing that the witness does not consume pork. Likewise, witnesses Ismet Ibrahimović and Asim Banjanović testified that Sreten was good, and after Asim was beaten and brought to DP Novi

Izvor, he brought him inside, saying that "*no one will harm him again",* for which the witness remains grateful to him.

245. As for the Accused Dragan Stanojević, the Panel was mindful of the evidence of witnesses Fadil Smajlović whom the Accused assisted; Ahmet Bošnjaković, who thanked the Accused for his fairness in the prison; Alija Buljubašić, who described the event when Dragan saved them from paramilitaries while they were performing labour; Nenad Jeremić, who was drafted as a driver at the relevant time, and who drove prisoners to labour, where Dragan was most commonly the one to assist and protect the prisoners; Dobrivoje Ristić, who had the work obligation at his company's farm and who drove the prisoners from the Military Farm to perform labour. On the occasion, he would be given a list of supplies, especially cigarettes that the witness would buy in a small kiosk during his journey, while Dragan, as a guard who was taking them, never prevented them from doing so. Therefore, the Accused Stanojević assisted most of the prisoners during their stay in the prison, by demonstrating humanity and understanding, which is the very reason why most of the accused did not file property claims in relation to Stanojević.

246. As for the Accused Ostojić, the Panel was mindful of the absence of persistence and recklessness in the commission of criminal offences, in view of the commission of one single criminal act, as well as the fact that, in general, the witnesses, former detainees, do not recall him as a person prone to violent behaviour.

247. Following a detailed analysis of all mitigating circumstances individually, as well as in their mutual connectedness, the Panel found that these circumstances, as foreseen under Article 49(b) of the CC of BiH, in their totality amount to particularly mitigating circumstances and prevail over the listed aggravating circumstances, and indicated that the reduced sentence of imprisonment for the term of nine, seven and five years respectively can meet the purpose of punishment.

248. Therefore, all the foregoing facts suggest that the purpose of punishment, from the perspective of special, but also general deterrence, according to this Panel and in relation to the Accused Lazarević, Stanojević and Ostojić, may be satisfied with the sentences bellow the specific minimum in reference to this criminal offence. Therefore, applying the provisions concerning a reduced sentence referred to in Articles 49 and 50 of the CC of BiH, the Panel decided as stated in the operative part.

8. Decision on the costs

249. In view of the decision to relieve the accused of the duty to pay the costs of the criminal proceedings in relation to the convicting part of the Verdict, given the poor financial standing of the accused Lazarević, Stanojević and Ostojić the Court finds that the accused would not be able to bear the costs of the criminal proceedings, as the payment would jeopardise the sustenance of the persons whom the accused are obliged to support, particularly after the imposition of long prison sentences and custody, hence the Court relieved them of this duty in accordance with Article 188(4) of the CPC of BiH. While doing so the Panel was mindful that the previous decision on relieving of the duty to pay the costs was not appealed, that is, was not contested by any party, thus the first instance decision regarding the costs of the first instance proceedings has remained unchanged (and final), which is the reason why this decision, that is identical for the mentioned reasons, relates to the costs incurred in the appellate proceedings.

250. Pursuant to Article 189(1) of the CPC of BiH, the necessary costs in relation to the Accused Marković and his defence shall be borne by the budget considering his acquittal on all charges.

RECORD-KEEPER:
Medina Džerahović

PRESIDING JUDGE:
J U D G E
Mirza Jusufović

LEGAL REMEDY: No appeal lies from this Verdict.