BOSNA I HERCEGOVINA  БОСНА И ХЕРЦЕГОВИНА

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СУД БОСНЕ И ХЕРЦЕГОВИНЕ

COURT OF BOSNIA AND HERZEGOVINA

Case Number: **S1 1 K 014293 16 Krž 2**

Judgment pronounced on: **26 May 2017**

Before the Appellate Panel composed of:

Judge Hilmo Vučinić, Presiding Judge

Judge Tihomir Lukes, Reporting Judge

Judge Mirko Božović, member

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

G. V., M. D. and Ž. I.

SECOND INSTANCE JUDGMENT

Prosecutor for the Prosecutor's Office of B-H:

Behaija Krnjić

Defense Counsel for the Accused G. V.:

Attorney M.V.R.

Defense Counsel for the Accused M. D.:

Attorney D. B.

Defense Counsel for the Accused Ž. I.:

Attorney M. R.

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Number: S1 1 K 014293 16 Krž 2
Sarajevo, 26 May 2017

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel of the Appellate Division composed of Judge Hilmo Vučinić, as the Presiding Judge, and Judge Tihomir Lukes and Judge Mirko Božović, as members of the Panel, with the participation of Legal Advisor Neira Tatlić, as the record-taker, in the criminal case conducted against the Accused G.V., M.D. and Ž.I., for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the Criminal Code of Bosnia and Herzegovina (CC B-H), as read with Article 180(1) and Article 29 of the CC B-H, having decided on the respective Appeals by the Prosecutor's Office of Bosnia and Herzegovina of 28 September 2016, Attorney M.V.R., Defense Counsel for the Accused G.V., of 3 October 2016, Attorney D.B., Defense Counsel for the Accused M.D., of 3 October 2016, and Attorney M.R., Defense Counsel for the Accused Ž.I., of 3 October 2016, from the Judgment of the Court of B-H No. S1 1 K 014293 13 Krl of 8 July 2016, after a session of the Panel held on 26 May 2017 in the presence of the Prosecutor for the Prosecutor's Office of B-H, Vesna Ilić, the Accused G.V. and his Defense Counsel M.V.R., the Accused M.D. and his Defense Counsel D.B., and the Accused Ž.I. and his Defense Counsel A.L., pursuant to Article 310(1), as read with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC B-H), rendered the following

J U D G M E N T

The respective Appeals by the Prosecutor's Office of B-H and Defense Counsel for the Accused G.V., M.D. and Ž.I., are hereby **dismissed as unfounded,** and the Trial Judgment of the Court of B-H No. S1 1 K 014293 13 Krl of 8 July 2016 is hereby **upheld**.

REASONING

I. PROCEDURAL HISTORY

A. TRIAL JUDGMENT

1. Under the Judgment of the Court of Bosnia and Herzegovina No. S1 1 K 014293 13 Krl of 8 July 2016 (Trial Judgment), the Accused G.V., M.D. and Ž.I. were found guilty of the charges in Section I of the enacting clause of the Judgment, that is, of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC B-H, as read with Article 180(1) and Article 29 of the CC B-H, and the Accused G.V. also as read with Article 21 of the CC B-H. The Accused were sentenced as follows: the Accused G.V. to imprisonment for a term of 6 (six) years, the Accused M.D. to imprisonment for a term of 12 (twelve) years, and the Accused Ž.I. to imprisonment for a term of 5 (five) years.

2. Pursuant to Article 56 of the CC B-H, the time the Accused G.V. and M.D. spent in custody from 4 December 2013 to 30 December 2013 was credited toward the imposed sentences of imprisonment.

3. Pursuant to Article 188(4) of the CPC B-H, the Accused G.V., M.D. and Ž.I. were relieved of the duty to reimburse the costs of the criminal proceedings which were to be paid from the budget of the Court.

4. Pursuant to Article 284(c) of the CPC B-H, in Section II of the enacting clause of the Judgment the Accused M.D. and Ž.I. were acquitted of the charges that they committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC B-H, as read with Article 180(1), and the Accused Ž.I. also as read with Article 29 of the CC B-H.

5. Pursuant to Article 186(1) and (2) of the CPC B-H, the Accused M.D. and Ž.I. were relieved of the duty to reimburse the costs of the criminal proceedings with respect to the acquittal, so the costs were to be paid from the budget of the Court.

6. Pursuant to Article 198(2) of the CPC B-H, the injured parties were instructed to pursue their potential claims under property law in a civil action.

7. Pursuant to Article 283(b) of the CPC B-H, in Section III of the enacting clause of the Judgment, charges were dismissed that the Accused G.V., M.D. and Ž.I. committed

the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC B-H, as read with Article 180(1), and the Accused Ž.I. also as read with Article 29 of the CC B-H.

8. Pursuant to Article 186(1) and (2) of the CPC B-H, with respect to Section III of the enacting clause of the Judgment, the Accused were relieved of the duty to reimburse the costs of the criminal proceedings which were to be paid from the budget of the Court.

9. Also, pursuant to Article 198(2) of the CPC B-H, the injured parties were instructed to pursue their potential claims under property law in a civil action.

B. APPEALS AND RESPONSES

10. The Trial Judgment was appealed by the parties as follows:

- the Prosecutor's Office of B-H (the Prosecution) appealed the Judgment on the grounds of essential violations of the provisions of criminal procedure referred to in Article 297(1)(k) of the CPC B-H, incorrectly and incompletely established state of facts in violation of Article 299(1) of the CPC B-H, decision as to the criminal sanction referred to in Article 300(1) of the CPC B-H, and moved the Court to either grant all grounds for appeal in their entirety and revise the contested Judgment by establishing complete criminal responsibility of all Accused for the acts they committed that are listed in the amended Indictment, and by pronouncing them guilty and imposing on them the sentences of imprisonment lengthier than the ones they have been sentenced to, or to revoke the contested Judgment in entirety and schedule a hearing at which all evidence would be adduced again before a Panel of the Appellate Division of the Court of B-H (Appellate Panel);

- Defense Counsel for the Accused G.V., Attorney M.V.R., appealed the Judgment on the grounds of essential violations of the provisions of criminal procedure referred to in Article 297(1) and (2) of the CPC B-H, violation of the criminal code referred to in Article 298 of the CPC B-H, incorrectly and incompletely established state of facts in violation of Article 299(1) and (2) of the CPC B-H, and the decision as to the criminal sanction referred to in Article 300 of the CPC B-H, and moved the Appellate Panel to revise the Trial Judgment by rendering an acquittal, or to revoke the Trial Judgment and order a hearing;

- Attorney D.B., Defense Counsel for the Accused M.D., appealed the Judgment on the grounds of essential violations of the provisions of criminal procedure referred to in Article 297 of the CPC B-H, violation of the criminal code referred to in Article 298 of the CPC B-H, incorrectly and incompletely established state of facts referred to in Article 299 of the CPC B-H, and the decision as to the criminal sanction referred to in Article 300 of the CPC B-H, and moved the Appellate Panel to grant the Appeal and revoke the contested Judgment in the convicting part pursuant to Article 315 of the CPC B-H, and schedule a hearing on the ground of the existence of essential violations of the provisions of criminal procedure;

- Attorney M.R., Defense Counsel for the Accused Ž.I., on the grounds of essential violations of the provisions of criminal procedure referred to in Article 297 of the CPC B-H, violation of the criminal code referred to in Article 298 of the CPC B-H, incorrectly and incompletely established state of facts in violation of Article 299 of the CPC B-H, and the decision as to the criminal sanction referred to in Article 300 of the CPC B-H, and moved the Appellate Panel to revoke the contested Judgment and schedule a hearing pursuant to Article 315 of the CPC B-H.

11. The Prosecutor's Office submitted a response to the Appeals by the respective Defense Counsel and moved the Court to dismiss them as unfounded and to uphold the Trial Judgment.

12. Defense Counsel submitted to the Court of B-H their responses to the Prosecution Appeal, and moved the Court to dismiss the Prosecution Appeal as unfounded.

13. At a session of the Appellate Panel held on 26 May 2017, pursuant to Article 304 of the CPC B-H, the Prosecution stated that with respect to the conviction the Court modified the facts since a different finding of facts follows from the adduced evidence. The Prosecution claims that a widespread and systematic attack happened in both the area of ... and of .... . The Prosecution also emphasizes that the Accused G.V. and M.D. made the unlawful arrest possible and organized it. The Prosecution contends that the Accused V. was charged individually, personally, in line with Article 180(1) of the CC B-H, and that the Trial Panel misinterpreted it, as if the Accused had been charged with command responsibility, and after the Trial Panel established that such responsibility did not exist, it sentenced him for omission. The Prosecution particularly stressed that the Accused V. was a member of a Joint Criminal Enterprise (JCE) and that it was not possible to omit that

concept of responsibility in the Indictment. The Prosecution considered that with respect to the acquittal, the Trial Panel incorrectly established the state of the facts concerning S.M., given that that count was confirmed by the statement of an injured party. An incorrect inference was also made with respect to S.B. because of a link to a wrong person. In addition, the Prosecution also argued that the criminal sanctions were unusually light and that they should have been more stringent.

14. The Prosecution also delivered a response to the Appeals by Defense Counsel, which it considered unfounded and unsupported with arguments.

15. With respect to the essential violation of the provisions of criminal procedure referred to in Article 297(1)(j) of the CPC B-H, Defense Counsel for the Accused G.V. stated that the Accused was not charged with command responsibility under any Indictment. For that reason neither the Defense adduced evidence nor the Accused presented defense in that respect. Defense Counsel also considered that the Indictment was altered essentially and drastically, and that the Prosecution did not prove individual responsibility either. Defense Counsel therefore considered that the charge was exceeded. The Court established in the contested Judgment that the Accused V., as a co-perpetrator, perpetrated the act by omission. The Defense asked: *"Can this criminal offense be perpetrated by omission at all?"* The Judgment does not provide an explanation how the Accused knew and had reason to know about the committed criminal offenses. Defense Counsel noted that the Court was bound by the factual substratum, even with respect to the manner of perpetration. With respect to the killing of F. A., the Trial Panel made a correction to the factual substratum and created a new factual description. The Defense also argued that the Trial Panel exceeded the charge with respect to deportation. As there was no description of the acts of the Accused, Defense Counsel wondered how they had made it possible. With respect to the essential violation referred to in Article 297(1)(k) of the CPC B-H, the Defense emphasized that there did not exist a widespread and systematic attack, and that the Trial Panel did not evaluate all facts, that is, evidence. The Defense considered that the element of widespread attack was not proved, and that the Court took into account a broad period of time, given that they did not present defense for the period of 1991. With respect to the incorrectly and incompletely established state of facts, the Defense was of the opinion that the Court did not analyze the evidence properly. According to Defense Counsel, a mistake was made when a systematic en masse deprivation of liberty was established. The Defense considers that the arrests took place

on 10 June and that they were incidents conducted by paramilitaries. The situation in B. was chaotic for all its inhabitants as B. was in a tri-border area. Defense Counsel claimed that the Accused were not aware of an attack because there was no attack. The Prosecution did not prove that any of the Accused had possessed the required intent, since no witness confirmed that the Accused had acted with discriminatory intent. The Defense emphasized that the Trial Panel did not evaluate the statement of Defense witness S.A. The Defense corroborated his testimony with a piece of documentary evidence. According to Defense Counsel, the Trial Panel incorrectly established the decisive facts relative to deportation, given that there are no elements of the crime of deportation. Defense Counsel stated that the facts were incorrectly established regarding inhuman treatment as well. The Trial Judgment does not cite a reasonable conclusion to support the claim that severe mental and physical suffering was caused. The Defense stated that the criminal offense was not proved on the basis of the finding and opinion of expert witness K., who made the finding for just nine injured parties, whilst the Prosecution listed twenty-four injured parties. The Defense also pointed that expert witness H. Ž. based his finding and opinion for injured party M. on the medical documentation that had been delivered from Spain. With respect to inhuman treatment, the Defense stressed that there was no plan and that the Accused V. could not have any influence on the conditions in which the detained persons were staying, and members of their families used to bring them food, which shows that the imprisoning was not organized. The Defense stressed that the circumstances of 1992 should be taken into account. Defense Counsel also stated that the Court did not evaluate the effect of a field telephone on human body, about which the Defense adduced its evidence. When it comes to the death of injured party F.A., Defense Counsel stressed that expert witness Ž. established that the soft tissue of F.A's body was gone, so he could not determine the cause of death. With respect to a breach of the Criminal Code, the Defense cited the relevant reasons in the Appeal, but emphasized that the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) should have been applied in the case at hand. The Defense also considers that the Trial Panel should have given the right to appeal the established facts. It was also emphasized that the imposed sentence was too high and that a sentence below the statutory minimum should have been imposed. Defense Counsel, therefore, concluded that he fully maintained the Appeal and the response to the Prosecution Appeal.

16. The Accused G.V. stated that he agreed with the averments of his Defense Counsel

and that he had nothing to add.

17. Defense Counsel for the Accused M.D. stated that he fully reiterated all grievances in his Appeal, and that the Court regarded the respective Appeals by the first Accused and the second Accused as an integral text. The Defense stressed that there was no description of the act of commission or omission either in the amended Indictment or in the Judgment, and that enabling or organizing was referred to as the relevant act of commission. Therefore, the Defense concluded that the Accused were convicted for the wording in the enacting clause of the Judgment. Defense Counsel also stated that another problem was the exception to direct presentation of evidence given the fact that the Trial Panel forgot to enter into the case file the statement of H.Ć., which was a Defense exhibit, although the Panel entered it in the annex to the Judgment. The Defense therefore considered that the Court did not evaluate that statement. Defense Counsel also pointed that the Defense had tendered 35 pieces of documentary evidence but that not one was evaluated, and that the Court only addressed the evidence of the convicting nature. Defense Counsel found unacceptable the Court's position that only an objective piece of evidence that the Accused M.D. was outside of B. in the relevant period could have saved him from a conviction. Defense Counsel also stressed that the amended Indictment did not read that there was someone else in addition to the police, that is, military or paramilitary force, in the field. He also stated that the contested Judgment used different terms with respect to where the Accused M.D. was a commander, at the PS [Police Station] ... or SJB [Public Security Service] .... The Defense also argued that the charge was exceeded with a description that both military and paramilitary forces were in the field, which constitutes an absolutely essential violation of the Criminal Code provisions. The Defense made a particular reference to the statements of witness A1 and the discrepancies with respect to the timing of the event concerned. The Defense argued that there was no evaluation of contradictory exhibits. Witness A1 also testified with respect to Count 5 reference to the victim F.A., so the Defense wondered why the Court did not trust the witness that F. had been killed by a rod, and the contested Judgment did not provide reasoning in that respect. The Court fully credited the statement of witness B1 with respect to all Counts related to him, including Count 5 of the amended Indictment. The Defense wondered what injury had led to the death of F.A. and assumed that he might have died out of fright. With respect to Count 16 of the amended Indictment concerning the throwing of smoke grenades, the Defense contested the timing, because witness A3 said that it had happened exactly on 25 August 1992, whereas the Judgment read that it had happened

on an undetermined date, but did not provide the reasoning for that decisive fact. Defense Counsel pointed at the statement of witness E.B. concerning Count 10 of the amended Indictment, which witness had not shown respect for the Court, had been punished for some 50 times, and had wanted to kill the Accused D. Defense Counsel concluded that such witness could not be trusted, as his statement was not corroborated at all. Defense Counsel claimed that the publicly pronounced Judgment did not correspond to the written Judgment. With respect to the criminal sanction, Defense Counsel stated that it could not be seen in the Judgment which act of the Accused D. guided the Court to differentiate among the respective Accused regarding extenuating circumstances, given that both of them showed a very proper conduct toward the Court. When it comes to the prior convictions, Defense Counsel stressed that the Accused had been fined for a slight bodily injury and that the punishment had been expunged, which circumstance the Court considered as aggravating. The Defense also responded to the Prosecution Appeal, stressing that a considerable number of disputable averments from the Appeal were not resolved in the Prosecutor's oral presentation.

18. The Accused M.D. said that he agreed with his Defense Counsel's averments.

19. Defense Counsel for the Accused Ž.I. reiterated all Appeal grievances and accepted all arguments of her predecessors concerning the criminal offense of Crimes against Humanity. She particularly emphasized that the burden of proof fell on the Defense and that the Court was selective when evaluating the evidence concerning the Accused I. She also stated that the forensic analyses were conducted on the basis of medical documentation alone. Defense Counsel quoted the inhuman-treatment-related views in the available case law. The Counsel also stated that witness M. was credited selectively and that the statement of M. O. was read out, for which reason the Defense did not get to cross-examine the witness. According to the Defense, his statement was not corroborated by other witnesses' statements. The Counsel supported the argumentation of her colleague B. with respect to the exceeded charges. The Defense did not present defense or adduce evidence for that period. Defense Counsel stressed that the Court did not evaluate a single piece of evidence of the Defense. For that reason she presented the same proposal as stated in the Appeal and added that she stood by her response to the Prosecution Appeal.

20. The Accused Ž. I. stated that he agreed with the Defense Counsel's averments.

21. Having reviewed the contested Judgment insofar as contested by the Appeal, pursuant to Article 306 of the CPC B-H, the Appellate Panel rendered a decision as quoted in the enacting clause for the reasons that follow.

II. GENERAL CONSIDERATIONS

22. Prior to addressing each ground for appeal, the Appellate Panel notes that an appeal, pursuant to Article 295(1)(b) and (c) of the CPC B-H, must include the grounds for contesting the judgment and the reasoning behind the appeal.

23. Given that the Appellate Panel shall review the judgment insofar as it is contested by the appeal, pursuant to Article 306 of the CPC B-H, an appellant is required to draft his appeal in such a way that it may serve as a basis for reviewing the judgment.

24. In that respect, the appellant must specify the grounds on the basis of which he contests the judgment, specify which section of the judgment, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

25. Referring to appeal grounds in general terms only and arguing the alleged irregularities in the first instance proceedings without specifying which appeal grounds the appellant refers to, do not constitute a valid basis for reviewing the first instance Judgment. For that reason, the Appellate Panel will dismiss, without further consideration, the uncorroborated and unclear appeal arguments.

III. ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

A. STANDARDS OF REVIEW

26. A judgment may, pursuant to Article 296 of the CPC B-H, be contested on the grounds of essential violations of the criminal procedure provisions. The essential violations are defined under Article 297(1) of the CPC B-H.

27. As to the gravity and significance of the procedure violations, the CPC B-H differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced judgment (absolutely

essential violation), and such violations regarding which it us up to the court to assess, in each specific case, whether they have or could have affected the validity of the judgment (relatively essential violation).

28. Absolute essential violations of the CPC B-H are listed in Article 297(1)(a) through (k) of the CPC B-H. Should the Appellate Panel establish an essential violation of criminal procedure provisions, the Panel must revoke the first instance judgment pursuant to Article 315(1)(a) of the CPC B-H, except in the cases referred to in Article 314(1) of the CPC B-H.

29. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise if during the main trial or in rendering a judgment the Court did not apply a provision of the law or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the judgment.

30. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper judgment, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper judgment. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper judgment. Further, where the Appellate Panel is satisfied that a lawful and proper judgment was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC B-H was not violated.

1. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS, ARTICLE 297(1)(d) OF THE CPC B-H

(a) Appeal grievances

(i) Appeal by the Defense for the Accused G. V.

31. The Defense considers that when the Trial Panel was not able to find the evidence that the Accused had ordered the relevant acts, it altered the state of facts in the enacting clause stating that the Accused enabled and organized these acts, whereby the Panel significantly influenced the identity of the Indictment given that it concerns the manner of participation in the criminal offense on the part of the Accused. It resulted in a violation of

the right to a defense as stipulated in Article 297(d) of the CPC B-H, given that the Accused did not present defense concerning the referenced facts in the proceedings, as stated in the enacting clause of the contested Judgment. Therefore, the Court is not authorized to alter the factual description of the commission of a criminal offense without an amended Indictment, not even when it established, on the basis of the adduced evidence, such a state of facts with respect to the commission that differs from the description in the Indictment.

(ii) Appeal by the Defense for the Accused M. D.

32. The right to defense of the Accused M.D. was violated by the filing and confirmation of the amended Indictment and by the enacting clause of the Trial Judgment, given the terminology used in Sections 4, 4a, 4b, 5, 6, 7, 8, 9, 10, 10a, 10b, 11, 11a, 12, 14, 15 and 16 of the enacting clause. According to the Defense, such Indictment preserved a terminology which could not serve as a basis for an efficient defense. Also, in the process of adjudication the enacting clause did not include a more detailed or precise timing of the alleged perpetration either, so the Defense considers that the Trial Panel violated the right to a defense at this stage as well.

33. The Defense is of the opinion that such terminology cannot be justified by the non-recollection on the part of the witnesses who personally experienced unpleasant situations over a period about which they testified before the Court and at the investigation stage.

34. According to the Defense, astonishing is the requirement that the Court put before the Defense at the stage of adjudication, as seen in paragraph 553 of the Judgment, in which the Court required from the Defense to accept the statements of those few witnesses whose statements the Court evaluated to some extent at least (a total of 5 out of the 15 who testified personally, and one whose statement was read out).

35. The Defense claims that because of such a requirement, the Accused M. D. did not enjoy the right to a defense in the course of the proceedings and that he was in an unlawful position in advance, from the aspects of evaluation of evidence, the *in dubio pro reo* rule, Article 281 of the CPC B-H, and the presumption of innocence.

36. The Defense moves the Court to have in mind, when analyzing the Appeal, that the essence of this violation is that it was explained through an incorrectly and incompletely

established state of facts, and that the Appeal constitutes one integral text.

37. The Appeal further reads that a comparison between the acceptance of flexibility regarding the terminology in the enacting clause in the Conviction (evaluation of the Prosecution witnesses' statements), and the positions in paragraphs 203 and 553 of the reasoning of the Judgment, shows that the Accused M.D. did not have a possibility of presenting defense. It was satisfied only formally, but was never executed essentially, given that the Court did not apply the *in dubio pro reo* principle, which it could not have applied anyway as it did not give any qualifications about the Defense evidence – witnesses and documentary evidence pursuant to Articles 281 and 3 of the CPC B-H.

38. The Defense Appeal also reads that it is sufficient for the Court that an injured party says that he was beaten, although he does not know in which of the four or six months of the detention he sustained an injury or was beaten. It is irrelevant for the Court that there was no forensic analysis of the injuries (the Court has interpreted medical documentation), it is also irrelevant that there is no identification of the injury or of the place – locality of the injuries in the Indictment (the Court identified it but did not write it in the enacting clause), whereas only an impartial piece of evidence with specified dates is required from the Defense. The Defense again warns of the imbalanced attitude of the Court toward the Defense and the Prosecution, which has become blatantly obvious in the course of adjudication. Hence, under paragraph 203 of the Judgment, the fact that in the six months of the relevant period the Accused was seen 5-7 times in B. was absolutely sufficient for the Court to conclude that it was "feasible" for him to come from the frontline, commit a crime and return to the frontline.

(iii) Appeal by the Defense for the Accused Ž. I.

39. The Appeal stresses that the Accused was not able to present appropriate defense because he was not charged with criminal offenses prior to June 1992 or the offenses that had been committed prior to the proclamation of the state of war in Bosnia and Herzegovina, since there was no reference to that period in the Indictment, although there is one in the contested Judgment.

(b) Decision of the Appellate Panel

40. Article 297(1)(d) of the CPC B-H sets forth that there is an essential violation of the

criminal procedure provisions if the right to a defense of the Accused was violated. This implies non-application or misapplication of the rules of procedure to the detriment of the Accused by depriving him of the right to a defense.

41. First of all, the Appellate Panel considers that every violation of procedural standard to the detriment of the Accused means that there was a violation of his right to a defense guaranteed by both the CPC B-H and international instruments, and in that respect the Panel reviewed appeal grievances concerning the application of the principle of presumption of innocence in order to evaluate whether there has been a violation of the right of the Accused to a fair trial and the right to a defense.

42. In that respect, this Panel has concluded that when conducting the main trial and evaluating the evidence the Trial Panel was guided by the principle of legality and the requirement that innocent persons should not be convicted, and that perpetrators of crime should receive criminal sanctions stipulated by the Criminal Code.

43. The Trial Panel's intervention in terms of correction of the factual description in the Indictment was done with a view to establishing facts beyond any reasonable doubt, and such intervention was done in favor of the Accused. The Court is not bound by the legal definition from the Indictment, therefore there was no relevant violation argued by the Appeal. Therefore, new charges were not added in order to put the Accused in a less favorable position, given that they could not defend themselves as they did not know what the charges against them were, as the Appeals argue without grounds. Also, the description of facts in the Indictment was not essentially changed in terms of its objective identity, but corrections were made after the presentation of all evidence with a view to specifying the description of facts in order to have a credible complete picture of the events and the participation of the Accused in the perpetration of the offense they are charged with, which will be discussed in detail in the section of the Judgment addressing an essential violation of the criminal procedure provisions referred to in Sub-Paragraph (j).

44. The foregoing also pertains to the timing of certain charges, in which respect the Trial Panel corrected the Indictment in order to make the state of the facts more precise following the evidentiary proceedings. In that respect, it is important to emphasize that the time of perpetration is a relevant fact that is being proven in criminal proceedings, but does not constitute an essential element of the criminal offense that the Accused are charged with.

45. The time of perpetration would be of decisive importance only in case of the application of statute of limitations. However, given that this is a criminal offense from Chapter XVII of the CC B-H, that is, these are crimes against humanity and the values protected by international law, the statute of limitations for criminal prosecution and execution of sanction does not apply.

46. In the case at hand, it was necessary to separately evaluate the time of the perpetration when proving the alibi of the Accused M.D., which the Trial Panel did by evaluating the Defense evidence first. However, the Trial Panel properly credited and gave preponderance to the statements of the injured parties, who were consistent when it came to identification of the Accused as the perpetrator, given that they had known him from before, so they did not leave any room for any doubt that the Accused perpetrated the offense he was charged with, as indicated in the enacting clause of the Judgment, contrary to the Defense evidence which indicated, in an unreliable way, that the Accused was on the frontline at that time.

47. For that reason, the Appellate Panel will not elaborate here on a violation of the right to a defense, given that in their respective Appeals the Defense Counsel do not separate this violation from the other essential violations of the criminal procedure provisions. The Panel will, therefore, provide a more detailed reasoning relative to the referenced appeal grievances further in the text.

48. The Appellate Panel evaluated the foregoing Defense appeal grievances relative to essential violations of criminal procedure provisions referred to in Article 297(1)(d) of the CPC B-H and inferred that they were ill-founded because the Appeals did not provide solid proof that there were violations of the procedural law in the first instance proceedings or that there was a miscarriage of justice.

2. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS, ARTICLE 297(1)(i) OF THE CPC B-H

(a) Appeal grievances

(i) Appeal by the Defense for the Accused G.V.

49. The Defense is aware that the institution of judicial notice of facts established in the final Judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

plays an important role in the criminal proceedings conducted before the Court of B-H, primarily with respect to the fact that the proceedings could be significantly accelerated owing to the institution. However, the Defense considers that the fact that decisions on established facts cannot be appealed before an appeal from the Judgment is filed considerably jeopardizes the principle of a fair trial.

50. According to the Defense, the proposal to the Court to free the Prosecution of the burden of proof with respect to those particular facts is problematic. It leads to an upside-down situation in which the burden of proof is shifted to the Defense. Under the general principle of criminal law, the Prosecutor is the party with an obligation to "prove" the criminal responsibility of each Accused under the procedure set forth by law.

51. The Appeal also reads that the Defense is in such a situation that it has to present evidence in order to contest the facts proposed by the Prosecution although it does not know on what basis and how the previous Court established the existence of certain facts in a case.

(ii) Appeal by the Defense for the Accused Ž.I.

52. The Defense considers that the fact that decision on established facts cannot be appealed before an appeal from the Judgment is filed considerably jeopardizes the principle of a fair trial.

53. With respect to the foregoing, it is true that the Prosecution proposes the admission of facts whilst it does not comment on the information, evidence and the manner in which the facts were established. It is also true that it is not known in which way these facts, which the Trial Panel admitted as established in its Decision, were contested in the previous case, if they were.

54. On this occasion the Defense uses its right and files an appeal from the Court's decision to accept the established facts, because the Accused Ž.I., as a police officer, a street policeman in an undeveloped Municipality such is B., definitely could not have been familiar with the established facts and the positions of the SDS (Serb Democratic Party) and its leadership at the time, as he was not that party's member and its positions are absolutely unacceptable to him as he was in an inter-ethnic marriage.

(b) Decision of the Appellate Panel

55. Article 297(1)(i) of the CPC B-H sets forth that there is an essential violation of the criminal procedure provisions if the Judgment is based on evidence on which it cannot be based according to the CPC B-H. Under this statutory provision, the use of an invalid piece of evidence in adjudication suffices to conclude that there was an essential violation of the criminal procedure provisions referred to in this Sub-Paragraph.

56. It should be borne in mind that there do not exist distinct formal rules for evaluation of legality of certain specifically determined pieces of evidence, but the Court will evaluate the legality of each piece of evidence according to the circumstances of a specific case, pursuant to Article 10 of the CPC B-H.

57. Having evaluated the foregoing appeal grievances, the Appellate Panel concluded that they were ill-founded, because the Law on the Transfer of Cases sets forth that a judicial notion of established facts may be contested in an appeal from a Judgment and does not allow for a separate appeal from such decision. For that reason, there was no essential violation of the criminal procedure provisions or violation of the right to a fair trial.

58. The primary objective of the procedure of admission of established facts is to secure efficiency of proceedings. By admitting established facts, the Panel will achieve economy of court proceedings by condensing the proceedings to the most important aspects of presentation of evidence of all parties and will eliminate the need to prove again a fact that has already been adjudicated in earlier proceedings. The procedural-legal effect of a judicial notice of an established fact is the transfer of burden of proof in terms of disqualification of such fact to both parties. If in the course of the main trial one of the parties wants to contest an established fact admitted by the Panel, the other party has the right to adduce evidence with which it would challenge the accuracy of the established facts (in order to secure the fairness of the trial).

59. The Appellate Panel emphasizes that its first task is to make sure that the Accused will have an expeditious and fair trial in accordance with Article 13 of the CPC B-H and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Therefore, as long as this principle is satisfied, the Panel is obliged to avoid an unnecessary waste of time and resources.

60. The objective of the legislator when vesting in the Court the discretion to admit

adjudicated facts “as proven” was the efficiency of proceedings and support for the right of an accused person to a trial within a reasonable time, but also consideration for witnesses in order to reduce the number of courts before which they have to repeat their testimonies that are often traumatic for them. Such objective is also in accordance with the right of the Accused to be tried without delay, as stipulated by Article 13 of the CPC B-H and Article 6(1) of the ECHR. However, this objective must be in line with the principle of presumption of innocence, or else it would not be possible to avoid a situation in which the evidentiary proceedings would *de facto* be completed to the detriment of the Accused even before a direct presentation of all evidence in a case. Admission of adjudicated facts “as proven” does not rule out compliance with the presumption of innocence. The Panel is of the opinion that the facts that were admitted in the case at hand are sufficient for the Prosecutor to adduce evidence on the issue that each fact is related to, without the need to present additional evidence. With respect to the Defense grievances that the admission of established facts as proven implies a violation of the presumption of innocence, the right to a defense, and Article 15 of the CPC B-H, the Panel emphasizes that indeed the general principle of criminal law requires that the Prosecutor is the one who must prove the criminal responsibility of the Accused. However, this principle is not violated with the admission of adjudicated facts since these facts had already been established before the ICTY, and in order to comply with the principle of a fair trial the parties can contest such facts at the trial by presenting to the Court the evidence that call into question the truthfulness of the adjudicated facts. The adjudicated facts are being admitted as an option and cannot serve as a basis for criminal responsibility of the Accused. In the proceedings they represent a specific action in evidentiary procedure and the Trial Panel treated them as one of the exhibits in the proceedings. An admission as proven of the facts established in proceedings before the ICTY is not in contravention of Article 6 of the ECHR, provided that their use must not challenge the fairness of the proceedings as a whole.

61. Based on the foregoing, the Appellate Panel has concluded that by using the evidence that is disputable for the Defense Counsel, the Court did not violate the rights of the persons participating in criminal proceedings or commit essential violations of the criminal procedure provisions.

62. The Appellate Panel has therefore found Defense Counsel’s appeal grievances of essential violations of criminal procedure provisions referred to in Article 297(1)(i) of the CPC B-H to be unfounded, and dismissed them as such.

3. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS, ARTICLE 297(1)(j) OF THE CPC B-H

(a) Appeal grievances

(i) Appeal by the Defense for the Accused G.V.

63. The Defense stresses in the Appeal that the Accused G.V. was never charged with command responsibility, hence the Defense did not adduce evidence on those circumstances in the course of the proceedings, that is, the evidence that would have concerned his *de facto* and *de iure* position in terms of the superior-subordinate relation. The Panel intervened in the description of facts by omitting the elements of command responsibility and adjusted it to the manner of the perpetration of the offense the Accused V. has been convicted of, that is, of omission to act under Article 21 of the CC B-H. According to the Defense, it is clear that the Prosecution did not prove either the individual participation in the criminal offense with which the Accused G.V. was charged or the command responsibility with which he was not charged. However, the inference by the Trial Panel which intervened in the manner of the Accused's participation in the criminal offense definitely exceeds the charges, as the mode of his responsibility in the perpetration of the offense of Crimes against Humanity was thus completely changed.

64. According to the Defense, for the Trial Panel to be able to make an inference about the Accused G.V.'s omission to act as in paragraph 423, it should have first evaluated the evidence indicating that the Accused was aware of the alleged committed criminal offenses and that he agreed with their perpetration.

65. The Defense considers that by changing the description of facts in the Indictment, that is, omitting the part relative to the mode of responsibility of the Accused, the Trial Panel committed an essential violation of the criminal procedure by exceeding the charges, given that the Trial Panel is bound by the factual substratum, even when facts indicate the mode of responsibility, that is, the manner of participation in a criminal offense.

66. As the Defense argues, a violation of the *reformatio in peius* ban pursuant to Article 307 of the CPC B-H, which is the case here, constitutes exceeded charges with respect to the Accused G.V., hence there has been an essential violation under this section.

67. With respect to Count 3a and Count 5 of the Indictment, that is, the killing of F.A., the Judgment combined it into a joint section for the first Accused and the second Accused. The Appeal stresses that the Trial Panel "corrected" the Indictment by combining in the enacting clause of the Judgment some facts from Count 3a of the Indictment and some facts from Count 5, thus creating a completely new factual description of how this event had allegedly happened, whereby the Trial Panel made an absolute essential violation of exceeding the charges in the contested Judgment.

68. The Defense argues that the Trial Panel also exceeded the charges in Sections 1 and 2 of the enacting clause of the Judgment. In Counts 1 and 2 of the Indictment, the first Accused and the second Accused are charged with having planned, ordered and organized deportation and unlawful arrests of non-Serbs referred to in Count 1, whereas the enacting clause of the Judgment reads that the first Accused and the second Accused (...), by conducting persecution, organized unlawful arrests and deportations. Both the Defense for the Accused G.V. and the Defense for the Accused M.D. argued throughout the whole proceedings that the Accused had neither planned nor ordered the unlawful arrests, deportation and inhuman treatment, which the Trial Panel also states in the Judgment.

69. If, according to the Trial Panel, the Accused did not order the foregoing acts, there is a question as to which specific evidence indicates that they organized and made them possible. The contested Judgment did not answer this question (the Trial Panel did not provide any reasoning in it as to how the Accused organized, that is, enabled those unlawful arrests and imprisoning of Bosniaks; there is no description of their specific acts from which such averments of the Panel would follow). The Trial Panel only drew a general conclusion about the manner of the Accused's participation in the offense, and did so only, as the Trial Panel states, on the grounds of their carrying out of the respective duties of the SJB chief and the SJB commander at the relevant time.

(ii) Appeal by the Defense for the Accused M.D.

70. The Appeal states that the enacting clause on page 6 of the Judgment reads that the arrests of non-Serb civilians were carried out by "members of the police from the PS ..., and members of paramilitary and military formations". On page 7 of the Judgment, in the section of the enacting clause addressing Count 1 of the amended Indictment, the same wording is repeated: "*and paramilitary and military formations"*. According to the

Defense, a comparison of the amended Indictment of 21 March 2016 with the enacting clause of the Judgment brings about an unambiguous conclusion that when resolving this part of the Indictment the Trial Panel exceeded the charges with its enacting clause.

71. It was not clear to the Defense either from the reasoning or the enacting clause what PS … meant. The Defense stressed that there was no evidence in the case file that on 10 June 1992 or afterward there existed the Police Station in … . As stated, this is an essential and decisive inference of the Court, especially given the fact that the Court established the capacity of the Accused M.D. as the commander of the Police Station in … in that same enacting clause and on the same page.

72. The Defense stressed that when rendering the Judgment the Trial Panel exceeded the charges from the amended Indictment, as it did not stick to the precisely determined date as the factual ground pursuant to Article 280 of the CPC B-H, given that the amended Indictment did not read that the act of arrest that the Accused M.D. was charged with happened on the days preceding or succeeding 12 June 1992, but exclusively and only on that particular day.

73. If the Court had actually applied what is written in paragraph 49 of the Judgment and if the Court had based the Judgment on what witness A1 said at the main trial, the Court would have established that the day concerned was 6 June 1992 or, if it had accepted this witness' statement from 1996, it would have accepted that the date concerned was 14 June 1992. However, the Court did not trust the witness and arbitrarily made a completely erroneous and different determination, without evaluation or reasoning of any other piece of evidence, and obscured the time in the Judgment although the time was precisely determined in the Indictment – 12 June 1992. Such action of the Court therefore turned out to be detrimental to the presumption of innocence, the *in dubio pro reo* rule, and the properness and legality of the Judgment.

(iii) Appeal by the Defense for the Accused Ž.I.

74. The Appeal reads that, in order to justify its averment from the Judgment that there existed a widespread and systematic attack, the Trial Panel explained that such attack had existed way back in 1991, whereby the charges were exceeded and an essential violation of the procedure committed.

(b) Decision of the Appellate Panel

75. Article 297(1)(j) of the CPC B-H sets forth that there is an essential violation of the criminal procedure provisions if the charge has been exceeded.

76. When it comes to this violation of the criminal procedure provisions, the Court may commit it only in the enacting clause of a Judgment. The Appellate Panel refers to Article 280(1) of the CPC B-H, stipulating that the Judgment shall pertain only to the person accused and only to the act as charged in a confirmed Indictment. In that respect, the statute requires the existence of the subjective and the objective identity between the Indictment and the Judgment.

77. The issue of subjective identity of the judgment and the indictment shall be resolved by checking the identity of the person against whom the criminal proceedings were conducted and the Trial Judgment rendered. The objective identity of the offense is preserved if the act in the Judgment is the same or only slightly different from the one in the Indictment, but it must never be more grave on the Accused than the one in the Indictment. The Judgment and the Indictment must not only have an identical past event as their basis, but the Judgment must not go beyond the framework of the Prosecution's description of the event.

78. The objective identity of the Indictment actually represents the event that is the subject of the trial, and the respective factual descriptions thereof in the Indictment and in the Judgment must be identical. Those facts that are not important for the very act of perpetration and that the Court added or removed from the factual description of the Indictment, do not constitute a change of the identity of the act and are allowed.

79. Having evaluated a Defense appeal grievance that the Trial Panel deleted the elements of command responsibility from the description of facts in the Indictment, the Appellate Panel has concluded that the Accused G.V. was never charged with command responsibility. The fact that the Trial Panel made a correction to the description of facts in order to adjust the description with the proven facts, that is, altered the manner of perpetration, does not automatically mean that the Trial Panel exceeded the charge. The Trial Panel evaluated the function of G. V. as the chief of the SJB ... only when proving the authority and reputation that the Accused enjoyed.

80. In rendering its decision the Court is not bound by the Prosecution's proposal of the

legal definition of the offense, so the Court may and is allowed to subsume the described factual substratum in the Indictment under another legal definition of the criminal offense, but must take care to completely resolve the charges and to not exceed the charges. The Court is authorized to make changes to the description of facts which would be within the framework of the criminal event, as well as to adjust the manner of the perpetration, but must be very cautious in doing so.

81. Therefore, the Defense was not brought into a position not to know what their clients were charged with, which is why they were not able to prepare adequate defense. An efficient defense can be secured only when the respective identities of the Indictment and the Judgment are fully complied with, as the Accused knows what the charges against him are, so he can prepare an efficient defense against these charges, which would not be possible in case the function of Prosecutor were transferred to a judge. In that respect, the Trial Panel did not go beyond the bounds of the permitted intervention in the description of facts of the Indictment, and it properly established that the personal contribution of the Accused G.V. in the perpetration of the acts as charged acquired the form of the Accused's personal participation in the perpetration by omission, given that, as the SJB… chief, he did not prevent the consequence prohibited under statute.

82. With respect to the Defense appeal grievances that the Trial Panel merged two Counts of the Indictment relative to the injured party F.A., the Appellate Panel states that by that the Accused were not charged with additional crimes nor did the event concerned change at all. Therefore, the respective texts of the Indictment and of the enacting clause of the Judgment give rise to a logical conclusion that the Trial Panel did not create a new factual description essentially different from the original one, as the Appeal claims without grounds. The Court is bound by the event charged in the Indictment, the one that transpires with all details as a result of the main trial. The charges have not been exceeded as long as the Judgment stays within the framework of the criminal event as actually happened, irrespective of whether it was precisely and completely described in the Indictment.

83. The relevant acts of the Accused G.V. and M.D. are mutually connected, hence neither the description of facts nor the reasoning can be separated from the enacting clause of the Judgment given the fact that the Accused are connected by their official positions and duties in the SJB ..., although they held different ranks and acted within the framework of their respective authorities. Also, there is one and the same injured

party in the case at hand. It should be emphasized that the individual contributions of both Accused to the perpetration of the criminal offense concerned is clearly seen from the factual description, which the Trial Panel properly established, although the Appeals claim to the contrary.

84. Further individualization of the relevant acts would only lead to fragmentation of the state of the facts to several identical charges for the different Accused, which would certainly not contribute to a better understanding of the factual description of the offense, thereby also of the Panel's arguments.

85. The Appeal by Defense Counsel for the Accused M.D. properly suggests that the respective terms SJB … and PS … are confused in the contested Judgment. However, the Appellate Panel considers the latter to be a colloquial term, given the fact that the witnesses expressed themselves differently when testifying. It follows clearly and unambiguously from the adduced evidence that at the relevant time the Accused G.V. was the Chief of the SJB …, the Accused M.D. the commander in the SJB ..., and the Accused Ž.I. a police officer in the SJB ..., as indicated in the enacting clause of the contested Judgment. Given that the contents of the charge may be resolved only by the enacting clause of a Judgment, as only what is quoted in the enacting clause constitutes the adjudicated matter (*res iudicata*) and only that is binding, the referenced failure of the Trial Panel to use the same term, that is, SJB ..., consistently in the reasoning of the contested Judgment does not render the Judgment incorrect and incomprehensible. Therefore, the Appellate Panel has dismissed as unfounded the relevant Defense appeal grievance, and stressed that in this Judgment it will refer to parts from the contested Judgment without changing the terms used by the Trial Panel.

86. This Panel has also concluded that it can be seen from the enacting clause of the contested Judgment that it made reference to both military and paramilitary forces that also took part in the events as charged, which is absolutely logical given that the witnesses testified about their presence. However, this does not mean that the Accused are also charged for these forces' acts, but only for what they personally did or failed to do, and these acts are being referred to in the context of a widespread and systematic attack for the relevant period.

87. It was established beyond doubt in the contested Judgment that the adduced evidence, especially the statements of witnesses[1] who had lived in the territory of the Municipality of … and the settlements in the vicinity in early June 1992, the documentary evidence, and the admitted established facts from the cases of K ... and B …, give rise to a conclusion that there was a widespread and systematic attack in the territory of the Municipality of … in the period from early June to late December 1992. The attack, which was oriented only against the non-Serb civilian population of that Municipality, was undertaken by members of the active and reserve components of the police force, and partially also of the military and paramilitary units of the Serb Republic of Bosnia and Herzegovina.

88. However, it also clearly follows from the adduced evidence that mainly in the course of June 1992, and partially also in July 1992, there were mass and individual arrests in the territory of the Municipality of …. A large number of non-Serb civilians were deprived of liberty by members of the then SJB in … , of the active and the reserve components alike, whose direct superiors at that time were the Accused V., as the Chief of the SJB …, and the Accused D., as the commander of the SJB ….

89. As the contested Judgment reads, it is a fact that the witnesses also mentioned people from ... and ..., as well as members of the army, but this Panel has concluded, as did the Trial Panel, that their role was insignificant. In other words, it is indisputable that the arrest operation was organized by the PS …, that is, its leading officers, primarily the PS Chief V. and the commander D. (the latter often personally participated in the arrests), whereas the role of the military and paramilitary forces was rather to assist in the campaign, especially given the fact that all arrested persons were brought solely to the building of the PS ... .

90. Also unfounded is an appeal grievance by the Defense for the Accused M.D. concerning the time of the relevant event, that is, the arrest in which the Accused personally participated. Having established a more specific and accurate time of the perpetration, the Trial Panel did not violate the identity of the charges to the extent that it would be considered another or a different offense, since the event as charged was not called into question. Likewise, it was not a decisive fact which would have called into question the essential element of the offense of which the Accused was found guilty. The

[1] Witnesses: E. B., R. B., A1, A8, A5, E.r A., M. Č., M. B., A. Đ., A3, N. Đ. and others.

Trial Panel was authorized to make such determination as it did not encroach upon the legal definition of the offense and did not call into question the identity of the act from the Indictment in any other way. Therefore, in the case at hand the factual description of the act was made more precise, in line with the state of the facts established in the evidentiary proceedings, which the Trial Panel was authorized to do, as there is no doubt that even after that change the Judgment concerns the offense as charged in the Indictment.

91. Having evaluated the appeal grievance of the Defense for the Accused Ž. I. that the Trial Panel exceeded the charges by stating in the Judgment that there had been a widespread and systematic attack in 1991 as well, the Appellate Panel concluded that the referenced violation did not happen, because paragraph 103 of the reasoning of the contested Judgment reads that the Trial Panel analyzed witnesses' statements and concluded that tension could be felt in the territory of the Municipality of … as of late 1991, more precisely, as of the fall 1991 when the Serb Autonomous Region of Herzegovina (SAO Herzegovina) was established. In the period that followed until June 1992, the Serb forces set up checkpoints to control movement in and out of B., and various military formations appeared in the town, more precisely, those were members of the reserve forces who went to frontlines in … but were stationed in the town and opened fire from their arms in a show of force, all of which caused fear with the local non-Serb population.

92. The Trial Panel stated in the reasoning of the contested Judgment that it obtained the referenced information having evaluated the witnesses' statements, which does not immediately suggest that the Accused were charged with that time period as well and thereby brought to an unfavorable position, but that an introduction was made into the events as charged only for the purpose of a better understanding, thereby an essential violation that the Appeal argued does not exist.

93. This Panel will provide a more detailed explanation concerning the referenced grievances in the part of the Judgment related to the state of the facts in order not to repeat its arguments. Also, the respective Appeals by Defense Counsel do not make a strict distinction between the voiced grievances, which are intertwined and repeated.

94. Based on the foregoing, the Appellate Panel has concluded that the appeal grievances of violation of Article 297(1)(j) of the CPC B-H are unfounded, and that the Trial Panel did not exceed the charges when it made the state of the facts in the enacting clause more precise, and it is important to emphasize that the referenced Court's

intervention was not made to the detriment of the Accused.

4. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS, ARTICLE 297(1)(k) OF THE CPC B-H

(a) Appeal grievances

(i) Appeal by the Prosecutor's Office of B-H

95. The Prosecution considers that by rendering the contested Judgment the Court committed essential violations of the criminal procedure provisions since the Judgment does not contain clear and proper grounds on which it is based, especially not the reasons concerning the decisive facts, whereas the cited grounds of the Judgment are completely contradictory, both to the adduced evidence and to certain grounds of the Judgment. This leads to a conclusion that the cited grounds of the contested Judgment are based on the Trial Panel's arbitrary and blanket evaluation, not on the facts that were actually established in the evidentiary proceedings.

(ii) Appeal by the Defense for the Accused G.V.

96. The Appeal reads that in the reasoning, when the Trial Panel addressed the conclusions on the existence of a widespread and systematic attack, it was guided by the statutory elements of widespread attack which would imply the existence of a wide range of committed acts and number of victims, which the Trial Panel established in paragraphs 75 and 76 of the contested Judgment. The term widespread concerns an attack which is comprehensive in its nature and directed against a large number of persons. The Defense wonders, if, according to the Judgment, approximately 150 Bosniaks were the target of this widespread attack carried out by the Accused, what happened to the other 1,800 Bosniaks who lived in the territory of B. or, if we wish to deal with trivialities, if one Croat person was the target of persecution under the Indictment, what happened to the other 39 Croats who, according to the census, had lived in the Municipality of … before the outbreak of armed conflict in Bosnia and Herzegovina. In that respect the Defense has concluded that the attack was not widespread and directed against a large number of non-Serb persons, which was also indicated by certain facts which the Trial Panel did not evaluate at all, hence the Defense wants to point at some witness statements which completely refute the criminal offense of persecution. Those are the statements of witnesses S. S., I. O., M. G.,

S. E., N. E., M. P. and H. Ć.

97. When it comes to the element of systematic attack, the Trial Panel cites the fact that the execution of the attack followed a well-established and routine pattern. If something is said to be well-established and routine, it means that it was repeated multiple times. Such position of the Panel is absolutely contrary to the statements of the witnesses whose examination the Prosecutor and the Defense for the first Accused and the second Accused proposed, namely A5, R.M., E.A., M.Č., A.Č., M.B., A.Đ., A3, A.Č. and Z.B. According to the Defense, it can be concluded clearly based on these statements that arrests happened on 10 June 1992 and that nothing had happened before 10 June 1992, and even that the very arrest by armed paramilitaries was an incident (the Defense has referred to the case of *N. M. et al.*). Thus, according to the Defense, there had not been any routine attacks following a well-established pattern in the Municipality of B. prior to 10 June 1992 when these random arrests took place.

98. In order to justify the averment in the Judgment on the existence of a widespread and systematic attack, the Panel explained that such an attack had existed way back in 1991. In paragraph 123, the Trial Panel cited the facts that indicate the existence of the systematic nature of the attack, including the fact that mobilization calls were sent to able-bodied citizens in early 1992, which goes beyond the timeframe from the Indictment and the Judgment. The Accused did not defend himself from it, given that he was not charged with criminal offenses committed before June 1992 or before the proclamation of the state of war in Bosnia and Herzegovina.

(iii) <u>Appeal by the Defense for the Accused M.D.</u>

99. Having concluded that police officers of the PS ... participated in the arrests (with the assumption that the Court might have implied police officers of the police station, not something else, or, exactly something else), the Court also made an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC B-H, as the enacting clause of the Judgment is primarily incomprehensible (D. was the commander of police station, police members of the PS … participated in the arrests). Also, such enacting clause is not based on any piece of adduced evidence, therefore there is no reason about this decisive fact either in the reasoning of the Judgment or the evidence adduced at the main trial.

100. In paragraph 192 the Trial Panel established that the Accused M.D. was the commander “in the SJB …”, and in paragraph 193 that the Accused M.D. was the commander “of the SJB”, although not one piece of evidence indicated so, nor did a single witness confirm it. For that reason, the Defense wonders about the grasp of the state of facts in the criminal matter at hand, that is, the evidence that the Accused M.D. was ”the commander of the SJB”, which makes the Judgment unreasoned as well as incomprehensible and confusing. The Defense notes that over the course of the reasoning of the contested Judgment the Accused M.D. evolved to “the commander of the PS”, as the Trial Panel concluded in paragraph 245.

101. The Defense adds in the Appeal that paragraph 246 of the Judgment reads that the Court concluded that members of “other public security stations” participated in the arrests (in the enacting clause, members of the police from the PS ...), as did members of the military and paramilitary forces. However, the Court added that none of the witnesses was able to say which public security stations and which military and paramilitary units they belonged to. This unequivocal determination of the Trial Panel is followed by paragraph 249 in which the Trial Panel established “as well as members of the army”, but found their role to be “insignificant”. Describing further the role of the military and paramilitary members the Trial Panel went as far as to say that it was “rather to assist in” the arrests.

102. The Defense therefore considers that the enacting clause reading that the arrests were carried out by the military and paramilitary forces is simply not reasoned, and when it is taken into account that the Trial Panel resolved that matter in two paragraphs of the Judgment at least, paragraphs 246 and 249, then the reasoning is contradictory in itself, and is particularly inconsistent with the enacting clause, which makes the enacting clause incomprehensible and also non-reasoned with respect to a decisive fact, and as such, it cannot be evaluated completely within the meaning of Article 297(1)(k) of the CPC B-H.

103. The Appeal argues that the enacting clause clearly reads that the military and paramilitary forces were resubordinated to the police, but there is no evidence about it, so the Court can neither mention nor evaluate it, in the opinion of the Defense. The Court’s conclusion is particularly confusing to the Defense given the uncorroborated decisive facts that the military and paramilitary forces, resubordinated to the police, participated in the arrest (without any order, verbal or written, or other evidence). Especially confusing is the Trial Panel’s conclusion in paragraph 254 that the arrests were carried out by members of

the active and reserve components of the PS … .

104. The Appeal also emphasizes that Article 290(1) of the CPC B-H ordains that a written Judgment must fully correspond to the Judgment pronounced. The Appeal reads that a written Judgment – a copy sent out on 2 September 2016 – does not correspond to the Judgment publicly announced on 8 July 2016. On page 9 of the Judgment, in Section 4, following the word "1992" there is a word that was not pronounced on 8 July 2016 – "together".

105. A direct result of the failure to comply with Article 290(1) of the CPC B-H is that, with respect to the joint arrival of three men in front of the house of the injured party A1, the Trial Panel lacks reasons about this decisive fact which was established in the enacting clause, although it is contrary to the Judgment announced, as the Panel does not state which particular evidence corroborated such a finding.

106. In paragraph 338 the Court definitively established "it was certainly organized in the manner so that police members carried out the arrests and apprehensions, took statements and guarded the premises on which the civilians were detained" (and in the reasoning there are no longer the military and paramilitary forces). According to the Defense, this paragraph is partially contrary to paragraph 306 of the contested Judgment.

107. The Appeal also reads that if in paragraph 338 the Trial Panel established that the Accused D. and V. organized the arrests, and in paragraph 306 that they were "the key link", then the Judgment is absolutely incomprehensible, uncorroborated, unclear, improper and unlawful and cannot be completely evaluated. It is as if the Trial Panel had hard time accepting its own finding that there was no JCE, so it mixed different modes of participation in paragraph 306, hence it is unclear whether the reasoning of the enacting clause about the Accused D.'s responsibility is that he is "the key link" or that he is 'the organizer" who independently, yet sharing the intent as a co-perpetrator, obviously arranged and organized the arrests. As for the organization of detention premises, as a co-perpetrator in terms of Article 29 of the CC B-H, he organized it, without anyone's prior order on arrest or detention.

108. Paragraph 306 of the Judgment reads that a definitive and final objective was the expulsion of the non-Serb population from the territory of B. As the Defense stressed, there is no clear and unambiguous reasoning in the Judgment regarding the knowledge of and conducting of the attack in the capacity as its organizer, the systematic deprivation

of liberty of non-Serb civilians, and their detention with a view to their definitive expulsion.

109. The Appeal further reads that, given that an order for arrest issued by the Accused V. and/or D. was not proven and that it, therefore, does not exist *de iure* and *de facto*, a question arises as to by what action the Accused M.D. organized the arrest of non-Serb civilians.

110. Also, in several paragraphs the Trial Panel made reference to an alleged activity of the Accused M.D. but did not explain it anywhere (paragraphs 249, 306, 301 ...). According to the Defense, it is very interesting that the Court did not refer to these facts at all. Nowhere in these paragraphs in which arrests are attributed to the Accused M. D. can one find the names of the examined witnesses who confirmed that the Accused M.D. had personally arrested them. Likewise, there is no reference to any piece of documentary evidence that will confirm that D. personally arrested non-Serb civilians on the scene. There is no such order, and there are no reasoned activities of the Accused V. and D.; therefore, to put it simply, the conclusion on the organization of arrests and detention by the police is simply unexplained.

111. In paragraph 269 of the contested Judgment the Trial Panel established that witness A1 said that the Accused D. had personally participated in his arrest. The Defense thinks that this is not correct, given that witness A1 actually mistook the identity of the person who might have arrested him on one of the given dates.

112. The Trial Panel resolved the issue of the existence of a widespread attack starting from paragraph 74 onwards. As the Defense claims, with respect to this part of the Judgment there exist essential violations of the criminal procedure provisions set forth in Article 297(1)(k) of the CPC B-H, given that the enacting clause is, first of all, incomprehensible, contradictory to the grounds of the Judgment, and without reasons on decisive facts and decisive facts at all.

113. The enacting clause of the Judgment connects the systematic and widespread nature of the attack to the army, police and paramilitaries of the Serb Republic of B-H first and only afterward of the Republika Srpska. According to the Defense, the Court did not explain that in the period from early June to late December there existed the Serb Republic of B-H. As the Appeal reads, this makes the enacting clause of the Judgment unexplained, but also incomprehensible when the reasoning in paragraph 129 is analyzed. In it the Trial Panel established the existence of the attack of the required wide

and systematic scope from June to late December 1992.

114. Also, when the Trial Panel explains that the attack existed from early June and that it was committed by the military and paramilitary forces, it does not explain on the basis of what evidence it has established that military and paramilitary forces participated in the attack, but includes it in the enacting clause nevertheless, or which particular military and paramilitary forces were concerned, especially not how the military and paramilitary forces of the Serb Republic of B-H, which did not exist as of 9 January 1992, participated in it.

115. With respect to the existence of the state of war and the relevant finding in the enacting clause, the Trial Panel did not refer to a single piece of evidence in the reasoning to explain this finding.

116. In paragraph 122 of the Judgment, the Trial Panel addressed the grounds of finding that the attack was widespread and systematic. The Trial Panel determined that the attack was widespread based on the wide-scale arrests of the non-Serb population. The Panel did not offer arguments of the wide scale by analyzing witnesses' statements, but made its own inference in paragraph 138 that the number of the arrested persons was enormous. The Appeal argues that the Trial Panel analyzed statements of nine Prosecution witnesses with respect to the enormous number, but did not evaluate a single Defense witness' statement, and if it had, it would have established essential facts concerning the element of widespread attack.

117. With respect to the systematic nature of the attack and the related essential violations, it will be important to compare the grounds arguing the existence of the systematic nature in paragraph 123 with the grounds arguing the non-existence of a JCE in paragraph 575, but also briefly with paragraph 83 of the contested Judgment, given that the Panel used this established fact to discuss the element of systematic.

118. In paragraph 123 the systematic nature is explained in five steps, namely, the call to mobilization, the Muslims' refusal to comply with it, the layoffs of Muslims, the arrests and the taking to the building of Z. Having reviewed these steps established by the Trial Panel and the enacting clause of the Judgment, the Defense concluded that the Trial Panel established that the attack existed in the period from early June 1992, which is the period referred to in the conviction. Such explanation of the systematic element suggests that there exists an essential violation of the criminal procedure provisions, as the Court did not provide in the reasoning, in paragraph 123, the grounds for the decisive fact which it

explicitly established (systematic), either with respect to the awareness or the will to organize and carry out the steps from paragraph 123, which makes the enacting clause unclear and contradictory to the grounds of the Judgment.

119. The same violations will also follow in the part of the reasoning pertaining to the Accused M.D's. knowledge of the attack and that his acts constituted a part thereof, and will lead to a conclusion that the application of paragraph 124 of the Judgment is completely out of the context of the conviction regarding the duration of the attack from the aspect of an alleged intent of the Accused M.D., which attack took place in early June 1992. In that respect, the Trial Panel stated in paragraph 152 that the position of the Accused M.D. was the prevailing reason for the Panel's determination that the Accused knew of the attack. Another thing that the Trial Panel refers to as the reason for that knowledge is the activities of the Accused M.D., but no explanation is given as to what those activities actually were. Only paragraph 148 addresses the enabling which does not imply commission only, and the organizing that must contain an essential activity as the underlying element.

120. The Defense stresses that there is no evidence of subjective or objective nature that would indicate that the Accused M.D. undertook any activity in the process of organization of arrests or detention (order). Knowledge and consent are not elements of direct intent, hence organization on the part of the Accused M.D. cannot exist.

121. The Trial Panel's omission to evaluate Exhibits O2-28 of the Defense for the Accused M.D. is an essential violation of failure to evaluate the Defense evidence, both documentary and testimonial, and is, as such, essentially important for the establishing of the relevant facts concerning the existence or non-existence of deportation as a Crime against Humanity of which the Accused was found guilty.

122. In paragraph 287 the Court established on the basis of "multiple pieces of documentary evidence" (which have not been identified) that on "6 October 1992" "a considerable number [of detainees] were released" from Đ. The enacting clause reads that the date in question was 5 October 1992. The Defense therefore stresses that with such reasoning of the release date as a decisive fact the Trial Panel committed an essential violation of the criminal procedure provisions, as it did not provide the reasons about the decisive fact in the enacting clause, that is, about the date of "release".

123. Also, the same part of the enacting clause (Count 1 of the amended Indictment,

page 7 of the Judgment) reads that on 5 October 1992 they were deported, not released as the Trial Panel determined in paragraph 287 of the Judgment. This again leads to an essential violation in terms of incomprehensibility of the Judgment (confusing the factual grounds and legal definition), because of the contradiction between the reasoning of the Judgment and its enacting clause. The Court also failed to give reasons about a decisive fact, that is, the date (5 or 6 October 1992).

(iv) Appeal by the Defense for the Accused Ž.I.

124. The Defense is of the opinion that the Prosecution did not at all propose or adduce evidence at the main trial about the widespread and systematic attack by the military, paramilitary and police units of the Serb Republic of B-H. Contrary to such determination of the Trial Panel, the Defense considers that it was possible to establish impartially on the basis of the adduced evidence that the deprivation of liberty and apprehension of one number of the Bosniak inhabitants in the course of June 1992 had been carried out by paramilitary units and members of the army, and that police members had not participated in those activities. It was also possible to conclude on the basis of the adduced evidence that military weapons and explosives were found with a number of the Bosniak inhabitants, which was the reason why police members carried out searches and arrested such persons.

125. In the process of discovering the weapons, conducting searches and arresting these Bosniaks, the Accused Ž.I. acted as a police officer and under orders of his superiors, he issued these persons with receipts of seized items, that is, weapons and explosives, and he handed them over to the officer on duty in the police station, with which actions his authorities ended.

126. That the Accused did not act with discriminatory intent against the non-Serb population in terms of persecution within the framework of a widespread and systematic attack against the non-Serb population is indicated by the testimony of Defense witness Z1, which the Trial Panel did not evaluate at all. The Defense draws the Appellate Panel's attention to the fact that protected witness Z1, an ethnic Bosniak, was examined at the main trial when he convincingly testified about humane and unselfish behavior of policeman Ž.I. who had brought food and cigarettes to the witness' father detained on the premises of Z. It is, therefore, clear, according to the Defense, that the element of

"widespread" was not satisfied as such.

127. It is also emphasized that there had not been any routine attacks following a certain pattern in the territory of the Municipality of … prior to 10 June 1992 when these random arrests were carried out by certain members of paramilitary units from the Republic ... whose behavior members of the SJB ... were not able to prevent.

128. In order to justify the averment in the Judgment on the existence of a widespread and systematic attack, the Trial Panel explained that such attack had existed as early as in 1991, whereby the charges were exceeded and an essential violation of the procedure committed. The Accused did not present defense relative to these grounds given that he was not charged with criminal offenses committed before June 1992 or before the proclamation of the state of war in Bosnia and Herzegovina.

129. Based on the foregoing, the Defense considers it necessary to stress that with respect to this underlying element of the criminal offense of Crimes against Humanity, that is, the existence of a widespread and systematic attack, the enacting clause of the contested Judgment is contradictory to its reasoning.

(b) Decision of the Appellate Panel

130. An absolutely essential violation of the criminal procedure provisions pursuant to Article 297(1)(k) of the CPC B-H exists when either the enacting clause or the reasoning of the first instance Judgment, as a formal judicial act, contains certain defects of such nature so as to prevent an evaluation as to whether the Judgment is lawful and proper. An essential violation of the criminal procedure provisions in terms of this Sub-Paragraph also exists in case when a Trial Judgment does not at all contain the reasons or does not refer to the reasons on decisive facts.

131. After a detailed and comprehensive analysis of the enacting clause of the contested Judgment, the Appellate Panel concludes that it was sufficiently clear and comprehensible and that the reasons in the reasoning were not contradictory. The Appellate Panel concludes that the form and the contents of the Judgment are in accordance with the provisions of the procedural law and that there was no violation of the law in that respect, either.

132. In that respect, it is important to stress that the factual descriptions in the enacting

clause of the contested Judgment are sufficiently clear, distinct and complete, and that they contain the facts and circumstances that constitute essential elements of the criminal offenses of which the Accused were found guilty in the first instance proceedings. Also, the Prosecution's evidence in its entirety proves that the criminal offense concerned was committed in the manner, at the time and in the place indicated in the enacting clause, and in its reasoning the Trial Panel gave logical and sufficient reasons for its decision.

133. In that respect, the Appellate Panel does not consider as well-founded the Defense appeal grievance that the referenced essential violation of the criminal procedure provisions occurred because the enacting clause of the Judgment that was read out at the pronouncement hearing differed from the written copy of the Judgment, since the word "together", which the Defense considers disputable, does not change anything in essence. It is clearly seen from the description of facts that the Accused M.D. undertook the relevant acts together with two other police members, so even if that element were omitted from the text it would neither be missed nor indicate a different state of facts.

134. The contested Judgment also provided the reasons on the facts decisive for adjudication in the criminal matter at hand, with adequate evaluation of all pieces of evidence, both individually and in terms of their mutual correspondence. The Trial Panel provided a detailed reasoning for each section of the enacting clause with respect to all Accused by presenting the reasons that guided it to render its decision. The contested Judgment contains reasons on decisive facts and makes reference to the evidence that constituted the basis for the decision.

135. It is necessary to emphasize that the reasoning, which constitutes a component part of the Judgment, need not contain all details or give answers to all questions posed and arguments presented, and its scope always depends on the nature of the decision.[2] Despite that, the contested Judgment addressed all key issues raised at the main trial and in the closing argument, and in it the Trial Panel presented its position and reasons for its decision.

136. With respect to presentation of evidence in criminal proceedings, we may define the term as a procedural action in which with the help of evidence facts are established that

[2] See, Constitutional Court of Bosnia and Herzegovina, Decisions No. U 62/01 of 5 April 2002 and AP 352/04 of 23 March 2005; see, European Court of Human Rights, *R. T. v Spain*, Judgment of 9 December 1994, Series A, No. 303-A, para. 29.

are important for proper adjudication, both in terms of establishing the guilt and meting out the appropriate criminal sanction.

137. As a rule, the legislator does not set forth either which evidence serves to prove a fact or the required quality of evidence. Evaluation of evidence is left to the discretion of the Court having conduct in a given case. Naturally, a free evaluation of evidence does not mean total arbitrariness in evaluation which must be based on logic, rules of special characteristics of certain professions and a certain life pattern of the cause and the consequences.

138. In accordance with the foregoing, the contested Judgment provided the reasons on decisive facts relevant for adjudication in the criminal matter at hand. The Trial Panel commented in the Judgment on those exhibits that were relevant for its decision, and in the reasoning thereof presented conclusions on the facts that were of essential importance for the decision.

139. For the foregoing reasons, the Appellate Panel concludes that the Trial Panel, in application of the principle of free evaluation of evidence pursuant to Article 15 of the CPC B-H, properly evaluated all evidence tendered into the case file, the witnesses' statements and the documentary evidence alike, their reliability and probative value, and that in the reasoning of the contested Judgment it paid particular attention to the evidence that stood out by its significance and quality, that is, that was decisive for the establishing of the guilt of the Accused, pursuant to Article 231(6)(b) of the CPC B-H. Also, the elaborative methods that the Judgment used are in line with the provisions of the procedural law that governs this matter.

140. For that reason the contested Judgment contains evidentiary basis for each fact that is considered reliably established, regardless of which category the fact belongs to (decisive, indirect or control facts), and not one fact that was essential for adjudication was neglected.

141. Given the grievance that the burden of proof was shifted to the Defense, the Appellate Panel notes that the burden of proof lies with the Prosecutor, who must prove all elements of the criminal offense as charged. There is no such obligation on the part of the Accused given the presumption of innocence, but there is the right of the Accused to present his defense or remain silent given that there does not exist an obligation of proving one's own innocence. The equality of arms in criminal proceedings is one of the

elements of a wider concept of fair trial. It is manifested in the principle of equality of arms, which is one of the fundamental principles in criminal proceedings and which was not violated in the case at hand.

142. Article 290(7) of the CPC B-H sets forth that in a Judgment the Court " … *shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reasons why the Court did not sustain the various motions of the parties, the reasons why the Court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act.*" This provision of the law serves as a guarantee that the Court will present the reasons with respect to all facts and issues that were disputable in proceedings in such a way that all parties to the proceedings could clearly track the course of adjudication, that is, the path that led the Court to certain conclusions. In this way the CPC B-H provides protection from arbitrary adjudication and guarantees regarding the exercising of the right to a fair trial. The right to a reasoned judicial decision is one of the fundamental principles within the right to a fair trial, hence, although it does not make an integral part of Article 6 of the ECHR, it was recognized in the case law of the European Court of Human Rights (hereinafter the ECtHR) as the fundamental right of parties to criminal proceedings. The Constitutional Court of Bosnia and Herzegovina has also established: "One element of a fair trial [...] is the request that a judicial decision must include the reasons on which it has been based."

143. The Appellate Panel finds it justified to refer to Article 285(1)(a) of the CPC B-H which lays down the required contents of a conviction. It reads clearly that the Court shall pronounce "*the criminal offense for which the accused is found guilty along with a citation of the facts and circumstances that constitute the elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends."*

144. Although the CPC B-H in this part did not specify all conditions and facts that the enacting clause of a Judgment must contain, Article 227(1) of the CPC B-H stipulates the contents of the Indictment and of the description of facts, including *"a description of the act pointing out the legal elements which make it a criminal offense, the time and place the criminal offense was committed, the object on which and the means with which the*

criminal offense was committed, and other circumstances necessary for the criminal offense to be defined as precisely as possible." Therefore, the enacting clause of a Judgment must contain a factual description of the criminal offense of which the accused has been found guilty, which implies a description of the relevant act, the time and place of perpetration, the ensuing consequences and the causal links between the act of the accused person and the consequences of the act. The description of the criminal offense must be clear and comprehensible, so that the specific acts that the accused carried out which make it a criminal offense can be clearly seen from it. Each circumstance that concerns the elements of the criminal offense must be clearly indicated so as to be suitable for adjudication and evaluation.

145. The relevant *actus reus*, as one of the elements of the general concept of criminal offense and a human activity which is unlawful and which generates certain changes in the outside world in terms of jeopardizing or violating a protected value, must be specifically described in the enacting clause of a conviction through presentation of the facts and circumstances indicating some specific activity of the accused, that is, omission if the ommissive criminal offenses are concerned. It does not suffice to cite a legal definition in the description of facts, that is, include a description of the criminal offense from the corresponding provision of the Criminal Code without providing the specific circumstances and facts from which it would be visible in which way the accused person actually committed the offense.

146. Consequently, on the basis of the Prosecution evidence, especially the statements of the witnesses who lived in the Municipality of B. and the neighboring settlements in early June 1992, and also on the basis of documentary evidence and the admitted established facts from the cases of K. and B., the Trial Panel made a proper inference that there existed a widespread and systematic attack in the territory of the Municipality of B. in the period from early June to late December 1992, which attack was directed exclusively against the non-Serb civilian population of the Municipality and undertaken by members of the active and reserve components of the police and partially also by the military and paramilitary units of the Serb Republic of Bosnia and Herzegovina.

147. It should be emphasized here that this Panel has already presented arguments regarding the participation of the military and paramilitary units, so there is no need to return to that appeal grievance of the Defense.

148. Therefore, the Defense appeal grievances that a widespread and systematic attack did not exist in the period concerned are unfounded given that the Trial Panel provided clear, logical and detailed arguments that the “widespread” and “systematic” elements of the attack in the territory of the Municipality of B. were proved.

149. The Appellate Panel also considers unfounded the Prosecution appeal grievances regarding the widespread and systematic attack, as the Prosecution claimed that the attack had actually happened in an even wider area, that is, in G. and N., too.

150. The contested Judgment properly states that mobilization of able-bodied men started in early 1992 with a view to dispatch them to the frontline in D. The call-up was answered mostly by Serbs, whereas the Bosniak population was reluctant to respond to such calls (although a few Bosniaks did respond) for reasons of personal nature, that is, the Bosniaks did not want to join the Serb army which at that time waged war in the territory of ... .

151. As a consequence of the non-compliance with mobilization calls there was a mass layoff of Muslim men in spring 1992, when they were either dispatched to enforced annual leave or suspended temporarily. In some cases lists with the names of the Muslims who did not comply with calls-up and were therefore sacked were attached on notice boards in companies.

152. The grievance concerning the arming of the Muslims had been stressed by the Defense at the main trial as well, so the Trial Panel also addressed this issue. In that respect, the Trial Panel concluded that the mere fact that weapons were found with some Muslims, that is, that someone possessed weapons and the manner of its acquisition, is relevant only for potential filing of a crime report, but not for the existence of an attack in the case at hand, since the said weapons were surrendered.

153. Although that is not the case here, given the sporadic instances of Muslims possessing weapons, the Appellate Panel is of the opinion that persons who do not participate or are no longer capable of participating in hostilities are entitled to respect of their bodily and mental integrity. Such persons must be protected in all circumstances and treated humanely, without any unfavorable distinction.

154. After the surrendering of weapons the Muslim population was obviously completely incapacitated for putting up any resistance, which had not existed earlier anyway, as

properly stated in the contested Judgment. The Trial Panel made this inference on the basis of the statements of the witnesses, who agreed that there was no armed conflict in certain villages in the Municipality of B. Accordingly, the contested Judgment properly concluded that even if such situations had happened, by their quality and quantity they could only be considered sporadic and individual actions of individuals and could not serve as a basis to establish the existence of some kind of an organized armed resistance of the non-Serb population in that area.

155. For that reason, for the execution of a widespread and systematic attack in line with "strategic goals" it was not necessary to undertake major military operations. It was properly established that control was taken of the territory of the Municipality of B. peacefully since the Serbs made up the majority of its population, that it was proclaimed a Serb Municipality, and that governing bodies were established and other ethnicities excluded from them, which was followed by the crimes described in detail in the enacting clause.

156. Therefore, neither in the first instance proceedings nor in the filed appeals did the respective Defense Counsel successfully refute the existence of a widespread and systematic attack in the territory of B. The contested Judgment contains the reasons on decisive facts on the basis of which this Panel can evaluate it.

157. The Appellate Panel also considers unfounded the Prosecution appeal grievances and stresses that the contested Judgment contains reasons why the Trial Panel should not have established the existence of widespread and systematic attack in the Municipalities of G. and N. on the basis of the offered evidence.

158. In that respect the contested Judgment properly reads that none of the examined Prosecution witnesses spoke about any events in the Municipalities of G. and N., which is absolutely logical given that all examined witnesses had actually lived in the Municipality of B., thereby they could not have known of any events in the neighboring municipalities.

159. Certain witnesses said that, in addition to police officers from B., some unknown military also participated in their arrest, for which some people said they were from G., that is, unknown persons from N. The Trial Panel properly established that this fact does not in any way reach the threshold of compliance with the criterion of existence of the widespread and systematic elements, especially if the attack is regarded with respect to the area of three municipalities and the proven knowledge of the Accused of the

relevant events. The period concerned is related to the acts of the Accused and their intent to commit them, therefore the Trial Panel concluded that the Accused's consciousness and will to commit the relevant crimes did not involve potential events in the municipalities of N. and G. in the same period.

160. Based on the foregoing, the Prosecution appeal grievance of a widespread and systematic attack also in the municipalities of G. and N. was ill-founded, for which reason the Appellate Panel dismissed it.

161. Therefore, the contested Judgment contains reasons on all decisive facts on which the Trial Panel established the existence of a widespread and systematic attack in the Municipality of B. in the period from early June to late December 1992, whereby the first general element of the criminal offense of Crimes against Humanity under Article 172 of the CC B-H was satisfied.

162. The Appellate Panel also considers unfounded the Prosecution grievance concerning the Trial Panel's non-acceptance of the JCE concept.

163. As indicated earlier, the contested Judgment contains a proper and detailed reasoning for each decisive fact, including this one, and this Panel also completely accepts such argumentation. It was properly established that, although the Prosecution adduced certain pieces of evidence of objective nature that would suggest the existence of the common purpose of persecution of the Muslim and the Croat population of the referenced municipalities, the Trial Panel did not find it proven that even if such a plan existed, the Accused knew of it before or at least during the mass arrests and detention of civilian men to detention facilities in B., more precisely, that at the time of the arrests the Accused shared a common *mens rea* to participate in the common plan with a view to its execution.

164. With respect to the existence of a common plan, more precisely, a possibility that the Accused knew of such common plan to implement the official policies determined by the strategic goals of the Serb people, adopted at a session of the Assembly of the Serb Republic of B-H on 12 May 1992, and thus carry out persecution through unlawful imprisonment, inhuman detention in inhuman conditions, deportation, murders, torture, and physical and psychological abuse, the Trial Panel emphasized that in the course of the proceedings evidence was adduced by examining witnesses-injured parties who were only from the Municipality of B. and detained in the facilities in B. Witnesses from G. and N. were not examined during the proceedings, so it has remained unknown to

the Trial Panel if the Accused knew at all that persecution had also been carried out simultaneously in these municipalities as part of the common plan and if the Accused knew at all that such plan existed, thereby the Accused's participation and contribution to the execution of the referenced plan is also questionable.

165. For that reason the Trial Panel concluded that the evidence did not indicate that the Accused had been informed of the circumstances in SAO Herzegovina and that they had actively participated in their execution, so the Trial Panel could not conclude beyond reasonable doubt that the Accused had known of such a plan, that they had shared the same intent and had contributed to the execution of such a plan with their acts.

166. The contested Judgment properly states that it was not disputable in the course of the proceedings that the Accused … was the Chief and the Accused … the commander in the SJB B., but, despite that, the Trial Panel did not find it proven that the Accused V. and the Accused D. had the common purpose and intent to contribute to the execution of such purpose.

167. Having evaluated the foregoing, the Trial Panel concluded that by participating in unlawful arrests, imprisonment and elimination of the non-Serb civilian population in B. and in the other established criminal acts, the Accused demonstrated their discriminatory intent to carry out persecution of the non-Serb population of B. However, there is no evidence that they knew of the existence of the plan – official policies of persecution from the first strategic goal (elimination of the non-Serb population from the neighboring municipalities of G. and N.) and that they acted following a previously determined plan for persecution and shared it.

168. Contrary to the Prosecution appeal grievances, the Trial Panel was mindful of the fact that the Prosecution referred in its closing argument to a number of exhibits concerning the existence of a common plan, including exhibits T-147, T-122, T-123, T-138, T-121, T-114 and other documentary evidence indicating that as early as in 1991 the SDS leadership had intensified the process of taking over power in certain territories through the establishment of special and parallel institutions of the Bosnian Serbs, including the adoption of the Instruction, with a view to have the local Serb communities and their leaders prepare to take over power in municipalities.

169. However, the Trial Panel properly established that in the course of the proceedings no evidence was adduced about the existence of awareness and knowledge with

the Accused that with their acts they contributed to the execution of the common plan, that is, the plan to conduct persecution in a wider area encompassing B. and other towns in SAO Herzegovina. Therefore, no evidence was presented that the Accused V. and D. knew that the persecution in the Municipality of B. actually constituted a link toward accomplishment of the common higher goal that the Accused shared with K.S., M.S., V.P., G S., and the commanders of the Herzegovina Corps and B. Brigade of the Army of Republika Srpska. For that reason the Trial Panel made a proper inference that there was no established link between the Accused and other members of the JCE, hence there was no common intent either.

170. Given that it was not proven that the Accused acted within the framework of a JCE, the Trial Panel properly established that the acts of the Accused were acts of co-perpetration. Therefore, the Trial Panel found that the Accused G.V., M.D. and Ž.I. acted as co-perpetrators in the commission of the criminal offense of persecution and that they possessed the intent to perpetrate those criminal offenses.

171. The Appellate Panel has concluded that the JCE concept applies in case where it is not possible to completely individually define each person's contribution to the perpetration of the criminal offense and where the referenced acts, as forms of criminal conduct, are completely equalized, which implies acting in accordance with the common plan and the intent to achieve the ensuing common result.

172. Contrary to that, in the case at hand the Accused were found guilty of the precisely established acts with which they consciously and willingly decisively contributed (by commission or omission) to the perpetration of the criminal offense they are charged with, hence they acted with intent as co-perpetrators.

173. The Appellate Panel will present a more detailed deliberation on the appeal grievances related to the acts of co-perpetration below in this text, in the part addressing the alleged incorrectly and incompletely established state of facts.

174. Based on the foregoing, the Appellate Panel has concluded that the respective Appeals by the Defense Counsel and the Prosecution did not provide solid grounds for averment that the contested Judgment was incorrect and unlawful and that, consequently, the Trial Panel did not breach Article 297(1)(k) of the CPC B-H, as the Appeals stated without grounds.

5. ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS, ARTICLE 297(2) OF THE CPC B-H

(a) Appeal grievances

(i) Appeal by the Defense for the Accused G.V.

175. The Appeal argues that in paragraphs 52 and 53 of the contested Judgment there was an essential violation of the criminal procedure provisions because the Court did not apply provision from Article 281(2) of the CPC B-H.

176. The Defense is of the opinion that pursuant to the CPC B-H, the Trial Panel was obliged to provide evaluation of each piece of evidence, individually and in terms of its correspondence with the rest of the evidence. Corroborating such a position are the Defense appeal grievances, especially the ones of an incorrectly and incompletely established state of the facts which the Trial Panel caused exactly because it failed to evaluate all evidence in totality and with respect to each individual Count.

(ii) Appeal by the Defense for the Accused M.D.

177. The Defense considers that the failure to apply Article 280 of the CPC B-H in the process of rendering the Trial Judgment led to an improper and unlawful Judgment in terms of Article 297(2) of the CPC B-H, which also constitutes an essential violation of criminal procedure provisions, a distinct one but consequential, as there is no reasoning of the facts with which the Court exceeded the charges.

178. As the Appeal reads, when resolving this criminal matter the Court was guided rather by the legal position in paragraph 52 of the contested Judgment than the statutory provision in Article 281(2) of the CPC B-H. The Appeal reads that the interpretation that the Court provided in paragraph 52 that the Court is not obliged to deal with each piece of evidence which was so restrictively applied in the criminal case at hand, constitutes a direct violation of the referenced statutory provision.

179. The Defense points that nowhere in the reasoning of the Judgment did there exist any position, view or comment of the Court concerning the Defense exhibit – evidence adduced by reading the statement of witness H.Ć. or the majority of the other exhibits of the Defense for the Accused M.D.

180. The Appeal also reads that the issue of evaluation of the evidence adduced by the Defense for the Accused M. D. will not stop at the partial analysis of the omission to apply the imperative standard from Article 281(2) of the CPC B-H as read above, but will continue with respect to the omission to evaluate the statements of examined witnesses S.E., N.E., M.G., I.O., S.S., M.P. and others, first individually and then in terms of their correspondence with the other evidence. Such omission in application of law and such restrictive attitude and interpretation of a legal position prevented the Trial Panel from rendering a proper and lawful decision, which is imperative, and directly prevented the Accused from exercising the right to a defense and a fair and just trial, which the Accused M.D. did not have in the adjudication process.

181. According to the Defense, if the Court had evaluated the statements of these witnesses it would have established decisive facts, such as, for example, that a number of Muslims remained to live in B., that there were villages right next to B. where no member of the reserve or active component of the police came, that Serbs were arrested and brought to the same premises where Muslims were because they had attacked the Muslims' property, that there were Muslims who never terminated their employment, lived in the houses bordering the SJB B., and never left B., and other decisive facts (witnesses S., E., M., M.P., I., H.).

182. Given that the Court did not evaluate these statements at all, the Defense argues that the foregoing facts about which the witnesses of the Defense for the Accused M.D. testified at the main trial, could actually be considered completely new facts. They could thus constitute the basis for an incompletely established state of facts, in terms of Article 299(2) of the CPC B-H.

183. Another violation under Article 297(2) of the CPC B-H, according to the Defense, is the fact that witness A1 repeatedly said that he thought that this happened to him because he had voted for dismissal of D. some time before the war. If the Court had accepted this part of the statement arguing that dismissal was the reason for potential acts against the injured party, it could have established very easily that there was no ground in this to establish discriminatory intention on religious and ethnic grounds. However, the Court did not do so; it did not even mention this fact, yet it is of decisive nature for application of law, more specifically, application of the Criminal Code.

184. According to the Defense, as was the case before, the Court again did not evaluate

a single piece of objective evidence by the Defense, the ones relevant for this particular section of the Judgment being exhibits O2-12, O2-28 and O2-30.

185. Also, by having failed to evaluate the subjective evidence of the Defense for the Accused M.D., namely the statements of witnesses S.E., M.G., N.E., M.P., G.S., and I O., the Court definitely decided to prevent the Accused M.D. from exercising the right to defense and the right to a fair trial by not evaluating these statements, and then, logically, by not being able to comment on them in terms of contents with at least partial application of Article 15 of the CPC B-H when it comes to the Accused M.D.

186. The Appeal also stresses that if the foregoing facts, and not only they, had been established, they would have constituted the basis that would have clearly demonstrated to the Court, in application of the *in dubio pro reo* rule, that there were no elements of systematic and widespread, thereby also no attack, as the underlying element of the criminal offense of which the Accused was convicted in the first-instance Judgment.

(iii) Appeal by the Defense for the Accused Ž.I.

187. The Defense claims in the Appeal that paragraphs 52 and 53 of the contested Judgment contain an essential violation of the criminal procedure provisions, since the Court did not apply the provision in Article 281(2) of the CPC B-H.

188. The Defense is of the opinion that pursuant to the CPC B-H, the Trial Panel was obliged to provide evaluation of each piece of evidence, individually and in terms of its correspondence with the rest of the evidence. Corroborating such position are the Defense appeal grievances, especially the ones of an incorrectly and incompletely established state of the facts which the Trial Panel caused exactly because it failed to evaluate all evidence in totality and with respect to each individual Count. The Trial Panel did not evaluate a single piece of evidence of the Defense for the Accused Ž.I., which is unacceptable.

(b) Decision of the Appellate Panel

189. An essential violation of criminal procedure provisions under Article 297(2) of the CPC B-H, that is, a relatively essential violation, exists if the Court has not applied or has improperly applied some provisions of the CPC B-H before or during the main trial or in rendering the judgment, and this affected or might have affected the rendering of a lawful

and proper judgment.

190. With respect to a relatively essential violation of the criminal procedure provisions, an appeal should not only point at the acts and omissions that reflect a non-application or misapplication of a certain provision of the procedural law, but also how and why that affected or might have affected the rendering of a lawful and proper judgment, or else a review of whether a relatively essential violation of the criminal procedure provisions was committed would turn into an *ex officio* review.

191. In that respect, this Panel has concluded that the Appeals by the Defense Counsel in this case did not prove successfully that the Trial Panel rendered an unlawful and improper Judgment due to the omissions argued in the Appeals, thereby the referenced appeal grievances were dismissed as unfounded.

192. It should be noted that, when rendering the contested decision, the Trial Panel took into account all evidence adduced at the main trial and conducted a detailed analysis thereof to the extent that was relevant for the rendering of the final decision on the guilt of the Accused for the perpetration of the relevant offenses. The Trial Panel acted in this way aware of the fact that a potentially more detailed analysis of the evidence would not have any impact on the finally established state of the facts and the conclusions made on the basis of the evidence whose detailed evaluation the Panel presented in the Judgment, in terms of Article 15 of the CPC B-H which envisages the principle of free evaluation of evidence without formal limitations and formal evidentiary rules.

193. The facts on which adjudication is based must be established truthfully, as they happened. The true culprit must be found and he alone must be punished, that is, the full and real truth about the criminal offense and the perpetrator must be established. For that reason criminal proceedings contain a justified requirement for obtaining the truth about the facts to the fullest possible extent. Evidence (testimonial or material) is only that fact which is inherently connected to the criminal offense and which caused the very perpetration of the offense in the process of interaction, mutual connection of the perpetrator, means of perpetration, the object of the attack and the scene of the crime. Testimonial evidence is used as an important means, not only because there is no other evidence in some cases, but also because it may be used to check the authenticity and truthfulness of the other evidence. In certain cases the documentary evidence may be the only reliable evidence for discovering, investigating, establishing and proving the truth,

because the importance of that evidence lies primarily in its objectivity, unlike the testimonial evidence.

194. Contrary to the appeal grievances, the Appellate Panel established that the principle of “equality of arms” was complied with throughout the complete first instance proceedings, and that the parties enjoyed identical procedural position during the trial and the presentation of the respective arguments of the Defense and the Prosecution. The Defense was not brought in an unfavorable position compared with the Prosecution, given that the Accused were given an opportunity to comment on all facts and evidence they were charged with by the Prosecution, and to present all facts and evidence in their favor. In compliance with such approach, the Trial Judgment contains evidentiary grounds for each fact that it considers reliably established, and it has not failed to take into account a single one that was relevant for adjudication. Therefore, the Trial Panel conducted the proceedings without delay and rendered impossible any abuse of the rights that the Prosecution and the Defense are entitled to.

195. In the part of the Judgment related to the general evaluation of evidence, the Trial Panel properly reasoned its decision about the acceptability of the adduced evidence, and provided more detailed reasons about it and the evaluation of its credibility, grounds, authenticity and probative value when explaining certain counts of the Indictment and whether or not they were proven.

196. Contrary to the Defense appeal grievances, the Trial Panel did not err when it said in the contested Judgment that *”the Court did not have to give a detailed evaluation of each piece of evidence adduced at the main trial, that is, the Trial Panel did not have to address each piece of evidence”*, because it conducted a free evaluation of the significance of each piece of evidence, and referred in the Judgment to the evidence which was of decisive importance for the rendered decision on the guilt of the Accused. It is important to note that the Trial Panel based this view on the ECtHR case law, too, as indicated in a footnote.

197. The Trial Panel acted in this way aware of the fact that a potentially more detailed analysis of the evidence would not have any impact on the finally established state of the facts and the conclusions made on the basis of the evidence.

198. Based on the foregoing, it is not true that an evaluation of the Defense evidence is completely lacking, but the Trial Panel commented on certain Defense exhibits that

were important for the decision, and evaluated some other, but did not provide a more detailed reasoning in the Judgment about it, as they were not of decisive importance. In that respect, the contested Judgment contains a detailed reasoning of the evidence adduced by the Defense for the Accused M.D. concerning his alibi. The Trial Judgment thus reads that the Trial Panel analyzed the statements of Defense witnesses O.V., B.A., P.P., S.I. and Ž.A. and established their correspondence with the statements of the injured parties who stated consistently that during their detention they used to see the Accused D., whom they knew from before, with a large number of witnesses having been direct victims of the acts of the Accused or eyewitnesses to the Accused's unlawful acts against other persons. Based on the foregoing, the Trial Panel concluded that the Accused was the very person who had committed the crimes as charged in the convicting part of the Trial Judgment.

199. In the contested Judgment the Trial Panel also evaluated the Defense evidence with respect to other circumstances, as, for example, in paragraph 243 with respect to the proving of the unlawful arrests of the non-Serb civilian population.

200. The Appellate Panel has concluded that the provided evaluation of the witnesses' statements and other evidence could have been far more specific and detailed indeed, but that it was nevertheless conducted in the manner that can satisfy the required minimum of the evaluation standards. It should also be noted that the conclusions which the Trial Panel drew from that evidence were drawn properly. For that reason this Panel could not accept as well-founded the appeal grievances that the contested Judgment lacked a comprehensive evaluation of evidence.

201. Based on the foregoing and starting from the referenced principles laid down in the national law and Article 6(1) of the ECHR under which all national courts must *"indicate with sufficient clarity the grounds on which they based their decision"*, the Trial Panel carefully evaluated all adduced evidence, which will be elaborated on later in the reasoning of this Judgment.

202. In the course of the main trial the Trial Panel did not commit a violation of the law that would constitute an essential violation of criminal procedure provisions pursuant to Article 297(2) of the CPC B-H, nor does the contested Judgment contain defects that would have such character, all of which leads to the conclusion that the relevant appeal grievances are ill-founded.

IV. ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF REVIEW

203. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. In order for the Appellate Panel to determine whether a fact was incorrectly established as argued in appeal, it will be reviewed whether a decisive fact that is referred to corresponds to the results of the adduced evidence, or it would have been determined differently if some other evidence had been adduced or some other facts established than the ones referred to in the appeal.

204. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond any reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a judgment, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

205. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

206. The Constitutional Court of Bosnia and Herzegovina, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR. However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel’s factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any reasonable doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

B. APPEAL GRIEVANCES

1. Appeal by the Prosecutor's Office of B-H

207. The Prosecution considers that the Trial Panel rendered the contested Judgment on the basis of an incorrectly and incompletely established state of facts, given that it did not evaluate all evidence adduced in the evidentiary proceedings on which depended the decision on criminal responsibility of the Accused, which should have been done. On the contrary, the Trial Panel evaluated only an insignificant quantity of evidence, which resulted in an improper and untenable decision.

208. According to the Appeal, in the contested Judgment the Court changed the Indictment in its introductory part which read that there existed a widespread and systematic attack of the military, police and paramilitary units of the Serb Republic of B-H, and then of Republika Srpska, directed against the non-Serb population of the Eastern Herzegovina, carried out in the municipalities of B., N. and G. in the period from early June to late December 1992. The Court determined in the enacting part of the contested Judgment that such widespread and systematic attack had taken place only in the territory of the Municipality of B … . The Court provided reasoning for such conclusion in paragraph 120. The Prosecution stressed that it was true that the examined Prosecution witnesses were not asked about the events in the municipalities of G. and N., which is logical as all witnesses lived in the Municipality of B. and could not have had important information about the events in other municipalities. However, according to the Prosecution, incorrect is the Court's conclusion that not a single piece of evidence was presented about the existence of the attack in the municipalities of G. and N., and it directly contradicts the facts that the Trial Panel admitted as proven upon the Prosecution motion. The Prosecution added that, in addition to the foregoing facts that the Court admitted as proven in the contested Judgment, also tendered into the case file was the documentary evidence indicating the existence of a widespread and systematic attack directed against the civilian population of the municipalities of G. and N. which the Court did not take into account or evaluate at all, which resulted in the rendering of a completely improper decision in this part of the contested Judgment.

209. The Appeal reads that the Court said in paragraph 208 of the contested Judgment that it did not follow from the adduced evidence that the Accused G.V. and M.D. planned and ordered unlawful arrests of Bosniak civilians in the Municipality of B., as Count 1 of the

amended Indictment reads, but that they enabled and organized unlawful arrests of those persons. According to the Prosecution, such conclusion of the Court is absolutely improper and completely contradicts the adduced evidence and the relevant reasons that the Court referred to in the contested Judgment. If the Court had taken into account the established practice of the ICTY Trial Chambers and had evaluated the adduced evidence in a clear and specific manner, it would have concluded absolutely clearly that the Accused G.V. and M.D. first planned and ordered arrest of all able-bodied Bosniak men in the territory of the Municipality of B. and then their detention in two camps under the Accused's jurisdiction. The very wording in the contested Judgment that both Accused enabled and organized unlawful arrests is unclear as the Court did not specify which acts of the Accused constituted the enabling and which the organizing of the arrests. The Prosecution claims that this decision of the Court is completely improper, which is indicated by the Court's clear and resolute inferences in the contested Judgment that all arrests that took place in the Municipality of B., especially the mass ones of 9 June 1992, were conducted in entirety by members of the active and the reserve components of the police force of the then SJB B. Also, one of the inferences of the contested Judgment reads that it was established absolutely clearly and unambiguously through the adduced evidence that in the period indicated in the amended Indictment, that is, from April to December 1992, the Accused G.V. was the Chief of the SJB in …, while the Accused M.D. was the police commander in the same Station. According to the Prosecution, it is clear from these facts that under the principle of subordination as the basic principle of work of police bodies, members of the active and reserve components of the police were neither able nor allowed to conduct any single arrest, let alone mass arrests of non-Serb civilians who had not been linked to any form of crime perpetration in June 1992, without explicit order and approval by the Accused G.V. and M.D. as their chief and immediate order-issuing authorities. In the contested Judgment the Court avers that these Accused allegedly did not order unlawful arrests and explains it by the fact that none of the examined witnesses knew under whose order they were apprehended, and that not one piece of documentary evidence was tendered concerning that circumstance, either. The Prosecution considers this to be absurd, as it is absolutely clear and logical that none of the arrested had any way of knowing who had ordered the arrests, and it was not possible to obtain any relevant written exhibit either, given that such written order did not exist. Given these facts and their correspondence with the modes of individual criminal responsibility related to planning and ordering adopted by the ICTY, it is absolutely clear that only the Accused G.V. and M.D. could have devised a plan of execution of unlawful arrests of Bosniaks in the

Municipality of B. They were absolutely aware that crimes would be committed in the course of the execution of the plan, given the fact that there was no legal ground for the arrest and imprisonment of those persons, whereby they possessed full awareness required for determining the responsibility on the grounds of planning. Given the fact that the Accused, as the only persons who by their position in the SJB in B. could have come up with and ordered such arrests, it is absolutely clear to the Prosecution that the Court's conclusion in the contested Judgment that they had not done it is absolutely incorrect. The Prosecution considers that the Court's conclusion about their non-participation in the planning and ordering of mass unlawful arrests is completely improper.

210. According to the Appeal, in paragraph 345 of the Judgment the Court concluded that the Accused G.V. was charged under command responsibility for the acts referred to in Counts 3a, 3b and 3c of the amended Indictment since, under the factual description in Count 3 of the Indictment, although he allegedly knew of the killings, torture and abuse of the detained civilians, being a superior, that is, the chief of the SJB B., he did not prevent these acts by punishing the perpetrators. This conclusion of the Court is absolutely incorrect. The Court stated in the same paragraph that under the amended Indictment the Accused V. was charged with personal criminal responsibility pursuant to Article 180(1) of the CC B-H, due to which the Court could not evaluate the Accused's responsibility in light of command responsibility. For that reason the Court intervened in the description of facts by omitting the elements of command responsibility and adjusted it to the manner of perpetration of the offense that the Accused V. was sentenced for -- omission referred to in Article 21 of the CC B-H.

211. When one takes into account the conclusions of the ICTY Trial Chambers (cases of M. *et al.*, and B.) and the facts and evidence established in the proceedings against the Accused G.V. *et al.*, but also the fact that Article 7(1) of the ICTY Statute is completely identical to Article 180(1) of the CC B-H, and Article 7(3) of the Statute to Article 180(2) of the CC B-H, it is absolutely clear, according to the Prosecution, that the behavior of the Accused G.V. constituted support, encouragement and aiding of the perpetrators of criminal offenses – police members subordinated to him who committed the said offenses against the detained Bosniaks. The encouragement, support and aiding was a result of the Accused's omission to exercise his statutory authority to take care of the persons detained on the premises of the SJB in B. and to intervene every time he learned of any unlawful act undertaken against them. The adduced evidence absolutely clearly indicates that the

Accused V. never carried out any act or gesture to prevent the crimes committed against the detained persons by his subordinates or to subsequently try to punish the perpetrators, whereby he created a climate of impunity which encouraged many perpetrators to continue their acts, and by supporting the perpetrations he supported their ultimate goal – persecution of non-Serb persons in the Municipality of B. The Appeal therefore reads that in the amended Indictment the Prosecution absolutely properly and clearly defined the acts of the Accused G.V. as the acts of support, encouragement and aiding of the perpetrators of crimes against the detained persons, which acts the Accused carried out by omission, that is, by failing to exercise his statutory authorities, due to which the Prosecution defined such acts as responsibility of the Accused stipulated under Article 180(1) of the CC B-H. This legal definition is completely in accordance with the established views that arise from the ICTY Judgments. For that reason, as the Appeal reads, the Trial Panel made interventions in the contested Judgment without any grounds whatsoever, whereby the contested Judgment is absolutely unlawful and improper in this part.

212. Having taken into account the Court's reasoning of non-acceptance of the JCE concept in paragraphs 569-594 of the contested Judgment, the Prosecution concluded that the existence of the *actus reus* of a JCE was not disputable for the Court at all, given that it did not argue or challenge the existence of the JCE *actus reus* anywhere in the Judgment. The only thing disputable for the Court regarding the existence of the concept of JCE is *mens rea*, that is, the awareness of the Accused G.V. and M.D. that by participating in the common plan they contributed to its realization.

213. Although the Court, by its overall explanation of the contestable facts in this part of the contested Judgment claimed that the acts of the Accused V. and D. may be linked exclusively to the events in the Municipality of B., not in any way to the events in the whole territory of SAO Herzegovina, whereby their acts would have been absolutely independent and isolated, it completely derogated its own conclusion with inferences in paragraphs 584–588, where it stated that the Court's conclusion that the Accused did not commit the offense as members of a JCE does not *a priori* mean that such JCE, whose goal was an expulsion of the Muslim and Croat population from the territory of that municipality, did not exist at all.

214. The Court's conclusion in the contested Judgment that the events in the Municipality of B. were not isolated and unplanned actions, but a premeditated mode of expulsion of the Muslim and Croat population from the Municipality of B. based

solely on discriminatory intent, is completely contradictory to the Court's conclusion that the acts of the Accused V. and D. were isolated and undertaken exclusively with the goal of persecuting the non-Serb population of the Municipality of B. without the knowledge of the previous plan that also included expulsion. Therefore, the Prosecution concluded that such inferences of the Court in the contested Judgment were completely untenable as they were directly contradictory to each other.

215. Although such contradictory conclusions of the Court generate an essential violation of the criminal procedure provisions, which in its own right leads to absolute untenability of the contested Judgment, the Prosecution notes that it is nevertheless important to state that there are multiple pieces of evidence in the case which the Court did not evaluate at all and which indicate that the Court made a completely improper conclusion on the non-existence of awareness on the part of the Accused V. and D. for participation in a JCE.

216. The Appeal further reads that all evidence and facts were evaluated and that correspondence was established between them and the facts that were proven during the proceedings suggesting that before the outbreak of the war conflicts the Accused G.V. had held the office of the chief of the SJB B. and that on 4 April 1992 he left the Ministry of the Interior of the Republic of Bosnia and Herzegovina (MUP RB-H) on his own will and joined the newly-established MUP of the Serb Republic of Bosnia and Herzegovina, where he continued carrying out the same duty, and that way back in 1991 the Accused M.D. was appointed in a violent and unlawful manner to the duty of police commander in the SJB of B., which he continued holding in the newly-established MUP of the Serb Republic of B-H, and that he was also a member of the SDS Main Board for B. It can, therefore, be concluded clearly and unambiguously that both Accused were definitely well informed of the organizing of parallel governing bodies in Bosnia and Herzegovina at the time, and of the establishment and secession of the MUP of the Serb Republic of B-H from the then MUP of the Republic of B-H. They were also informed of all other premeditated plans to take control of the territories that were supposed to be within the boundaries of the designed state of the Bosnian Serbs, whereby the Panel's conclusion in the contested Judgment that they could not have known about it and that there is no evidence in that respect is completely arbitrary and generalized.

217. The Prosecution considers as completely wrong and generalized the Court's conclusion that in the case at hand no evidence was adduced which would have showed that the Accused V. and D. had ever informed K.S., as their immediate superior,

about the events in B., that is, that no evidence was presented about the existence of any coordination between them which would have indicated that they were all connected by common intent and purpose.

218. The Prosecution therefore stressed that the final Judgment of the Court of B-H in the case of *K. S.* established that the convicted person S. was guilty of the expulsion of non-Serb persons from the territories of B., G., N. and K. as a member of the JCE. It was clearly indicated and proven in the Judgment that one of the members of the JCE was the Accused G.V. in the capacity as the Chief of the SJB in B., under whose leadership unlawful arrests and imprisonment, tortures, killings and deportations of non-Serb persons from the Municipality of B. were carried out. In the Judgment against K. S. the Appellate Panel of the Court of B-H took such proper and clear position about the participation of G.V. in the JCE only on the basis of few witnesses' statements and few pieces of documentary evidence. It is, therefore, absolutely clear that in the case against the Accused G.V. and others, in which dozens of witness examinations were conducted and dozens of pieces of documentary evidence tendered, it was proven even beyond the necessary scope that both the Accused G.V. and the Accused M.D., as JCE members, participated in the implementation of the common plan with a view to achieving the set goals.

219. With respect to the acquitting part of the contested Judgment, the Prosecution stresses that it is clear that the statement of witness S.M., whom the Court credited in the Judgment, was not evaluated carefully enough, and that the Court erred by having acquitted the Accused D. of responsibility under this Count of the amended Indictment (11a) without any reason or arguments. The Court also acquitted the Accused M.D. of responsibility for the acts referred to in Count 13 of the amended Indictment. In the opinion of the Prosecution, the Court rendered such conclusion arbitrarily, without paying necessary attention to the adduced evidence from which it could have easily established that this Count of the Indictment does not pertain to the examined witness S.B., son of A., who never said in his testimony that he had been physically mistreated by the Accused D., but that it actually pertains to the injured party S.B., son of Š., who was deprived of liberty together with E.B. and brought to the SJB of B. where he was beaten multiple times by the Accused D., which was confirmed by witness E.B. and many other witnesses.

220. According to the Prosecution, if the Court had carefully and properly evaluated the statements of witness -- injured party S.B., it could have made a clear inference on the

responsibility of the Accused Ž.I. for his physical abuse, as the witness clearly and specifically named the Accused I. as the person who abused him physically several times, and described the manner of the abuse. For that reason the Panel's averments in the Judgment regarding this decision and the other sections of the acquittal are absolutely improper, as it is obvious that the Panel had at its disposal very clear and specific evidence with respect to the facts charging the Accused, but made erroneous conclusions about their criminal responsibility on the basis of erroneous evaluation of evidence.

2. Appeal by the Defense for the Accused G.V.

221. According to the Appeal, the Trial Panel erroneously concluded in the contested Judgment that there was no armed conflict in the area of and around the Municipality of B., given that witnesses for the Defense of the second Accused, O.V., B.A., P.P., V.Š., D.R. and M.P., testified about an armed conflict around the Municipality of B., namely, in the Mostar front and Žegulja. However, the Trial Panel did not analyze these testimonies in that context at all. Also erroneous is the Trial Panel's conclusion that the arming of the Muslims had nothing to do with the state of war in Bosnia and Herzegovina, since if it had not have anything to do with it, these arms would probably not have been hidden, as was the case with witness A1, and they would probably not have been obtained through the SDA (Party of Democratic Action).

222. Also, the Trial Panel established the state of the facts incorrectly when it concluded that the witnesses were systematically and massively deprived of liberty, although they did not take any part in combats or pose any threat to overall security at that time. The Appeal also reads that the situation in B. and the neighboring villages in 1992 was chaotic and could not be kept under control by the police force in charge of public law and order, since it had 7-8 active officers and its reserve component was mainly on the frontline. According to the Appeal, the arrests that happened on 10 June 1992 were not carried out by the police and were neither preplanned nor enormous in scale, given that 150 persons were arrested, but were actually incidents carried out by unknown armed paramilitaries.

223. According to the Defense, from the foregoing follows the fact that the Accused were not aware of the attack as there was no attack at all, and that their performing of some official duty is not a sufficient proof of awareness of the existence of an attack in such chaotic situation in the Municipality of B. during 1992. As the Appeal reads, proof of

specific intent is of vital importance to avoid cumulative convictions.

224. Discriminatory intent must be proven, as it is the only materially different element that makes persecution different from other crimes against humanity. Without it, a conviction for persecution would be cumulative with convictions for inherent acts, which is lacking in the contested Judgment. The Defense is of the opinion that, when presenting its evidence, the Prosecution did not once demonstrate that any of the Accused possessed the intent to discriminate anyone in any way, and that the Trial Panel did not render a proper conclusion from the foregoing facts on the existence of discriminatory intent.

225. The Defense for the first Accused asked each Prosecution witness whether the Accused G.V. had ever publicly generated fear of and promoted and demonstrated hatred for non-Serb persons, whether he had considered the non-Serbs an inferior race or second-rate citizens, whether at public rallies he had advocated and proclaimed their resettling from the territory of B., whether he had advocated creation of an independent Serb state in the territory of Bosnia and Herzegovina, and whether he had advocated dismissals of non-Serb employees. Not a single witness said that the Accused G.V. had done so, either as a private person or in the capacity as the Chief of the SJB.

226. The Appeal argues that the erroneous and incomplete state of facts is also demonstrated in the reasoning of Section 1 of the enacting clause where a wrong timing is quoted. It is stated that unlawful arrests took place in the course of June, more precisely from 10 June 1992, although it follows clearly from the majority of the witnesses' statements that there had been no arrests before 10 June 1992 and that the arrests were carried out on that day alone. It is also stated that the arrests were carried out by police members subordinated to the Accused, yet it is clear that they were carried out by paramilitaries, which also follows from the witnesses' statements. In that respect the Defense points at the statements of witnesses A3, R.M., E.A., M.Č., A5, A.Č., M.B., A.Đ., A.Č. and Z.B. According to the Defense, it can be clearly concluded on the basis of these statements that the arrests happened on 10 June 1992 and that nothing had happened before that date and that these arrests by the armed paramilitaries were incidents.

227. The Defense examined S.A. as its witness (but the Trial Panel did not evaluate his statement at all). He testified, *inter alia*, about the non-functioning of the judiciary in Eastern Herzegovina, and the Defense corroborated his testimony with Exhibit T-158. Policemen who were witnesses for the Defense for the second Accused also testified

about the same topic, that is, non-existence of a court in B. which would have ordered into custody the persons who were in Z. and Đ.

228. The Defense recalls that not one piece of evidence was adduced that would have indicated that the Accused G.V. enabled and organized arrests of the non-Serb population and that not a single witness for the Prosecution said that they had seen the Accused in Z. or in Đ.

229. With respect to the existence of deportation, the Trial Panel erroneously established decisive facts that are required for the criminal act of deportation to exist within the criminal offense of persecution. The Defense points at Exhibit O1-17 – Agreement on release and transfer of prisoners upon the ICRC (International Committee of the Red Cross) appeal, signed in Geneva on 1 October 1992 (which the Trial Panel did not evaluate at all).

230. The Appeal reads that all Prosecution witnesses said when testifying at the main trial that the ICRC had visited them twice, registered them and asked them where they wanted to go, to the neighboring countries or third countries, and whether they wanted to leave B. pursuant to the signed agreement. The witnesses said that after the release they all went in the direction of the Republic of Montenegro by transport organized with the ICRC mediation. Witnesses A.Č., M.Č., S.K. and others testified about these circumstances.

231. The Defense has concluded that when all these facts are taken into account, there are no elements of the criminal offense of deportation, since the *mens rea* for the crime of deportation is the intent to relocate persons from a certain area. The Defense wonders if such intent can be proven with the Accused given that the ICRC acted under an agreement reached by all hostile forces.

232. According to the Defense, a particular light on the issue is shed by Defense Exhibit O1-12 – SDA proclamation, that is, Instruction on emigration from Trebinje (another exhibit that was not evaluated by the Trial Panel).

233. The Appeal adds that Section 1 of the enacting clause reads that around 100 detained persons and their families were deported to the Republic of Montenegro on 5 October 1992, whereas the remaining detained persons were released on 17 December 1992. According to the Court, some prisoners were deported and some were not. The Defense considers it clear that if there had existed the *mens rea* for deportation, everyone

would have been deported, not just some persons. For that reason the Defense asked how long the *mens rea* of the Accused for deportation lasted, whether for a while or during the whole period indicated in the Indictment. The Trial Panel did not give an answer to this question, which, according to the Defense, directly points at an erroneous and incomplete state of the facts in the Judgment.

234. The Defense also sees erroneous and incomplete state of the facts in Sections 2 and 3c of the enacting clause, that is, the reasoning of the Judgment. The Appeal reads that not one article of the CC B-H provides a definition of inhuman treatment.

235. The Trial Panel did not provide a reasonable conclusion on the facts that, with the acts the Accused undertook, that is, his responsibility for inhuman conditions referred to in Section 2 of the enacting clause, and with his omission to prevent inhuman treatment referred to in Section 3c of the enacting clause, he inflicted severe mental suffering to witnesses referred to in Sections 2 and 3c of the contested Judgment. Irrespective of it, Defense Counsel stresses that the Accused did not cause suffering which was serious, real and great, in line with Pictet's commentaries on the IV Geneva Convention, which are identical in this respect to the commentaries on the II and the III Geneva Conventions that provide a number of useful observations about the meaning of the phrase *"willfully causing great suffering or serious injury to body or health"* (violation of bodily integrity).

236. With a view to proving that the injured parties referred to in Sections 3 and 3c experienced great mental suffering because of the acts of the Accused, the Prosecutor adduced as evidence a forensic medical analysis of the state of the injured parties' mental health, conducted by a standing court forensic expert, neuropsychiatrist Dr. A.K. The Defense made a particular comment on it, given that the Prosecutor did not prove the subject matter of this criminal offense -- inflicting of serious mental injuries, and for that reason the Trial Panel did not mention this analysis in its Judgment.

237. On the basis of written statements of witnesses and partially of medical documentation, expert witness K. drafted a finding about the fear and mental pain suffered by nine witnesses (A1, A2, B1, A.Đ., S.M., E.B., S.K., I. and S.B.). The Defense notes that the Prosecutor mentioned 24 injured parties, but nine were a subject of forensic analysis relative to these Sections. With all nine persons he registered fear during the detention, mental pain, reduced capacity for life and post-traumatic stress disorder (PTSD). The Defense stated that only three of the nine persons reported for treatment, and that the

forensic expert did not challenge the Defense argument that the finding was largely hypothetical.

238. Forensic medicine expert, Dr. H.Ž., also conducted a forensic analysis of the medical documentation about the type and degree of injuries for S.M. and established that M. suffered from fractured elbow and ribs.

239. The Defense also adds in the Appeal that Prosecution witness Dr. B.B. said in his evidence that in the summer of 1992, 10-15 people were admitted in B. over light injuries and that they received the best possible treatment.

240. With respect to inhuman treatment with a view to affect the health of detainees by keeping them in inhuman conditions, the Defense stresses that, given the fact that the isolated persons were brought on an *ad hoc* basis, without a plan or organization of their accommodation, the Accused G.V. could not have had any influence on the conditions of the detention. In that respect the Defense points at the statements of witnesses A8, S.M. and R.P.

241. According to the Defense, it is clear that facts were not properly established in the contested Judgment which could have led to a reasonable and convincing conclusion that the Accused G.V. committed the acts referred to in Sections 2 and 3c of the enacting clause. A Judgment must contain an indisputable conclusion not only that the act was committed, but also that it had grave consequences for a victim, as it does not necessarily mean that such act constitutes a grave breach of international humanitarian law, unless the breach constitutes a serious offense. The contested Judgment did not comply with this requirement.

242. As the Appeal reads, with respect to the circumstances in Section 3b, the criminal offense of persecution by torture, the Trial Panel again failed to take into account and evaluate all adduced evidence, particularly the Defense Exhibit O1-18, Finding and Opinion of expert witnesses in electrical engineering and medicine, Đ.Z. and M.A. respectively, about field telephone's effect on human organism and its technical features.

243. In the opinion of the Defense, the acts the Accused undertook toward the injured parties referred to in Sections 2, 3 and 3c cannot be treated as acts by which Article 3 of the Geneva Convention is breached.

244. According to the Appeal, the state of the facts in Section 3a has also been erroneously established with respect to the adduced evidence which is completely contradictory to the inferences of the Panel. Expert witness Dr. H.Ž. was examined about these circumstances and confirmed that he conducted the autopsy of F.A., who was identified by his father, and established that soft tissue was missing and that only the bones remained. The expert referred to a possibility of death by natural causes and injuries to abdominal organs.

245. The Appeal also indicates that the Trial Panel did not evaluate this Prosecution exhibit with which it was not proven beyond any reasonable doubt that F.A. had died a violent death in the manner described in the reasoning of the Judgment, and that in line with the expert witness' finding and opinion, the Trial Panel should have applied the *in dubio pro reo* rule to the first Accused and the second Accused.

246. The Defense also argues an erroneously and incompletely established state of facts in paragraphs 245-254 of the contested Judgment, where the Trial Panel concluded without a single piece of evidence that it was indisputable that the operation of arrest of Bosniak civilians was organized by PS B., by the first Accused and the second Accused as the respective chief and commander of that station, given that members of the active and reserve components of the PS unlawfully arrested abled-bodied men, and that the role of the military and paramilitary forces was to assist the police with those arrests. However, the Trial Panel did not explain how it was possible that the military and paramilitary forces were subordinated to the police at the time of immediate war threat, and did not state from which piece of adduced documentary evidence it followed that the first and the second Accused gave their consent to such mass arrests, especially when it comes to the reserve component of the police that was mobilized in 1991 by the then Secretariat for National Defense of B. The reserve police force was not commanded by the first Accused G.V. as the chief of the PS, or the second Accused M.D. as the commander of that station, but had its own commander, the foregoing having been confirmed by the examined Prosecution witness L.S.

3. Appeal by the Defense for the Accused M.D.

247. In the opinion of the Defense, the erroneously and incompletely established state of facts in this criminal matter is a consequence of the failure to apply Articles 280 and 281 of the CPC B-H, which happened in the process of rendering the Trial Judgment. This was

discussed in detail in the part relative to essential violations of criminal procedure provisions and breaches of Articles 3, 15 and 290(7) of the CPC B-H.

248. The erroneously and incompletely established state of facts is also a result of the fact that the Trial Panel had an opportunity to render proper conclusions in certain situations but failed to do so, whereby paragraphs 43 and 49 of the Judgment have actually become redundant, given that the principles therein which the Court referred to as the basis of its adjudication are yet to be met and justice is yet to be served. The conclusions would be proper only if they were in favor of the Accused, but since the *in dubio pro reo* rule was not applied, nor was the rule referred to in Article 290(7) of the CPC B-H, it did not happen.

249. The Appeal emphasizes that the Defense stated in the closing argument that such Indictment was not operational and that due to the wording used in the reasoning and its operative part, it did not allow for a possibility of exercising the right to a defense.

250. As the Appeal reads, witness A1 testified before the Court on 28 October 2014 and 11 April 2014, whereupon the Court adduced (but did not evaluate) Exhibit O2-31 as documentary evidence for the Defense for the Accused M.D. which comprises written statements of this witness of 3 July 2008 and 2 March 1996, and his statement of 24 June 1992. The Defense stresses that the witness was almost blind at the time of the testifying as he said that he could not see, that he gave one statement in the presence of his wife, that he is non-credible and that the Court should not have credited him as he told several different stories, adding in one moment things that he had never mentioned before but claiming that the new details were the accurate ones.

251. The Appeal adds that in Sections 4, 4a and 4b, in addition to exceeding the charges, the Trial Panel erroneously established that this witness had been deprived of liberty in the first half of June 1992. However, this witness did not once say that he could not remember or that he forgot when he had been deprived of liberty, but always clearly referred to individual precisely determined dates, whether he made reference to 6 June 1992, that is, the day after (examination at the main trial), or to 14 June 1992 (statement of 2 March 1996). However, in the part that concerns the time of the arrest, the Court drew an unprovable conclusion that it happened *"in the first half of June",* whereby it directly relativized the time, expanded the period of potential unlawful arrest and thus erroneously evaluated the witness' statement as authentic in the procedure of adjudication, and

undermined the presumption of innocence.

252. The witness also testified differently about other decisive facts (sub-machine gun, shooting from a cave, the place where the Accused D. allegedly came, the number of people with whom he came there, the appearance of the Accused, the acquaintanceship with him, the Accused's workplaces, the time, that is, 123 days spent in solitary confinement, beating of F.A. with an iron rod and so on), so he contradicted himself, as well as the other witnesses or objective evidence. According to the Defense, the Court did not provide in the reasoning an evaluation of contradictory reasons with respect to other witnesses or objective evidence, although in paragraph 49 it makes a reference as if it had done it.

253. Also, when the Court established in Section 5 of the conviction that the Accused D., with three other men, beat F.A. with his hands, it automatically discredited and did not trust witness A1 who said that he had personally seen the Accused D. doing it in front of him, beating F.A. with a rod against his head. The witness swore and said: *"I know D. as if he were my son."* Therefore, in the opinion of the Defense, with the enacting clause the Court established that protected witness A1 was not telling the truth with respect to Section 5 of the conviction. Although the Defense considers the Court's determination with respect to Section 5 to be incorrect in general, it made the foregoing reference specifically from the aspect of credibility of protected witness A1.

254. The Defense asks which rule the Trial Panel applied when evaluating the consistency of the essence, credibility and relevance of this protected witness' testimony, that is, to which extent a witness should err in order to become non-credible in the eyes of the Court, if ever.

255. The Appeal points that the enacting clause of the Judgment, compared with Section 4 of the conviction, reads that the Accused D. came with two other policemen, while witness A1 said in his testimonies that the Accused was together with four men, that is, with 5-6 members of the reservist force. Having had this information at its disposal, the Trial Panel decided that there were "two" policemen nevertheless, although it did not explain why two. The Defense claims that it is an erroneous determination given that nobody said that there had been two policemen.

256. The Defense also points that situation is similar with Section 4a of the enacting clause of the conviction, in addition to the fact that here as well the Court incorrectly

established that the “other” arrival is linked to an undetermined date in the first half of June. The Court did not trust the protected witness A1 that it was on the day following the day of the first arrival, which was on 6 June 1992 or 14 June 1992, as the witness said in his 1996 statement.

257. This witness also testified about who set a house on fire. At the main trial A1 said that he himself had set the house on fire, then that Zoran had done it, and then in cross examination he said that Rogan had done it. The Court made an absolutely erroneous determination that A1 had done it under threat of the Accused M.D. The Defense has also stated that it is true that the Trial Panel inspected the medical documentary evidence, but emphasized that the Court was not authorized to interpret medical findings. However, even if it were, in paragraph 431 this witness said that his left leg had been broken. The Defense therefore concluded that no finding would confirm it, as it did not follow from the Court’s “interpretation”, or that he also had four ribs broken.

258. Based on the foregoing, the Defense is of the opinion that the Court erroneously concluded that there existed the relevant act that would have constituted the essential element of the criminal offense of persecution by inhuman treatment.

259. The Defense also considers that this witness identified a completely wrong person as a person who might have come to visit him on a precisely determined date, hence the Court did not possess the quality of evidence which would have identified the Accused M.D. beyond any reasonable doubt.

260. In paragraph 433, the Court stated that witnesses E.Č. and K.V. testified about injuries, as did witness B1. The Defense stressed that such general mention without quoting a witness in one sentence at least, cannot be regarded as the reasoning of the quality required to support the Court’s inference that those were corroborating statements. Neither the Defense nor the Appellate Panel is in the position to know what these witnesses had actually said, as that cannot be seen from the reasoning of the Judgment. At this moment the Defense does not know which parts of the respective statements of witnesses V., Č. and B1 were obviously used as corroboration of witness A1’s statement. According to the Defense, it is incomprehensible that the Court did not convey the key sections of witnesses’ statements which were to corroborate the statement of witness A1. For that reason the Defense is not now making reference to what those witnesses said, but claims that the Court did not provide the reasons that the statement of protected

witness A1 was corroborated with respect to the alleged relevant acts of the Accused D., the quality or at least identification of the injuries or their location.

261. The Defense adds that when paragraph 207 of the contested Judgment is taken into account and when the Court's motives for not wanting to determine the date of protected witness A1's arrest are analyzed and disclosed, it can be concluded that witness A1 is the only one who said that the Accused D. was present when he was arrested, while there are no other witnesses, and no other day was referred to in the Indictment as the day of the arrest. According to the said paragraph, the Court concluded that the persecution commenced on 10 June 1992 precisely. Therefore, in the opinion of the Defense, the Court needed to exceed the charges and determine as the arrest date a period spanning the first half of June 1992 because only in that way could it correlate the alleged actions of D.'s. However, according to the Defense, the Court established that witness A1 did not tell the truth when he described that D. had beaten F.A. with a rod.

262. The Defense compared paragraphs 207 and 210 of the Judgment in terms of legal ground for a potential unlawful deprivation of liberty and imprisonment. As the Appeal reads, it is argued throughout the whole Judgment that they were arrested without any legal grounds. However, for the sake of illustration, it is the cross examinations of protected witness A6 and others (E., M. B.) that showed that they were the ones in possession of illegal weapons, and E.B. also testified about it and his desire and motive to kill the Accused M.D.

263. With respect to the circumstances in Section 5 of the conviction for the Accused M.D. and Section 3a for the Accused G.V., the Defense stressed that that the Court analyzed several witnesses and that paragraphs 348-368 of the Judgment are common for the Accused G.V. and M.D. The referenced paragraphs analyzed several Prosecution witnesses: E.B., A5, A1, S.M., R.P., I.B., A.Č., M.Č. and B1. The statement of witness A7 was read out and the Court adduced and analyzed documentary evidence T-53, T-54, T-55 and T-56. Contrary to that, the Defense emphasized that the Court did not evaluate the statements of Defense witnesses Z.V. and Ž.A.

264. According to the Defense, not one exhibit indicated – confirmed the cause of death. Expert witness H.Ž.'s forensic analysis showed in paragraph 362 that the cause of death could be natural, given that the expert witness did not have at disposal any medical document on the basis of which he could have confirmed that the acts of the Accused

M.D., referred to in Section 5 of the conviction, were actually the cause of death of F.A.

265. The Appeal also reads that after the Court conducted the analysis, in paragraph 364 of the Judgment it established decisive facts that primarily concern the time of perpetration, so the Court concluded that F.A. was taken out of the premises of Z. on 6 October 1992. The Court inserted this decisive fact in the enacting clause by saying *"on an undetermined date in October."* For that reason the Defense concluded that the enacting clause lacked reasoning and that the right to a defense was violated as indicated previously, that is, the Court established a decisive fact to a certain extent, but then did not insert it in the enacting clause, but inserted a vague term instead, expanding the time of the alleged perpetration to the whole month of October, and the Defense wondered why.

266. The Court also established that police members took F.A. out of the building, and made a reference to it in the enacting clause. The protected witness A1 said that the Accused D. was the one who took F.A. out of the prison premises. The same was said by witness B1 (the alleged eyewitness that the Accused D. hit F., on the basis of whose statement the Accused M.D. was convicted, as paragraph 364 reads), who established that K. was the one to take the prisoner out of the premises. According to the Defense, the Court incorrectly established that this witness' statement was credible and authentic in entirety (B1) and in the part of the decisive facts with respect to Section 5 of the conviction of the Accused M.D., and that, as such, it could serve as a basis for factual determinations. The Defense noted that this witness testified about a number of facts which the Court did not take into account, that is, did not trust his account of the situation.

267. When the objective evidence, primarily the autopsy report, is related to the statement of the alleged key witness B1, then it cannot be established beyond any reasonable doubt that the Accused D., together with three other men, inflicted injuries that caused death, according to the Defense.

268. The statement of witness B1 was corroborated by the statement of witness I.B., who said that when he volunteered and entered the room he found Ž.A. there. In that respect, the Defense emphasizes that the Court did not evaluate a statement of witness A., thereby it could not do its job referred to in Article 290(7) of the CPC B-H and could not apply the *in dubio pro reo* rule, and, therefore, could not render a proper and lawful conclusion either.

269. In the opinion of the Defense, the Court made its adjudication on the basis of

rumors (R.P.) and a witness whose credibility is questionable (protected witness B1) and who does not have corroborating evidence. Also, the Court's averment that the testimony of I.B. was a product of an incompletely established state of facts and necessarily also of a wrong conclusion that the witness was credible, since the facts that he testified about did not prove to be accurate, as the Appeal reads. *[sentence as rendered in the original text; translator's note]*

270. The Appeal also reads that Section 6 of the conviction is based on the statement of an injured party and the statement of witness R.B. The testimony of B. was presented as the evidence corroborating the testimony of I.B. It is hear-say evidence, as the witness B. conveyed everything that witness I.B. had allegedly told him. What this witness saw personally is stated in paragraph 441 of the Judgment, that is, that Ismet arrived two hours later. The Defense has, therefore, concluded that the Court did not act in accordance with Article 290(7) of the CPC B-H and did not provide an evaluation of contradictory evidence.

271. According to the Defense, the facts that witness I.B. referred to, which were included in the enacting clause of the conviction with respect to Section 7 thereof, were not confirmed by anybody, let alone by witness R.B., who said at the main trial that he *"talked with Ismet"*. Not only that there is no mention in the Judgment of the presumption of innocence and the *in dubio pro reo* principle, but they are so remote that it is really worrying, argues the Defense.

272. For that reason, this part of the Judgment is based exclusively on one witness' statement and there is no proof that the Accused M.D. committed the criminal offense of persecution by torture of I. B.

273. With respect to Section 7 of the conviction, the Appeal reads that in paragraphs 445-452 the Court addressed the reasons of determination from the enacting clause, and analyzed the statements of protected witnesses A5 and A8, the read out statements of S.B. from the investigation tendered into the case file pursuant to Article 273(2) of the CPC B-H, and Exhibits T-44 and T-45, but did not read one statement of this witness. The Defense emphasizes that although the Court claims that it analyzed Exhibit T-44 (Witness Examination Record for S.B. of 22 June 2009) in the reasoning of the Judgment, it did not do so at all, hence the state of the facts was erroneously and incompletely established.

274. Having trusted the statement this witness gave in 2013, the Court should have considered it to be accurate in the part concerning the time of M.B.'s arrest as well.

The Appeal argues that if the Court had compared this witness' statements that were read out pursuant to Article 290(7) of the CPC B-H and had evaluated the contradictions therein, it would have realized that there was a difference in the mechanism of inflicting the injury (paragraphs 448 and 449 of the Judgment).

275. It is also stated that the Court was mindful of the statement of protected witness A5, who said at the main trial on 16 December 2014 that he had talked with S. who had told him a different thing, that is, that the Accused D. had hit him with a rifle grenade. As already said, the Court did not elaborate on this fact and did not consider it to be established. For that reason, although this witness talked with S., his statement cannot be a corroborating proof that the Accused D. beat up S. nor when, where and how it happened, as he did not discuss it with S.B. and did not describe anything to the Court, either.

276. According to the Defense, witness A8 was not an eyewitness, but only heard that S. had been beaten, since S. and E. had been hated. Defense Counsel claims that witness A8's referenced statements in paragraph 451 of the Judgment cannot be considered as rumors, let alone indications.

277. Given the existence of obvious erroneous conclusions about the existence of decisive facts (relevant act is disputable, as is the presence of the Accused M.D.) and the time of perpetration of the alleged criminal act, the Defense considers that the Court could not establish beyond any reasonable doubt, on the basis of the analyzed witness statements, that the Accused M.D. had committed the acts he was convicted of under the Judgment -- the criminal offense of persecution by inhuman treatment.

278. With respect to Section 8 of the conviction, the Appeal reads that not a single witness said that it had happened "about" 25 August 1992, therefore this finding of the Court is wrong. According to the Defense, the Court accepted the 2009 statement of M.O. as relevant and credible (p. 7 thereof), as well as the one from 2008 (paragraph 17), in which M. said that it had happened "exactly" on 25 August 1992. The other witnesses analyzed in paragraphs 459, 458 and 457 of the Judgment did not make any reference to the date. There is no objective evidence either on the date of probable beating-up, according to the Defense.

279. The Defense also states that, when it comes to the date, the Court simply disregarded witness A.Đ.'s statements and accepted his statement only with respect to

the date that is relevant for this injured party. This witness claims that it was on the same day when he was beaten up, that is, 28 August 1992 (direct examination of the witness on 10 March 2015). No witness contested that A., M., S., M.B. and others had been taken out of there on the same day. In his testimony of 17 March 2015, protected witness A3 precisely determined the date when A. and others had been taken out of there; he said that it had happened on 25 August 1992 exactly, not “about” that date.

280. As the Appeal reads, the Court had an opportunity to provide its evaluation of the contradictory statements about the date, pursuant to Article 290(7) of the CPC B-H, but failed to do so, and then, on the basis of “appropriate” statements, asserted that it had happened “about” 25 August 1992, not on 28 August 1992, as A. said (both dates exist in different sections of the conviction).

281. Also, none of the witnesses confirmed the statements of M.O. regarding the sustained injuries, their identification and potential qualification, which were accepted pursuant to Article 273(2) of the CPC B-H. Therefore, the only thing left to do is to credit the witnesses’ statements from the investigation, T-48 and T-49, and documentary evidence T-173.

282. Based on the foregoing, the Defense has concluded that erroneous is the Court’s conclusion that the left leg was broken and three teeth knocked out, as there is no evidence of it. In addition to the lack of reasoning of decisive facts relative to the injuries which were incorporated in the enacting clause of the Judgment, there is no evidence that the injuries were identified either.

283. Therefore, the Defense considers that the Court established the decisive non-verifiable facts as stated above and, on the basis of insufficient and incorrect information, found the Accused M.D. guilty of the criminal offense of persecution, with the facts as indicated in the enacting clause. The facts were not only incorrectly established, but were not commented on either by witnesses or through objective evidence.

284. The Appeal refers to the statement of witness B.B., who said that the injuries in question were light, excoriations and abrasions, and who testified about the reasons why M. was transported to Podgorica in paragraph 459. The Court credited this witness, but only partially (that he was admitted with injuries). The second part of the statement is not important as it does not “serve the purpose of the Judgment”. According to the Defense, it is obvious here as well that there is no evaluation in terms of Article 290(7) of the

CPC B-H. Therefore, as the Appeal reads, applying the rule from paragraph 52 of the Judgment and disregarding the provisions of Articles 3 and 14, part of Article 15, and Articles 281 and 290(7) of the CPC B-H, it has become possible that the examination record of a witness who could not testify and could not go through cross-examination carried more weight than the testimony of a doctor who testified before the Court as a public witness.

285. When it comes to Section 9 of the Conviction, the Appeal reads that the Court proved its averments through witness-injured party A.Đ., then R.M. (who was not an eyewitness), N. Đ. (not an eyewitness) and witness A3 (not an eyewitness).

286. With respect to the date of the relevant acts, according to the Appeal, the Court opted for 28 August 1992 primarily because A.Đ. said that it was on his birthday, which is 28 August, according to the data he gave to the Court. However, another witness who testified about this fact -- the date -- as the decisive fact, was the protected witness A3, who said that it was on 25 August 1992 in paragraph 469 of the Judgment, as well as on the audio record of 17 March 1992 *[year as published in the original text; translator's note]* when he added: *"I will never forget that day"*. This date is linked to smoke grenades, as far as the witness remembers, but the Court erroneously refers to this date as the date on which A.Đ. was taken out of the building. The Defense stresses that the Court did not provide reasoning in that respect.

287. The Appeal also reads that the Court did not resolve the time of the perpetration in the reasoning of the Judgment or explain if it had attempted to resolve it, pursuant to Article 290(7) of the CPC B-H, but simply disregarded the issue, whereas the Defense was supposed to complain about something the Court should have done. Accordingly, the Defense considers that, based on the statements of witnesses who were not eyewitnesses, the Court erroneously concluded that the Accused M.D. undertook the relevant acts of inflicting injuries as referred to in the enacting clause.

288. In addition, the Defense also emphasizes that in his testimony at the main trial on 10 March 2015, A.Đ. said that he did not know, that he had not seen if the Accused Mi.D. had hit him, but knew that he had seen M.D. in the room to which he had been brought. The witness was sure about S. being the only one who did not beat him, and he knew that because later in the room he heard the Accused M.D. asking S.: "*Why didn't you hit him as well?"* According to the Defense, a proper inference would have been that the Court could

not identify with certainty the Accused M.D. as the perpetrator of the relevant acts by commission and direct participation, that is, by personal undertaking of some unlawful action against A.Đ.

289. The Defense, therefore, concluded that not only that the Court's inference is erroneous, but also that the enacting clause is ill-reasoned, primarily in the part concerning the alleged relevant acts of the Accused M.D. given that there are no eyewitnesses, as not even A.Đ., as the only one present, claimed it, but concluded that the Accused D. carried out the relevant act. Consequently, there is no evidence beyond any reasonable doubt that the Accused M.D. committed the criminal offense of persecution by inhuman treatment.

290. With respect to Sections 10, 10a and 10b of the conviction (injured party E.B.), the Defense stated in the Appeal that the Court analyzed statements of multiple witnesses concerning the factual findings in the enacting clause referred to in paragraphs 472-482. The Defense stresses that the Court failed to evaluate at least eight exhibits of the Defense for the second Accused M.D., namely, O2-5/6/21/22/23/24/25/26/27.

291. The referenced objective evidence of the Defense indicated what kind of personality the injured party was (with multiple convictions for different offenses dangerous for community; he tried to reinforce his testimony with an obviously incorrect report against a person claiming that the person threatened him over his testimony against the Accused M.D.).

292. As the Appeal reads, in paragraph 478 of the Judgment the Court analyzed the statement of witness S.K. whom the Prosecution dropped as an injured party under the original Indictment. It was established during the direct examination and the beginning of the cross examination that he had given the statement in an unlawful manner, which was a reliable signal to the Prosecution that this witness could not be trusted. Also, the witness stated that he did not know anything concerning E., whereupon the Prosecutor presented the witness' previous statement and then the witness said he thought *[sentence incomplete in the original text; translator's note].*

293. The Defense also referred to paragraph 481 of the Judgment which analyzed the statement of witness B.B., who said that nobody had sustained grave injuries, but excoriations and light injuries.

294. It reads that he did not tell protected witness A8 about injuries, but he heard about it

in general terms, not directly but as hearsay, so he conveyed to the Court the information that has the character of rumor (paragraph 480), not of a witness statement that can be evaluated.

295. The Defense emphasizes that paragraph 477 of the Judgment does not read that E. talked directly with protected witness A6, but A6 gave his conclusion based on the statement he made at the hearing on 7 July 2015: "*We asked them who had done it*". Therefore, according to the appeal grievances, E.B. did not directly talk with this witness either, so this witness also conveyed rumors. Also, at the same hearing this witness said that he had talked with professor M.O. although all witnesses agreed that M. had been transported to B., which calls this witness' credibility into question. Also, protected witness A6 did not testify with respect to a complete count 10 and did not say that he had ever heard that E.B.'s nose had been broken, and the other witnesses did not mention it either, which the Court explained in previous paragraphs.

296. Paragraph 479 of the Judgment reads that the Court also analyzed the statement of witness A5 who personally talked with E., but neither A5 told the Court that he knew or that E. told him that his bone had been broken or that he had been forced to drink 2 liters of water. According to the Defense, these facts were incorporated in the enacting clause of the Judgment as decisive, but unexplained, and the Accused was convicted on the basis of these incorrectly established facts. He did not say absolutely anything about E.B. Therefore, the Defense finds the credibility of this witness to be questionable from the aspect of his statement at the hearing on 16 December 2014 that he also talked with A. Đ.

297. Given that none of the witnesses whose statements were analyzed said that E.'s nasal bone was broken and that he was forced to drink 2 liters of water, and that the Court did not state it in the referenced paragraphs either, the Defense stresses that the Accused M.D. was convicted solely on the basis of the statement of one witness -- the injured party, whose credibility and authenticity simply do not exist.

298. With respect to Section 11 of the conviction, according to the appeal grievances, erroneous and uncorroborated is the Court's conclusion that the act was perpetrated in the period from July to October, given that the Court quoted statements of witnesses who clearly indicated the date in paragraphs 493 and 492 of the contested Judgment (N.Đ., P., 25 August).

299. In addition, in paragraph 490 of the Judgment the Court averred the existence

of corroborating evidence (witness A8 who is a cousin of S. M., testimony at the hearing on 11 November 2014, and Z.B.). According to the Defense, these witnesses are not eyewitnesses and did not say against which parts of the body the Accused M.D. allegedly hit S.M., or who, if anyone, kicked him in his chest.

300. Witness A8, as a protected witness, practically provided a testimony based on hearsay. Given that he is a protected and an indirect witness, and that he was presented with at least six facts from the Defense evidence that he had testified differently about, the Defense considers that this witness is not credible and authentic, and that his statement cannot serve as corroborating evidence for determination of facts in Section 11 of the enacting clause and the conviction.

301. The Defense also points that witness Z.B. did not talk with S.M. at all, so his statement cannot have the quality of corroborating evidence for S.M.'s averments. In addition, neither R.P. said that S. was returned, but that an automobile came and drove them away (testimony at the hearing of 30 June 2015). In that respect, protected witness A1 claims that he did not get out of solitary cell until 23 October 1992 (S. claims that he was taken from the SJB premises to Đ. while A8 claims the same).

4. Appeal by the Defense for the Accused Ž.I.

302. The Appeal reads that the state of the facts was erroneously established in the contested Judgment when the Trial Panel concluded that there was no armed conflict in the area of and around the Municipality of B., given that witnesses for the Defense of the second Accused, O.V., B.A., P.P., V.Š., D.R. and M.P., testified about an armed conflict around the Municipality of B., namely, in the Mostar front and Žegulja. However, the Trial Panel did not analyze these testimonies in that context at all. Also erroneous is the Trial Panel's conclusion that the arming of the Muslims had nothing to do with the state of war in Bosnia and Herzegovina, since if it had not have anything to do with it, these arms would probably not have been hidden as was the case with witness A1 and they would probably not have been obtained through the SDA.

303. Also, the Trial Panel established the state of the facts incorrectly when it concluded that the witnesses were systematically and massively deprived of liberty, although they did not take any part in combats or pose any threat to overall security at that time.

304. The Defense stresses that the Accused Ž.I., as a regular policeman, did not know or was not aware of the existence of an attack, as there was no attack, and his insignificant role as a regular policeman cannot in any way be related to the existence of awareness of a widespread and systematic attack without a risk of crossing into the domain of collective responsibility. According to the Defense Counsel, the proof of specific intent is of vital importance to avoid cumulative convictions.

305. The Defense emphasizes that discriminatory intent must be proven, as it is the only materially different element that makes persecution different from other crimes against humanity. Without it, a conviction for persecution would be cumulative with convictions for inherent acts, which is lacking in the contested Judgment.

306. The Defense is of the opinion that, when presenting its evidence, the Prosecution did not once demonstrate that any of the Accused possessed the intent to discriminate anyone in any way. Also, the Trial Panel did not render a proper conclusion from the foregoing facts on the existence of discriminatory intent, especially if it is taken into account that in the contested Judgment it did not sufficiently evaluate the fact that the Accused Ž.I.'s marriage was an inter-ethnic one, that he had spent his whole career in B. working as a policeman and that he had never been punished in disciplinary proceedings.

307. What is particularly obvious from the introductory part of the Judgment, according to the Defense, is that a wrong timing is quoted. Also untenable are the averments in the contested Judgment that the arrests were carried out by police members subordinated to the Accused, for a simple reason that the Accused Ž.I., being a policeman, held the lowest-ranking duty in the police force.

308. The averments in paragraphs 52 and 53 of the contested Judgment that the Trial Panel did not have to evaluate every piece of adduced evidence and that such evaluation would not serve the purpose and would burden the Judgment, are untenable, in the view of the Defense, because they resulted in the incorrectly and incompletely established state of facts in sections 18, 18a, 19 and 20 of the enacting clause, that is, the reasoning of the contested Judgment.

309. With respect to Sections 18 and 18a of the enacting clause, which relate to the injured party S.M., who said at the main trial that the Accused Ž.I. together with son of J. F. beat him on the premises of Z., the Defense examined witness D.F. The witness said specifically in his testimony that he had never entered the premises of Z., especially

not in June and July 1992 as argued in the Indictment, given that he had been a member of the army at that time and, as such, could not enter a police prison at all. The Trial Panel did not at all evaluate the statement of this Defense witness, who now works as the commander of the SJB B., or establish its correspondence with the other adduced evidence. The Defense therefore concludes that if the Trial Panel had evaluated the witness' statement, it would have made an absolutely contrary inference on the state of the facts in this section.

310. The Defense argues that the enacting clause reads that the Accused Ž.I. once kicked the witness – injured party S.M. in his chest on the SJB premises, in the presence of another four police officers. When giving evidence at the main trial, the witness said that he was allegedly beaten twice on the premises of Z, and that, when he was sitting in an armchair on the premises of the SJB, he was kicked in his chest by one R. However, having been reminded by the Prosecutor of his statement in the investigation, he corrected himself, that is, changed his statement by saying that he was not kicked by R., but by the Accused Ž.I. The injured party's changing of the statement about the manner and the person who kicked him makes his statement unconvincing and inconsistent, and him a non-credible witness, in the opinion of the Defense.

311. The Appeal stresses that with respect to bodily injuries of S.M., the Prosecution examined forensic medicine expert Dr. H. Ž., who stated in his Finding and Opinion that he conducted a forensic analysis of the referenced injuries on the basis of medical documentation alone. He gave his opinion that the injuries could also be caused by the body's impact on a hard surface, that is, by fall, but could not say anything about the age of the sustained injuries.

312. With respect to Sections 18 and 18a, the Defense examined witness M.S., an active police officer of the SJB in the referenced period, who testified at the main trial about the discovery of illegal arms, that is, an automatic rifle in witness S.M.'s possession. Witness S.M. was issued with a receipt on seizure and, in the opinion of the Defense, this was his motive for incriminating the Accused Ž.I. without grounds.

313. With respect to Section 19 of the enacting clause concerning the read out statement given by the injured party M.O. in the investigation, the Defense wants to point that the Prosecution attempted to prove this Count of the Indictment, too, by reading the statement of this witness who was not able to attend the main trial for health reasons. The Defense,

therefore, was not able to check the witness' averments in a cross examination or contest the witness' credibility, hence it considers that the Prosecution's standard of proof for this Count of the Indictment was insufficient and that the Count was not proven beyond reasonable doubt.

314. In that respect, the Defense avers that the presented example is an obvious demonstration of a breach of the principle of equal approach in the evaluation of adduced evidence by crediting the read out witness statement, without finding it necessary to evaluate the authenticity of the statement and the credibility of the Defense witness.

315. With respect to Section 20 of the enacting clause reading that A.Đ. was an injured party and specifying the incrimination of the Accused as follows, *"together with four other members of the police force [he] heat him all over his body and inflicted on him multiple injuries from which he lost consciousness,"* the Defense particularly points at the statement the witness gave at the main trial on 10 March 2015, which the Trial Panel did not evaluate either.

316. The statement of the witness -- injured party A.Đ. is not well-founded in its own right, although it was given at the main trial following personal recollection. The witness referred to the Accused Ž.I. saying that *"I. might have been present [during that event], but I'm not sure."* In that respect, the Appeal reads that the Trial Panel did not find it necessary to evaluate such witness statement when rendering the contested Judgment, whereby it made an essential violation of the procedure and found the Accused Ž.I. guilty on the basis of an incorrectly and incompletely established state of facts.

317. The Appeal reads that not a single article of the Criminal Code of B-H provides a precise definition of inhuman treatment. In its many Judgments the ICTY defined inhuman treatment as an intentional act or omission, that is, an act which, objectively speaking, is premeditated and not accidental, and which causes serious mental or physical suffering or injury, or constitutes a serious attack on human dignity.

318. It also reads that the Trial Panel referred to the Geneva Conventions, particularly Common Article 3, when defining civilian population in the contested Judgment.

319. Given that Article 130 of the II Geneva Convention and Article 147 of the IV Geneva Convention prohibit willful causing of great suffering or serious injury to body or health, the Defense argues that the Prosecutor should have proven the following: that the offense was

intentional, that it caused great suffering or serious injury to body or health.

320. The Defense also stresses that the Trial Panel did not explain the conclusion that the Accused caused great mental suffering with the acts he undertook, that is, the responsibility for inhuman treatment in the referenced sections of the enacting clause. The Defense argues that the Accused did not cause suffering that was serious, real and great.

321. With a view to proving that the injured party referred to in Sections 18 and 18a experienced great mental suffering caused by the acts of the Accused, the Prosecutor adduced as evidence a forensic medicine analysis of the state of mental health of the injured party conducted by forensic medicine expert witness under the order of the Prosecutor's Office of B-H, who also analyzed the medical documentation about the type and degree of injuries for S.M. and established that M. sustained fracture of elbow and ribs.

322. Based on the foregoing, the Defense is of the opinion that it was not proven beyond any reasonable doubt with the evidence adduced at the main trial that S.M. sustained the referenced injuries in 1992.

323. This expert witness did not conduct analysis of the other witnesses referred to in Sections 19 and 20 of the contested Judgment, which, according to the Defense, was imperative when it comes to this criminal offense.

324. Therefore, according to the Defense, a Judgment must be based on an indisputable conclusion inferred from the adduced evidence not only that the act was committed, but also that it had grave consequences on a victim, as it does not necessarily mean that the act constituted a grave breach of international humanitarian law, unless such breach constitutes a serious offense, which is anyway not indicated in the contested Judgment with respect to the acts of which the Accused Ž.I. was found guilty.

325. Finally, the Defense concludes that on the basis of the evidence adduced at the main trial the Court could not make a well-founded inference that the Accused Ž.I., in the capacity as a police officer, committed the referenced criminal offense as a co-perpetrator, as it is absolutely impossible that he would undertake any act jointly with his superior, the police commander and chief of the SJB. The Accused acted following the orders of his superiors, that is, he seized illegal arms and apprehended and brought into the station the persons on whom the arms were found, which is an absolutely legal act with which his

authorities as a regular policeman were completed.

C. DECISION OF THE APPELLATE PANEL

326. Having reviewed the appeal grievances arguing that the state of the facts in the contested Judgment was incorrectly and incompletely established, having analyzed in detail the contents of the contested Judgment, and having inspected the case file, the Appellate Panel concluded that the grievances were unfounded. The Panel concluded that the state of the facts was properly and completely established and that the contested Judgment contains valid and acceptable reasons on all decisive facts on the basis of which the contested Judgment was rendered.

327. Also, by the application of the principle of free evaluation of evidence, the Trial Panel properly and completely established all decisive facts, hence the contested Judgment is properly focused on the evaluation of evidence on which the Court's adjudication is based, so the state of the facts was not incorrectly and incompletely established in that way either.

328. Since the findings of fact made by the Trial Panel are given a margin of deference in the appellate proceedings, the Appellate Panel will not evaluate the views taken by the parties at the main trial, but will only consider the arguments that the Trial Panel's factual findings are unjustified.

329. The Appellate Panel addressed the appeal grievances concerning the evaluation of evidence when evaluating the existence of essential violations of the procedural law, so it will not repeat them here. The Appellate Panel's conclusion is that the Trial Panel provided sufficient argumentation from which it can be seen what were the reasons that guided it when rendering the decision and which evidence was the basis for its findings of fact.

330. The Appellate Panel also wants to stress that the appeal grievances regarding the incorrectly and incompletely established state of the facts, which specifically concern the widespread and systematic attack and the existence of a Joint Criminal Enterprise, have already been determined to be unfounded in the part of the Judgment addressing the essential violations of the criminal procedure provisions where the Appellate Panel presented the reasons for its decision and will, therefore, not be repeated in this part of the Judgment.

331. The Appellate Panel will, therefore, evaluate the appeal grievances concerning each relevant act by the Accused, in the order followed by the Trial Panel in the contested Judgment.

332. Based on the foregoing, the Appellate Panel has concluded that, with respect to Count 1 of the amended Indictment, the Trial Panel properly established that the Accused G.V. and M.D. enabled and organized unlawful arrests, which conclusion is accepted by this Panel, too.

333. With respect to the events in B. in 1992, the Trial Panel evaluated a large number of statements of the witnesses who were also injured parties, and fully credited these statements because they were logical, consistent and mutually corresponding in terms of essential facts. In that respect, the contested Judgment properly reads that the witnesses described mass arrests of the non-Serb population from the town of B. and the neighboring villages which started on 10 June 1992, as well as the subsequent arrests (for example, on 19 June 1992). The witnesses confirmed that members of the active and the reserve police components took part in the arrests, as did some uniformed persons unknown to them in some cases. While in captivity they were guarded by the regular and reserve police members from the PS B., who not only arrested them unlawfully and without any reason, but also interrogated, physically mistreated, and held them on the premises without water, unfit for living and for meeting basic hygienic needs, until 5 October 1992, and then deported them only because they belonged to a different ethnic group.

334. With respect to unlawful detention, the witnesses' statements[3] were interpreted and analyzed in detail in the contested Judgment, as was the documentary evidence, so this Panel has fully accepted as proper the averments in the contested Judgment, as there is no need to interpret the witnesses' statements in the said manner in this decision as well.

335. It is clear from the reasoning of the Judgment that the Trial Panel was mindful of the Defense objections from the main trial, that it evaluated them and presented its opinion on them. The Trial Panel stressed that unfounded were the averments of the Defense that Bosniak men were locked up for their safety, due to which the Defense found the arrests to be justified and lawful. In that respect, the Trial Panel properly analyzed all facts and reached a logical conclusion that the major number of civilian men were deprived of liberty

[3] Witnesses: M.B., S.M., N.r Đ., R.B., R.P., N.B., R.M., M.Č., V.M., A.Đ., I.B., A3, A8, M.Č., A.Č., L.S.

and taken to facilities where they were held against their own will in inhuman conditions and guarded by armed men. It is also clear that this process was not accompanied by any legal procedure, that the detaining was carried out under coercion and that the detained persons were not told of any valid reason for their arrest and detention (except for general and obviously insincere “explanations” given to some men that they were being detained for their personal safety or that they were supposed to give some statements). All these clearly proven facts lead to the conclusion that the detaining was unlawful.

336. In the Judgment the Trial Panel analyzed in detail the statements of the witnesses who described a uniform pattern of deprivation of liberty and apprehension to the PS, that is, the premises of Z. and Đ. In almost all cases the people were arrested at their homes or after they had surrendered to the police following days of hiding in the neighboring woods and villages. The police told them they were only going to give a statement, but had previously confiscated all their arms, which in the majority of the cases consisted of hunting rifles or pistols for which the injured parties possessed firearm licenses. Despite having been completely disarmed, they were taken by military trucks and TAM [Maribor Automobile Factory] trucks to the PS B., escorted by members of the active and reserve components of the police force of the PS B., and quite often also by members of an unknown military formation. They were not asked for their IDs or told why and where they were being taken or why they were being deprived of liberty, no legal procedure was conducted, and they were not given any document on imprisonment, whereby they did not have any possibility of resorting to legal remedies. It is also very indicative that the majority did not give any statement at all or that statements were taken afterward, and even after that all of them stayed detained for months in inhuman conditions until their deportation. The majority of them were Muslims and there were a couple of Croats, too.

337. Contrary to the appeal grievances of Defense Counsel that the Defense evidence was not evaluated at all, the statements of Defense witnesses S.I. and Ž.A. corroborate the foregoing averments. The witnesses, who were members of the police force at the relevant time, confirmed that a large number of Muslims were taken from their homes, apprehended and detained in June 1992, and that they received orders to issue the Muslims with receipts about seized items, and that a large number of them possessed arms with license. They also confirmed that the Muslims were detained and locked up in the building of Z. in front of which police members stood guard.

338. For that reason proper is the Trial Panel’s conclusion that all detained civilians

were deprived of liberty against their will and without legal grounds, given that none of them was notified of the reasons of the arrest nor was the justification of such arrest reviewed in judicial or administrative proceedings. This Panel also accepts the referenced conclusion because it is a result of a comprehensive, proper and impartial evaluation of evidence by the Trial Panel.

339. Also, contrary to the Defense averments, the Trial Panel properly established that the adduced evidence suggested that the mass and individual arrests of non-Serb civilians were conducted mainly in June 1992, and partially also in July 1992, in the territory of the Municipality of B. They were carried out by members of the then SJB in B., both its active and reserve components, whose direct superiors at that time were the Accused V., as the chief of the PS B., and the Accused D., as the commander of the PS.

340. As the contested Judgment properly reads, in the majority of the cases the arrests were conducted by police members of the PS B., but in some cases members of other public security stations in Eastern Herzegovina were involved, as were the military and paramilitary forces. However, none of the examined witnesses could identify the military units in question, except saying that they wore military camouflage uniforms and that the civilians-injured parties were transported to the PS B. building by military and TAM trucks.

341. Although the Defense claims differently in its Appeal, multiple witnesses[4] testified about the participation of members of the active and reserve components of the police, quoting the names of police officers who arrested them, which was corroborated by the exhibits listed in the contested Judgment. In that respect the Trial Panel established that S.R., R.N., N.K., Je. and other police members most often participated in the arrests. The Trial Panel was mindful of the fact that the witnesses also mentioned people from G. and N. and army members, but established that their role was insignificant and that the arrest operation was organized by the PS B., that is, by its leading officers, primarily chief V. and commander D. (the latter often personally participated in the apprehensions), while members of the military and paramilitary forces had a role of helpers rather, especially given the fact that all arrested persons were brought solely to the building of PS B.

342. With respect to the military and paramilitary forces and their participation in the arrests, the Appellate Panel has already presented its reasoning and accepted the

[4] Witnesses M.B., S.M., N.Đ., R.B., R.P., N.B., V.M., A.Đ., I.t B., A8.

averments in the contested Judgment as proper, and concluded that the Defense appeal grievances were unfounded.

343. The referenced determinations that the persons who participated in the arrests at the relevant time were members of the active and reserve components of the PS of B. were corroborated by the Trial Panel with exhibits containing lists.

344. The Appellate Panel considers as proper and not contested in any way the Trial Panel's conclusion that the Prosecution evidence suggests that all non-Serbs who were deprived of liberty were detained in two buildings, the so-called Z. building, located directly behind the SJB B., and the building of Đ., and that during the whole detention period they were guarded solely by members of the active and reserve components of the police.

345. This conclusion is based on the statements of all Prosecution witnesses who were detained in these buildings, as well as the statements of members of the then SJB in B., namely M.S., R.S., S.S. and S.V., who only guarded the detainees even when some were undergoing medical treatment as patients at B. in B. This also clearly follows from the statement of witness B.B., who worked as a doctor at B. in B. at that time.

346. The Trial Panel determined that these witnesses' statements were credible and authentic given that they were all logical, mutually consistent and very convincing. The Trial Panel concluded beyond any reasonable doubt that in the period from early June to late 1992, the Accused G.V. and M.D., as the respective chief and commander of the SJB in B., participated in the persecution of the non-Serb civilian population of the Municipality of B. by having organized and enabled unlawful arrests. Members of the active and reserve components of the PS B. unlawfully deprived of liberty the able-bodied men whom they held detained in camps set up on the premises of the SJB of B. and of the so-called Đ., where around 150 men were detained. On 5 October 1992, around 100 detainees and their family members were deported to the Republic of Montenegro, whereas the remaining detainees were released on 17 December 1992.

347. The Appellate Panel also considers that the referenced witnesses reliably described the events as charged and that the Trial Panel properly established the state of the facts based on their statements.

348. Having analyzed the statements of the witnesses[5] who had been arrested in June 1992, the Trial Panel concluded that a large number of the arrested persons were hit and beaten up during the arrest. The witnesses, that is, the injured parties, described in which way they were hit during the arrest by members of the active and reserve components of the PS B. That the Accused were present during the apprehensions and that the unlawful arrests were conducted with their consent and knowledge also follows from the statements of multiple witnesses.

349. In that respect, on the basis of witnesses' statements[6] and the documentary evidence, the Trial Panel made a well-founded inference that the Accused G.V. and M.D. were informed of the ongoing arrests of non-Serb men from B. and their unlawful detention and apprehension primarily to the PS B., and subsequent dispatching either to the building of Z. or the building of Đ. The Trial Panel established that the Accused D. and V. organized and enabled the unlawful arrests by having their subordinates -- members of the active and reserve components of the SJB in B., execute them. This could not have happened without prior consent of the Accused, in their respective capacities as the SJB chief and commander, who thus rendered possible the mass arrests that took place in the course of June 1992. Such conclusion is also confirmed by the fact that all arrested civilians were brought to the building of the SJB B., where the Accused V. and D., that is, their offices, were, that they were guarded by members of the police force throughout the whole detention, and that they were taken to interrogations in which the Accused also occasionally took part, which also indicates the consent of the Accused, as properly concluded in the contested Judgment.

350. Contrary to the appeal grievances, properly evaluated was the fact that the Accused D. himself participated in the arrests of Muslims, and all witnesses confirmed that on the first evening after the apprehension the Accused D., escorted by a policeman, entered the room where the men were detained. When it comes to the Accused V., the Trial Panel based the averment of his knowledge not only on the fact that he was the chief of the SJB B., but also on the fact that all arrested men were brought exactly to the building of the SJB B. and that when going up to the first floor they all had to pass by the office of chief V. In addition, the Accused V. had a direct contact with the injured party B1 after B1 had been arrested and brought to the PS B., whereupon he was released under V.'s order. However,

[5] Witnesses S.M., R.P., R.M., M.Č., A1, Z.B., A2, A8, M.Č., A.Đ., A3.

the following day police officers again came to pick up witness B1 and took him to the PS B again.

351. The Appellate Panel also accepts these properly established facts in entirety.

352. Also, the Trial Panel concluded based on the adduced evidence[7] that almost one half of the detained civilians were forcefully deported after having been released from detention facilities. They were forced to leave their homes against their will under police escort, that is, to leave the town of B. and cross to the territory of the Republic of Montenegro.

353. Based on multiple pieces of documentary evidence, the Trial Panel properly established that a substantial number of detained civilians were released from Đ. on 6 October 1992, that is, that the witnesses – injured parties were registered by C. during the detention, as well as the date of their release.

354. Also, having evaluated the witnesses' statements which the Trial Panel fully credited as they were all logical and mutually consistent although the events that the witnesses testified about had happened almost 25 years ago, the Panel concluded beyond any reasonable doubt that almost one half of the detained civilians were forcefully deported, that is, were forced to leave their homes against their will under police escort, leave the town of B. and cross to the territory of the Republic of Montenegro.

355. Contrary to the appeal grievances, the Trial Panel did not find that the reason of this relocation was their safety, as those very civilians were the target of an attack and were being deported by the forces that had participated in the attack against them within the context of a widespread and systematic attack. For that reason proper is the conclusion that they were forcefully relocated from the territory in which they had lived lawfully for decades to locations not of their choice.

356. The Appellate Panel, same as the Trial Panel, does not find contestable the subjective attitude of the Accused toward the committed crimes and their knowledge of all elements of their perpetration. The contested Judgment properly reads that by virtue of their offices the Accused had to know that serious deprivation of physical liberty,

[6] Witnesses A5, B1, A.Č., M.B., A.Đ., A3, R.B., N.B., A1.
[7] Witnesses I.B., M.Č., M.B., S.B., E.A., N.B., R.B., A1, A8, A5, and documentary evidence.

imprisonment without legal grounds and relocation of the non-Serb population from B. were not lawful, which undoubtedly suggests intent on their part.

357. Therefore, the Accused G.V. and M.D. participated in the established acts with discriminatory intent and thereby committed the criminal offense of persecution. That the Accused knew what was happening to civilians in this Municipality is also confirmed by the statements of witnesses, who said that on the first evening that they were deprived of liberty the Accused D. came to them and addressed them briefly and took I.B. out of the building, which indicates that D. was aware of the fact that on the upper floor of the Police Station in B. there were detained Bosniak and Croat men. The fact that the Accused D. personally participated in the arrest of the men should not be disregarded, either.

358. The Trial Panel established that the knowledge of the Accused G.V. stemmed primarily from the fact that he was the chief of the PS B. in the relevant period and that his office was on the ground floor, thereby he could not have been unaware of the fact that mass arrests of the non-Serb population from B. and its surroundings started mid-June 1992. All men were first brought to the building of the PS B., where they slept overnight on the first floor, whereupon they were dispatched to the building of Z. It was actually a component part of the PS B., located only some 5 meters behind it, and had used to be a custody unit. In addition, the detained men were guarded by members of the active and reserve components of the PS B. who were subordinated to the Accused V. Also, certain witnesses confirmed that they had seen the Accused V. in the course of their detention, that is, some had even talked with him immediately after their apprehension.

359. Thus, witness N.B. said that a couple of days after he had been brought in he was taken to interrogation by regular policeman R.S., that confiscated weapons were in the room, and that another policeman and police chief G.V. were there. He said that G. was asking questions and that every time he answered that he did not know he was hit by D. and S. Witness B1, who had been a policeman in the PS B. until the war, said that when he was apprehended to the upper floor he was told by policeman M. that chief G.V. wanted to see him. The witness went to his office and G. asked him how he had ended up there and told him to go home and that nothing would happen to him, but on the following day he was taken to the PS B. again. Witness A5 said that in the period after 10 August he used to see the Accused V. and D. in Đ., which was confirmed by witness E.A. Witness R.P. described the event when L., commander of the so-called *Beli Orlovi* [*White Eagles*, translator's note], came and told him to raise his hands, beat him, blood gushed forth,

kicked him, and he was lying in that state, and then G.V. came by on the way out of his office, laughing, in the company of F.I I. and A.S., G. looked at him and stopped laughing. The witness said that he personally knew the Accused V. from before as they had worked together. Witness A1 stated that he saw G.V. only once, whereas D. interrogated him about some ammunition. Witness N.Đ. has indirect information from M.O. that A.Đ., M.O., S.M., and M. B were beaten by D., V. and N. Witness A2 said that on the night of 5 September 1992 there was an attempt of throwing poisonous gases in Đ. and M., and that there was one honest guard in the police at that time. To the cries that those were Šešelj's and Arkan's men the guard said that it was not them but G., D. and their men. After that, the guard S.V. was taken to solitary confinement because he disclosed that G. and D. had thrown the grenades in.

360. Therefore, unfounded are the Defense appeal grievances that not a single piece of evidence was adduced that suggests that the Accused G.V. had enabled and organized the arrests of the non-Serb population, and that not one Prosecution witness said that he had seen him either in the building of Z. or in the building of Đ.

361. Having evaluated all referenced facts and circumstances, the Trial Panel made a proper inference that the Accused V. could not have been unaware of the fact that men were unlawfully apprehended and imprisoned. Therefore, although a considerable number of witnesses – injured parties clearly said that they had not seen police chief V. during their detention, his awareness and knowledge of the unlawful imprisoning is unquestionable, particularly because these men were unlawfully imprisoned for several months, during which time one number of them were not only in the building of Z., but also in the solitary confinement in the building of the PS B. In that respect, it sufficed for the Accused V., as the chief of the PS B., to come to work on a daily basis to be aware of the imprisonment.

362. Although the Defense Appeals argue to the contrary, the contested Judgment properly reads that the Accused not only knew of this process, but that by virtue of their offices they decisively contributed to the persecution of the non-Serb population from the territory of B. The Trial Panel based the referenced averment primarily on the offices they held, then on the facts that police members participated in the arrests, with the Accused D. also taking part in the arrests in certain cases, that police members guarded the facilities in which the civilian men were detained, that a certain number of persons were brought to the premises of the PS B. where their statements were taken, that a certain number of witnesses – injured parties saw the Accused in the course of the arrests or immediately

after they had been brought in, that a considerable number of the detained civilians were held on the premises of Z., which were actually within the PS B. and had once served as custody cells, and that one number were in solitary confinement in the PS building.

363. Based on the foregoing, the Appellate Panel concluded that proper were the averments in the contested Judgment that, given the fact that the target of the attack were civilians, non-Serb men fit for work, that no proceedings had ever been conducted against them related to their capture, that they were not told the real reasons for their arrests, that they never received any decision on capture, and that they were eventually expelled to the Republic of Montenegro, the acts in Count 1 of the amended Indictment, with the previously established discriminatory intent on the part of the Accused V. and D., satisfied all required elements of persecution perpetrated by unlawful imprisonment and deportation.

364. The foregoing suggests a conclusion that the Appeals did not contest the proper findings of facts by the Trial Panel, hence the Appellate Panel dismisses them as unfounded.

365. With respect to Count 2 of the amended Indictment, which also concerns the Accused G.V. and M.D., the Trial Panel concluded that the Count was proven based on the numerous statements of the witnesses – injured parties[8] which the Trial Panel properly evaluated as credible and authentic.

366. The knowledge and awareness of the Accused about the inhuman conditions in which the detained civilians were held follows from the statements of witnesses, and from the fact that the civilians used to see the Accused during the detention, that the facilities where the witnesses were detained were guarded by members of the reserve and active components of the police whose superiors were the Accused, who had information about the conditions in which the detained civilians were held, as well as from the fact that the Accused held the offices of the chief of the SJB and the commander of the SJB B. respectively. Having analyzed all witnesses' statements, the Trial Panel ruled out any possibility that the Accused remained unfamiliar with the conditions in which the detained civilian men were staying, especially given the fact that the building of Z. was a component part of the SJB B., commanded by police chief V. In addition, all witnesses confirmed

[8] Witnesses E.B., R.B., E.A., A5, M.Č., A.Č., A3, A1, A8, V.M., A.Đ.

several times that they saw both Accused in Đ., that is, the building of SJB B. when they were being taken to the beating and mistreatment.

367. Also, when it comes to the detainees' stay on the detention premises, the Trial Panel was mindful of the statements of multiple witnesses – injured parties[9] who testified about the situations in which they used to see the Accused V. and D. In addition, the Trial Panel also evaluated the statements of policemen – guards in the building of Z., namely: R.S., S.S. and M.S.

368. Having evaluated the adduced evidence, the Trial Panel established with certainty the involvement of the police, that is, members of the SJB B. in the relevant events following a well-established and routine pattern, of which the Accused must have been aware, especially given the fact that on several occasions the Accused D. personally participated in the interrogation of the men unlawfully detained in the building of SJB B., and that some of the witnesses said that they also saw the Accused V. in the building on that occasion. In addition, the detained civilians stayed in the building of Z. which is located behind the SJB B., which is another indication that there was no way that the Accused, who had offices in the SJB B. building, could have been unaware of the fact that civilian men were held there and of the conditions in which they were staying there.

369. With respect to the conditions in the building of Đ., the Trial Panel made an inference on the Accused's knowledge and will from the fact that they used to come to Đ. where multiple witnesses – injured parties saw them. The Trial Panel was particularly mindful of the fact that both facilities were guarded by members of the reserve, and later also of the active component of the police of the PS B. who were subordinated to the Accused, which leads to a logical conclusion that the Accused were aware of the situation in which the detained civilians were held. This conclusion of the Trial Panel is also entirely accepted by the Appellate Panel, since the contested Judgment contains appropriate reasoning concerning the Accused's knowledge of the inhuman conditions in which the detained civilians were held, whereby they committed persecution by inhuman treatment.

370. Contrary to the Prosecution's appeal grievances, the Trial Panel did not have sufficient evidence of quality on the basis of which it would have established beyond any reasonable doubt that the Accused ordered the imprisonment of non-Serb persons.

[9] Witnesses A5, M.Č., A.Č., R.P.

371. Therefore, the Appellate Panel considers unfounded all appeal grievances arguing an incorrectly and incompletely established state of the facts regarding Count 2 of the amended Indictment.

372. With respect to Counts 3, 3a, 3b and 3c of the amended Indictment, the Trial Panel concluded, on the basis of consistent statements of the examined witnesses, that the Accused G.V. committed the criminal offense of persecution by omission, in connection with the criminal offense of murder, torture and inhuman treatment. The Trial Panel established from the adduced evidence that the Accused V.'s personal contribution in the perpetration of the acts as charged gained the form of personal participation in the perpetration of the criminal offense by omission, that is, by failure to prevent the prohibited consequence in the capacity as the chief of the SJB B. The referenced opinion of the Trial Panel, which is a result of the properly and completely established state of facts, is also upheld by the Appellate Panel for the reasons indicated earlier in the reasoning.

373. The Appellate Panel evaluated the appeal grievances concerning Counts 3a and 5 of the amended Indictment and considered them to be ill-founded, whereas it considered the arguments in the reasoning of the contested Judgment to be sufficient and relevant.

374. The Appellate Panel is of the opinion that the Trial Panel acted properly when it evaluated within this context whether Count 5 of the amended Indictment was proven. Under this Count, the Accused M.D. personally participated in the beating of F.A. as a co-perpetrator and inflicted on him the injuries that caused his death.

375. When it comes to the circumstances of F.A.'s death, the Trial Panel evaluated statements of multiple witnesses[10] and the documentary evidence listed in the contested Judgment. Expert witness H.Ž. testified about the autopsy report at the hearing of 26 October 2015 and stressed that a bone of a young person healed within 20 days. He said that he had not found any soft tissue on A.'s body, only bones, and that no traces of trauma had been found on the bones of the limbs and torso, so he could not say what the cause of death was. The expert witness explained that traumas to abdominal organs never left visible traces and that death might have been natural or caused by arterial bleeding.

[10] Witnesses E.B., A1, A5, S.M., R.P., I.B., A.Č., M.Č., B1, A7 (read out).

376. It is necessary to stress here that ill-founded are the Defense arguments that there is no causal link between the grave physical mistreatment of F.A. and his death. It is absolutely clear that the acts that the Accused M.D. undertook together with other members of the police constitute the acts of co-perpetration in a murder, given that the victim had been fiercely hit and kicked to his chest and head, which resulted in his death. With these acts the Accused decisively contributed to the death of victim F.A., hence his acts constituted a link in a series of necessary acts that led to this murder.

377. The expert witness was not able to confirm with certainty that the victim's death was a consequence of the grave bodily injuries inflicted on him, given that there was no soft tissue on the basis of which he could have made such a conclusion, and that the bones alone did not give him that clue. However, that fact does not mean that other exhibits, together with this forensic analysis that was not restrictive, do not actually suggest a violent death of a young man of 30 when evaluated in terms of their mutual logical correspondence.

378. In that respect, the Trial Panel properly evaluated the statements of witnesses who testified about that circumstance, and concluded that F.A. was taken out of the premises of Z. on 6 October 1992, as was witness B1, and that they were taken to the police building. Although none of the examined witnesses personally saw the beating of F.A., the Trial Panel credited the statement of witness B1, who was taken out of the room after 15 minutes. The witness confirmed that on that occasion in the duty officer's room he saw the Accused D., K. and some other policemen, and that he was then taken into the room in which at that time F.A., all covered in blood, was lying on the floor, and D. ordered him to get up, but he was not able to, whereupon K. took him and placed him on an armchair. On that occasion the witness was also beaten by the Accused D. and was then taken back to the room from which they had been taken out, and he said that D. hit him then, and that D. also kicked B. two-three times. These averments were also confirmed by witness R.P., who was in the same room when F.A. was brought back.

379. As properly stated in the contested Judgment, the fact that the Accused D. was next to F.A.'s side while he was lying all covered in blood, was also confirmed by witness I.B. This witness confirmed that cries and moans could be heard after A. was taken out of the room, whereupon some policemen were looking for volunteers, so he went together with M.M. to the porter's lodge of the PS B. where D., A. and K. were. The witness described that at that moment A. was lying prone on the floor, and he was asked by D.: *"Has*

anyone hurt you?" The witness said that nobody had hurt them and then D. said: *"Take him with you, he'll come around"*. The Trial Panel also evaluated the statement of witness A1, who was taken out on the same night as F.A. and who personally saw when the Accused D. took F.A. out of the room, whereupon the witness was also taken to the police building, where he saw F. lying on the floor. F. was then taken back to the room where he died an hour and half later.

380. In addition to the foregoing witnesses, the death of F.A. was also confirmed by other witnesses who were detained in the same room as A. and who saw him being brought in. Witness S.M. confirmed that F.A. was seized and held by S.Č., that only rattle came from F.'s throat and that he died some 10 minutes later. Witness M.Č. also confirmed that F.A. was brought half-dead by N.K. and that only death rattle was heard from him.

381. Having found that the referenced statements of the witnesses complemented one another in terms of all important facts, that they were impartial and convincing, the Trial Panel did not have any reason not to trust these statements and considered them to be a reliable ground for determination of criminal acts of the Accused, as indicated in the enacting clause of the contested Judgment.

382. Although nobody had seen the beating of victim F.A., this Panel also has no doubt that this incrimination was proven. It is beyond dispute that direct evidence is more credible, but given the governing principle of judicial intimate conviction, it is up to the court to decide what, if anything, has been proven by a certain piece of evidence. In that respect the Trial Panel properly established a series of indications, that is, legally relevant facts that indicate that the victim died a violent death, and provided a proper and sufficient reasoning for its decision.

383. Therefore, the Appellate Panel considers that the Trial Panel properly concluded that the Accused M.D.'s personal participation in the described criminal acts was proven, and thereby found him to be criminally responsible for participation in the murder of F.A. as a co-perpetrator.

384. Having evaluated the referenced evidence, the Trial Panel also reached a proper conclusion that with his omission the Accused G.V. committed the criminal offense of persecution, in conjunction with the criminal offense of murder of F.A. The Trial Panel also concluded that the Accused V.'s personal contribution in the perpetration assumed the

form of personal participation in the perpetration by omission, given that, as the chief of the SJB B., he did not prevent the prohibited consequence and was, thereby, found responsible for participation by omission in the murder of F.A., as a co-perpetrator.

385. Based on the foregoing, the Appellate Panel considers that the contested Judgment provided adequate reasons for all decisive facts and that the respective Appeals by Defense Counsel did not successfully challenge the state of the facts for the referenced Counts of the Indictment. Also, the Prosecution did not properly argue the Trial Panel's error with respect to the Accused's participation in the perpetration of the relevant criminal offense. For that reason this Panel dismissed the referenced appeal grievances as unfounded.

386. Having reviewed the appeal grievances with respect to Count 3b of the amended Indictment charging the Accused G.V. with torture of A1, A2, M.M., I.B., S.B.a, A5 and S. K. by induction telephone, the Appellate Panel concluded that they did not call into question the proper findings in the contested Judgment.

387. It follows from witnesses statements[11] that in the building of Đ. the victims A1, A2, M.M., I.B., S.B., A5 and S.K. were tortured by police members (most often by N.K. and one A.), who attached on certain parts of the victims' bodies pins connected by wire to an induction device and then passed the current through the wire, which caused a high-intensity physical pain and suffering with the victims, as well as mental pain and state of shock.

388. The Defense appeal grievances that the victims' suffering was not of sufficient intensity to satisfy the standards of proof for torture, are unconvincing for this Panel compared with the sincere and detailed testimonies of the victims, who explained graphically how they felt after having been connected to the wire and how the others looked like after such procedure.

389. In this way, and being mindful of the consequences that the injured parties suffered, such as muscle spasms, loss of consciousness, and intense pain all over their bodies which made them disoriented and come to their senses several days later, the Trial Panel justifiably found that the guilt of the Accused G.V. for torture of the referenced persons was

[11] Witnesses: A1, E.B., A2, R.B., S.B., A8, A5, N.B., S.M., N.Đ., M.Č., I.B., S.K.

proven, as by his omission to prevent it he enabled the policemen subordinated to him to behave toward the injured parties in the described manner, whereby, as a co-perpetrator, he committed the criminal offense of persecution by torture.

390. Therefore, the contested Judgment contains the reasons which are sufficient and proper, according to the Appellate Panel, whereas the arguments in the Appeals did not convince the Panel to the contrary.

391. With respect to inhuman treatment described in Count 3c of the amended Indictment, the Trial Panel was mindful primarily of the statements of the injured parties, as well as the other corroborating statements of witnesses[12], who described in unison that they were exposed to beating and mistreatment at the hands of the police during their detention in the SJB B. and Đ. whereby they sustained multiple injuries.

392. Having evaluated the statements of the injured parties and being mindful of the consequences they suffered from the beating by the policemen, the Trial Panel properly concluded that the guilt of the Accused G.V. for the policemen's inhuman treatment of the injured parties was proven beyond any reasonable doubt, as with his omission to prevent it he enabled the policemen subordinated to him to behave toward the injured parties in the described manner, whereby he committed the criminal offense of persecution by inhuman treatment as a co-perpetrator. For that reason, all appeal grievances that contested the referenced findings of facts by the Trial Panel are unfounded and have been dismissed as such.

393. Given the fact that both the Prosecution Appeal and the Defense Appeal contested from their respective angles the findings of facts concerning Counts 3, 3a, 3b and 3c of the amended Indictment, the Appellate Panel emphasizes that the responsibility of the Accused G.V. for the referenced Counts was properly established, that is, that as a co-perpetrator and by omission he committed the criminal offense of persecution by murder, torture and inhuman treatment.

394. The contested Judgment properly concludes that the omission of the Accused G.V. to prevent the prohibited consequences of the criminal offense, which he was legally

[12] Witnesses: A.Đ., A3, R., V.M., A.Č., A5, S.K.k, A8, E.B., M.B., S.M., S.B., M.Č., I.B., E.A., N.B., A2, B.B.

obligated to prevent as the SJB chief, has the identical weight as the acts of direct perpetrators – his subordinates.

395. The Trial Panel found that the Accused was responsible because of his failure to act, that is, passive attitude and thus omission to act in line with his powers and obligations in the capacity as the chief of the SJB B. toward all members of the police force, as well as his obligation to provide protection, in accordance with the law, to all persons if their lives or assets were jeopardized (including, naturally, the detained civilians), which he failed to do in the case at hand.

396. Therefore, exactly because the Accused V. did not do anything as the police chief to prevent the murders, torture and other inhuman acts conducted against the detained civilians, he supported them by his omission and encouraged the police members to continue acting in that manner, creating a climate in which such acts were permissible, although as the police chief he had a statutory and moral duty to prevent them, which he did not even try to do either by a simple gesture or concrete action.

397. The Appellate Panel also considers that the Accused had certain obligations given his function, primarily the obligation to take care of the safety and lives of detained persons, and, consequently, to undertake appropriate measures in order to prevent any jeopardizing of the detained persons' safety and lives, which he did not do, as the Trial Panel properly established. In that way the Accused demonstrated that he shared the intent of the perpetrator and that he agreed with all potential consequences.

398. Based on the foregoing, the Appellate Panel has concluded that correct and sufficiently corroborated are the averments in the contested Judgment that the Accused G.V. knew of the events in the SJB B., and that despite that knowledge he chose not to undertake any measures to prevent the mistreatments of the detainees which were not incidents, but a practice carried out for a certain period of time. If the Accused had undertaken some action that would have prevented the others from treating the detainees inhumanely the perpetration would not have happened, but as he did not, he approved the conduct of the other SJB members and agreed with the prohibited treatment of the detainees, which indicates that he is responsible as a co-perpetrator.

399. According to the contested Judgment, the described manner of perpetration by this Accused indicates that he perpetrated the criminal offense with intent by omission, more precisely by failure to exercise his statutory duty to protect civilians as the chief of the

SJB. In the opinion of the Trial Panel, such omission carries more weight than if it came from any civilian, given that official duty and authority certainly carry a certain weight and responsibility for acting, which makes the Accused V. equal to direct perpetrators. Although there is no evidence that he personally undertook any action (of which the Indictment does not charge him anyway), by wanting or agreeing with the actions undertaken by police members he allowed them, and having in mind the gravity of the consequences suffered by the victims, such omission, by both its effects and significance, equals the very undertaking of the relevant acts.

400. To corroborate the referenced conclusions in the contested Judgment, the Appellate Panel also refers to the decision of the European Court of Human Rights in *B.Š.*[13], which reads:

> *"It is noted, however, that the applicant committed those acts as a police officer. The Court has held that persons carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails[14] (see Kononov, cited above, § 235). Furthermore, having in mind the flagrantly unlawful nature of his acts, which included murders and torture of Bosniacs within the context of a widespread and systematic attack against the Bosniac civilian population of the V. Municipality, even the most cursory reflection by the applicant would have indicated that they risked constituting a crime against humanity for which he could be held criminally accountable."*

401. Therefore, with respect to the criminal offense of persecution as an underlying act of the criminal offense of Crimes against Humanity, the Trial Panel concluded, as has the Appellate Panel too, that the acts of the Accused, more precisely, his omission, satisfied the elements of deliberate omission as a mode of perpetration. Therefore, the appeal grievances in that respect are unfounded.

402. Also, with respect to the Accused M.D. and Counts 4, 4a and 4b of the amended Indictment concerning inhuman treatment, the Trial Panel properly established the guilt of the Accused, contrary to the averments of the Defense. The injured party A1 claimed that

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[13] *B.Š. v. Bosnia and Herzegovina*, Application 51552/10, Decision of 10 April 2012.
[14] See *K. v. L.* [GC], No. 36376/04, § 235, ECHR 2010.

he was beaten, and witnesses B1, K.V. and E.Č. confirmed it in their respective statements tendered as Exhibits T-39 and T-41.

403. Consequently, having evaluated the statement of the injured party A1 as well as the other corroborating evidence, the Trial Panel concluded that the injured party A1 was mistreated and beaten in the manner described in the Indictment. However, when A1 was describing in his statement the event referred to in Count 4 of the Indictment he did not say that he was tied by barbed wire on that occasion, but said that he was tied after the burning of a house and a stable. The Trial Panel, therefore, justifiably omitted the part related to barbed wire from the description of facts in Section 4. In that way the Trial Panel demonstrated impartiality and proper evaluation of the statement of the injured party, in order not to charge the Accused with more criminal acts than were proven beyond reasonable doubt.

404. For the foregoing reasons, the Trial Panel made a proper and logical inference that the Accused M.D. committed the criminal acts described in Counts 4, 4a and 4b of the amended Indictment, whereby he committed the criminal offense of persecution in conjunction with inhuman treatment. The Appellate Panel considers unfounded the appeal grievances which contested the responsibility of the Accused for the referenced counts of the Indictment.

405. Having evaluated the appeal grievances regarding the torture of the injured party I.B. with which the Accused M.D. was charged in Count 6 of the amended Indictment, the Appellate Panel considered them to be unfounded, and stressed that the Trial Panel properly evaluated the statement of the injured party as credible, as its averments were also confirmed by witness R.B.

406. The contested Judgment properly reads that the acts of physical mistreatment of the injured party I.B. reached the threshold of strong physical pain and suffering, given that he was strongly beaten with fists and kicked with military-boots-clad feet all over his body, during which he was interrogated about arms, and the beating continued with the same intensity even after he fell unconscious from it. When he regained consciousness, the mistreatment continued for several hours, due to which he sustained numerous injuries to his head and chest. Therefore, contrary to the Defense appeal grievances, such acts satisfy the elements of crime of torture, according to this Panel as well.

407. Based on the foregoing, the Defense appeal grievances did not call into question

such properly established state of facts, that is, that the Accused M.D. personally participated in the torture of I.B.

408. With respect to the inhuman treatment of the injured party S.B. referred to in Count 7 of the amended Indictment, the Trial Panel properly evaluated this witness' statements which were read at the main trial and tendered as Exhibits T-44 and T-45, in which the witness described the mistreatment he suffered on the premises of the SJB B. in which the Accused M.D. participated directly.

409. The contested Judgment reads that the statements of witness S.B. were read at the main trial because the witness had meanwhile died, of which the Prosecution tendered Exhibit T-43, which, in the opinion of this Panel, justifies the reading of the statement which was permitted pursuant to Article 273(2) of the CPC B-H.

410. That the Trial Panel acted properly, that is, that it did not base the state of the facts solely on the statements read, is also confirmed by the averments in the contested Judgment that the beating of S.B. in the SJB B. was also confirmed by witness A5. This witness said that one day several detainees were brought to Đ., including S.B., and that they were all beaten up. The witness also stated that he was told that D., after his nephew had been killed, took them out in front of the SJB B. and that they were then beaten up. S.B. told him that D. had hit him, and he then showed the witness a scar on his head. Witness A8 also confirmed that S.B. was beaten often as was E.B., since they were particularly hated.

411. For the foregoing reasons, the Trial Panel concluded that the acts of the Accused satisfied the elements of persecution committed by inhuman treatment, which conclusion the Appellate Panel also upholds as it is proper and based on credible and authentic evidence.

412. Having evaluated the Trial Panel's reasons with respect to Counts 8 and 19 of the amended Indictment in the context of appeal grievances, the Appellate Panel has concluded that the Trial Panel properly evaluated the evidence and established the decisive facts. With respect to mistreatment of the injured party M.O., the Trial Panel evaluated this witness' statements that were read at the main trial and tendered as Exhibits T-48 and T-49, which was also confirmed by witnesses B1, A6, N.Đ. and B.B., but it also evaluated the other documentary evidence.

413. It is important to note here that Exhibit T-47, that is, the forensic psychiatric findings for the injured parties, is not incorrectly drafted, as the Defense claims, just because it was based on witness examination record and medical documentation. It is not disputable that it is far easier to draft a finding and opinion on the basis of an interview with a person and his physical examination, but due to the impossibility to do so, the expert witness was able to write a finding and opinion in a valid manner on the basis of the offered evidence, and it is up to the Court to decide what importance it would attach to such evidence anyway.

414. Based on the adduced evidence, the Trial Panel concluded that satisfied were the elements of persecution committed by other inhuman acts of similar nature aimed at inflicting great suffering or serious physical or mental injury or injury to health, which the Defense did not contest successfully by arguments in the appeal.

415. The Appellate Panel does not consider contestable the fact that the Trial Panel evaluated together Counts 8 and 19 of the amended Indictment in the context of participation and criminal responsibility of the Accused Ž.I. and M.D. because of the contextual and factual connection between the Counts, as the injured parties were the same in both, as were the events and the witnesses who testified about the circumstances therein. The Trial Panel found proven beyond reasonable doubt that the Accused I. and D. participated directly in the mistreatment of the injured party M.O. together with other policemen, in the manner described in the Indictment, whereby they committed the criminal offense of persecution, in conjunction with inhuman treatment.

416. Based on the foregoing, the Appellate Panel considers unfounded the appeal grievances contesting the referenced factual findings made by the Trial Panel.

417. Also, with respect to Counts 9 and 20 of the amended Indictment, the Appellate Panel considers proper the arguments in the contested Judgment which were not challenged by appeal grievances.

418. With respect to the beating of the injured party A.Đ., the Trial Panel evaluated his statement as well as the statements of witnesses R.M. and N.Đ., the latter having been confirmed by witness A3. Based on the witnesses' statements, the Trial Panel made a proper inference that all required elements of persecution by inhuman treatment, described in detail in Count 9 of the amended Indictment, were satisfied beyond doubt on the part of the Accused M.D.

419. In this case the Trial Panel also evaluated together Counts 9 and 20 of the amended Indictment in the context of participation and criminal responsibility of the Accused Ž.I. and M.D. because of the contextual and factual connection between the Counts, as the injured parties were the same in both, as were the events and the witnesses who testified about the circumstances therein. The Trial Panel found proven beyond reasonable doubt that the Accused I. and D. participated directly in the mistreatment of the injured party A. Đ. together with other policemen, whereby they committed the criminal offense of persecution, in conjunction with inhuman treatment.

420. The Appellate Panel concludes that the Trial Panel established the state of facts properly and completely, and is not convinced that the appeal grievances were justified.

421. The Appellate Panel also considers unfounded the appeal grievances concerning the improper state of facts concerning Counts 10, 10a and 10b of the amended Indictment.

422. In the contested Judgment, the Trial Panel analyzed in detail and evaluated the statements of witnesses and documentary evidence[15], found them to be consistent and convincing, and concluded with certainty that the Accused M.D. personally participated in the beating up of the injured party E.B., as indicated in Counts 10, 10a and 10b of the Indictment, whereby he satisfied the elements of inhuman treatment.

423. In the Appeal the Defense tried to contest the credibility of the injured party E.B., however, the injured party's statement was not the only exhibit adduced about this circumstance and was also corroborated by other evidence, as already indicated. All exhibits were evaluated both individually and in terms of their mutual correspondence and they clearly pointed at the Accused M.D. as the perpetrator of the referenced incriminations.

424. The Trial Panel thus provided sufficient and relevant reasons why it considered the referenced Indictment Counts to be proven, which suggests that the appeal grievances are ill-founded.

[15] Statement of the injured party, the corroborating statements of witnesses A6, S.K., A5, A8 and B. B., as well as Exhibit T-61, Notice by the International Committee of C. No. BAZ-300020 from 1994 for E.B.

425. The Trial Panel provided a single reasoning for Counts 11 and 18a, too, as they concerned one and the same injured party, so it evaluated in one place the participation of the Accused M.D. and Ž.I. in the acts as charged.

426. First of all, the Trial Panel evaluated Exhibit T-42, Finding and opinion on forensic medical analysis conducted by expert witness Dr. H.Ž. on 6 December 2013 about the injuries the injured party sustained and their cause. The Finding was made on the basis of medical documentation[16], which the Defense contested in the Appeal.

427. It is important to note that the expert witness stated in the conclusion of the Finding that two grave bodily injuries were observed with the injured party S.M. – fracture of elbow bone and fracture of ribs. According to the expert witness, the referenced injuries could be inflicted by a swinging kick by a shoed-clad foot, while the elbow bone fracture was inflicted by the blunt side of a swinging mechanical tool.

428. As indicated earlier, the Appellate Panel does not consider it contestable that an expert witness may draft a finding and opinion on the basis of medical documentation, given that the Court will evaluate it and other evidence and, consequently, render a conclusion on the value of that piece of evidence for adjudication.

429. In addition to the referenced evidence, the Trial Panel also evaluated the statement of the injured party S.M., as well as the statements of other witnesses[17] who testified about his beating. The Panel concluded that they were consistent in important aspects, that is, that potential discrepancies therein did not affect the Panel's conclusion that on the relevant day the injured party S.M. was beaten up by multiple persons after having been taken out of the room where he had been detained. The witnesses, including the injured party himself, were consistent that the Accused M.D. and Ž.I. and policemen R. and N. participated in his beating and inflicted injuries all over his body by punching and kicking him.

430. Contrary to the Defense appeal grievances, the Trial Panel properly noted that only after the presentation of his earlier statement did the injured party say that the Accused Ž. I. also participated in his beating as he kicked him, due to which the witness fell down. The

[16] The finding was made on the basis of Medical Report for S.M., issued by Los Madronos Hospital, Traumatology Ward, on 10 January 2008, tendered into evidence as Exhibit T-42 A.
[17] Witnesses A8, Z.B. and N.Đ.

Trial Panel also found that the participation of Ž.I. was corroborated by the statement of witness R.P., who had been told about it by the injured party. In addition, the witness said clearly that the passage of time was the reason why he said at the main trial that the blow that had made him fall had been delivered by R., and he was now absolutely sure that it was the Accused Ž.I., but did not deny that R. had also beaten him.

431. Contrary to the Defense averments, the Trial Panel provided in the Judgment the reasons why it had credited the witness. The contested Judgment reads that, despite this inconsistency, the witness' statement is consistent in the relevant part, especially given the fact that at the main trial, before being presented the earlier statement, the witness said that he had been beaten on that occasion by D., Ž.R. and some other men, while 5-6 policemen had been present there at the time. Therefore, in the opinion of the Trial Panel, the fact that the witness did not explicitly mention the Accused Ž.I. does not mean that the Accused was not present among the referenced others, but it is obvious that D. and R. took the lead in the beating, while the witness remembered the blow by Ž.I. by the fact that he lost consciousness after it.

432. For that reason proper is the state of the facts in the contested Judgment, as is the Trial Panel's conclusion, that the Accused committed the criminal offense of persecution, in conjunction with inhuman treatment.

433. With respect to Count 12 of the amended Indictment, the Trial Panel found proven the charge that the Accused M.D. participated in the mistreatment of M.B. on the premises of the SJB B., which conclusion this Panel has also upheld as proper.

434. The Appellate Panel has evaluated the adduced evidence[18] and considers as proper the conclusion that by beating M.B. the Accused M.D. intended to inflict on him serious physical and psychological injuries, and that thereby satisfied were the elements of persecution by other inhuman acts of similar nature committed with the intent of inflicting great suffering or serious physical and mental injury or injury to health.

435. The Appeal did not contest the proper determinations in the contested Judgment in this case, either.

[18] Witnesses R.P., R.B., A5.

436. With respect to the mistreatment of R.M., which was described in detail in Count 14 of the amended Indictment, the Trial Panel concluded, on the basis of witnesses' statements[19] which were consistent in relevant part, that one evening the Accused D. entered the room where they were all detained together with the injured party M.M. The Accused was escorted by several policemen, and, after a brief address, he started beating M.M. in front of everyone, so all witnesses were eyewitnesses and they all described the course of the event identically, stating that M. was unrecognizable after it.

437. For that reason proper is the Trial Panel's conclusion that by having beaten up the injured party M.M. on the premises of the SJB B. the Accused M.D. satisfied the elements of persecution by inhuman treatment with the intent of inflicting great suffering or serious physical or mental injury or injury to health.

438. The Appellate Panel considers that the appeal grievances did not contest in any way the referenced determinations in the contested Judgment and that they are, therefore, ill-founded.

439. With respect to Count 15 of the amended Indictment charging the Accused M.D. that he participated in the beating of the injured party – witness B1 by punching him in the head, whereupon he requested from him to write on a piece of paper the names of the people who possessed arms, and when the witness failed to do so, kicked him and punched in the head several times, the Trial Panel first evaluated the statement of the injured party and then the documentary evidence.

440. As the contested Judgment properly reads, witness B1 fully confirmed the averments from the Indictment and the Trial Panel credited him, given the fact that the witness had known the Accused D. from before as they had worked together previously. The Trial Panel therefore found that the Accused M.D.'s participation in the beating of witness B1 was proven and that the Accused was thereby responsible for inhuman treatment.

441. In that respect, the Appellate Panel also does not consider the witness' statement to be contestable, since the Trial Panel carefully evaluated it with respect to the event that he testified about and the Accused's participation in it. The Trial Panel accepted the

[19] Witnesses E.A., M.Č., A.Č., A2, M.B.

statement in its entirety as truthful and reliable as there was no doubt from it that the Accused was the one who mistreated the witness in the manner he described.

442. Given that the finding of facts in this Count is mainly based on the statement of witness – injured party B1, it should be stressed that, pursuant to Article 15 of the CPC B-H, the right of the Court to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules. In the opinion of the Appellate Panel, if a certain piece of evidence is lawful, valid, authentic and credible, it can be sufficient to establish the perpetration of criminal offense even if such evidence stems from a statement of one witness alone, as is the case here.

443. The Trial Panel, therefore, rendered a proper decision with respect to Count 15 of the amended Indictment, which suggests that the appeal grievances are unfounded.

444. With respect to the appeal grievances concerning Count 16 of the amended Indictment, the contested Judgment properly states that a large number of witnesses testified about the event on the night of 25 August 1992, when the Accused D. and other policemen threw smoke grenades into the premises of Z. where the civilians were detained, whereupon the Accused M.D. started shooting from firearms through the windows into the premises due to which several detainees sustained injuries, whereupon the Accused D. repeated the same action on the premises of Đ. The Trial Panel properly evaluated the witnesses' statements and credited them with appropriate significance when establishing the state of the facts.

445. With respect to the smoke grenades that were thrown into the premises of Z., in the contested Judgment the Trial Panel analyzed in detail the statements of witnesses A3, B1, M.Č., N.Đ., Z.B., R.P. and M.B about the participation of the Accused M.D.

446. With respect to the smoke grenades in Đ. the following witnesses testified: A8, E.B., S.B., R.B., M.Č., I.B., A6, A5, A2 and E.A.

447. The Trial Panel analyzed the witnesses' statements about the smoke grenades in the building of the SJB B. and established that one group of witnesses testified that they had personally seen D. throwing in smoke grenades and then shooting, another group that they had recognized the voice of D. in front of Z. on the evening concerned, and a third group heard rumors that D. had thrown in smoke grenades that evening.

448. Therefore, having analyzed the referenced witnesses' statements, especially of witnesses B1 and R.P., who personally saw the Accused M.D. on the occasion concerned throwing grenades into the premises of Z. and then shooting from an automatic rifle inside, and the statements of other witnesses who either heard from others that it was D. or who recognized his voice, that is, the statements of witnesses A8, E B., I.B. and S.B., who also personally saw the Accused throwing in grenades and shooting toward the premises of Đ. that same evening, the Trial Panel found it proven beyond reasonable doubt that in the night of 25 August 1992, the Accused M.D. perpetrated the criminal acts he was charged with in the manner described in Count 16 of the Indictment. The Trial Panel checked the alibi of the Accused and concluded that the injured parties' statements did not raise any doubt as to the presence of the Accused D. in front of Z. and Đ. on the referenced day, and that the Defense evidence did not successfully contest the injured parties' statements as it did not present in a convincing way the information about the Accused's presence on the frontline, which was addressed earlier in this Judgment.

449. This Panel accepts the referenced views of the Trial Panel in entirety and considers the appeal grievances contesting them to be unfounded.

450. With respect to the beating of the injured party S.M. in the manner described in Count 18 of the amended Indictment with which the Accused Ž.I. was charged, the Trial Panel evaluated the statement of the injured party. As properly stated in the contested Judgment, the injured party described the event in a credible way, and his statement was corroborated by other witnesses as well[20], for which reason the Trial Panel found the Accused Ž.I. guilty of inhuman treatment.

451. The Trial Panel analyzed the witnesses' statements, especially the statement of the injured party who said without any doubt both at the main trial and in the statement that was tendered into evidence (Exhibit T-19) that the Accused Ž.I. and policeman F. had beaten him together on the relevant occasion. The fact that the witness said at the main trial that his jaw had been broken on that occasion, something he had not said in the previous statement, was not relevant for the Trial Panel because Count 18 of the Indictment did not charge the Accused I. with breaking of the witness' jaw as a result of the beating, but with inflicting injuries to his head and causing a fracture of his arm, which the witness also stated.

452. Therefore, any possible vagueness regarding the description of facts of the event concerned was resolved in the contested Judgment and not one decisive fact is missing, which would have indicated an omission by the Trial Panel.

453. For that reason proper is the Trial Panel's conclusion that the Accused Ž.I. participated in the beating of the injured party S.M. whereby he committed the criminal offense of persecution, in conjunction with inhuman treatment.

454. Therefore, having evaluated all appeal grievances concerning the convicting part of the contested Judgment, the Appellate Panel concluded that the Trial Panel properly and completely established the state of facts and that the Appeal arguments of the Trial Panel's errors and evidence that would have led to different findings of facts were ill-founded, hence the Appellate Panel dismissed them as such.

Acquittal

455. The Appellate Panel also evaluated the Prosecution appeal grievances concerning the acquittal, and concluded that the Trial Panel properly acquitted the Accused M.D. of the charges for the acts referred to in Count 11a of the amended Indictment due to lack of evidence.

456. Judging from the case file, the Trial Panel rendered a proper decision that the Prosecution did not prove beyond reasonable doubt that by the acts referred to in Count 11a of the amended Indictment, the Accused M.D. persecuted non-Serb population in the Municipality of B. on ethnic and religious grounds by inhuman treatment.

457. Specifically, the Accused was charged with inhuman treatment of the injured party S.M. on the premises of the SJB B., but witness M. did not mention in his statement the event described in Count 11a of the Indictment. The witness described one occasion when the Accused D. and several other policemen beat him up by making him sit in an armchair whereupon he was kicked to his chest once and then everybody continued kicking and beating him all over his body, of which acts the Accused D. was found guilty under Count 11 of the Indictment.

[20] Witnesses A8, R.P., A Č. and Z.B.

458. In view of the fact that the injured party himself did not mention in his statement that he had once been taken to one room and then kicked to his head by the Accused D. due to which he fainted, the Trial Panel acquitted the Accused M.D. of Count 11a of the Indictment due to lack of evidence.

459. The Appellate Panel therefore concludes that the Trial Panel could not have established the referenced incrimination in a reliable way on the basis of the statement of the witness -- injured party, whereas the Prosecution did not clearly indicate in the Appeal the defects of the contested Judgment.

460. Also, with respect to Count 13 of the amended Indictment, charging the Accused M.D. that he once beat up the injured party S.B. on the premises of the SJB B. and inflicted bodily injuries on him, the Trial Panel was not able to conclude beyond reasonable doubt from the adduced evidence that the Accused D. committed the criminal acts he was charged with under the referenced Count.

461. In that respect, the contested Judgment reads that the Prosecution tendered as Exhibit T-35 the statement of witness S.B. which was read out because the witness had died, which was confirmed by Death Certificate, tendered as Exhibit T-34.

462. However, having inspected the referenced Record and Death Certificate, the Trial Panel found that the person in question was not B.S., son of Š., who is referred to as the injured party in Count 13 of the Indictment, but B.S., son of A., who was also detained on the premises of the SJB B. and Đ., and obviously a different person of the same first and last name, not the specific injured party.

463. With respect to the circumstances in Count 13 of the amended Indictment, the Trial Panel also evaluated the statement of witness S.B. which was read out at the main trial as well (Exhibit T-44). The witness said that he had once seen S.B. lying unconscious on the floor, with the Accused M.D. by his side.

464. With respect to the beating of S.B., witness A6 said that he had tried to escape to the Republic of Montenegro together with E.B., but they were caught and brought to the SJB B. The witness said that S. was brought there beaten-up and that he told them that D. and K. had beaten him up, which was also confirmed by witness E.B.

465. Given that the Trial Panel was not presented the statement of the injured party B.S.,

son of Š., with whose beating the Accused M.D. was charged under Count 13 of the Indictment, and given that no other witness mentioned the event with which the Accused D. was charged under Count 13, in the absence of other corroborating evidence the Trial Panel could not have concluded beyond reasonable doubt that the Accused D. committed the acts referred to in this Count.

466. As the Prosecution did not offer in the Appeal adequate evidence which would have contested the referenced conclusions of the Trial Panel, the Appellate Panel has not granted the Appeal and revoked the Judgment, which the Prosecution moved it to do.

467. The Appellate Panel also evaluated the Prosecution appeal grievances relative to the acquittal that concerns the Accused Ž.I. with respect to Counts 17, 17a and 21 of the amended Indictment.

468. With respect to the mistreatment of the injured party S.B. under Counts 17 and 17a of the Indictment, the Appellate Panel concluded that the Trial Panel properly evaluated his statements that were read at the main trial[21].

469. The contested Judgment properly reads that in the statement of 22 June 2009, the witness said that one day after the arrest he was taken to the duty officer's room where R.N., Ž.I., M.I. and N.K. started beating him instantly. He knew all of them from before and they were all active policemen. The witness added that after that he was transferred to Đ., where he was also mistreated and taken out multiple times, and that his worst ordeal was torture by electrical current, for which N.K. was an expert, which was horrible and after which he felt like paralyzed. The witness added that Ž.I. beat him with a baton all over his body and pushed it into his mouth. The witness said that he was black-and-blue all over when he came to Đ. and that the people there were crying because of the way he looked.

470. According to the contested Judgment, in the Record of Examination of the witness -- injured party S.B. of 16 July 2008 the witness described an event when several of them were called out by D., whom he knew personally and who was a reserve policeman, and when he was taken out to the hall of Đ. where he was beaten by N.K., R.N., Ž.I. and M.I., and also present there was M.D., who did not beat him on that occasion.

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[21] Statement given before the Prosecutor's Office of B-H, No. KT-RZ-166/06 of 22 June 2009 (Exhibit T-44) and statement given before SIPA, No. 17-04/2-4-04-2-760/08 of 16 July 2008 (Exhibit T-45).

471. The contested Judgment also interprets the statement of witness A5 who described taking the detainees out of the SJB B. in early August 1992 approximately. The witness said that during the attack on S. several persons from B. got killed, including a nephew of D., so D. took out the detainees, including S.B., and beat them. S.B. personally told the witness that D. had beaten him with a rifle grenade whereupon the group was taken to Đ., they were all beaten up and then they told them what had happened. S. showed them a scar on his head and said that the Accused D. hit him with a dummy grenade, and they did not mention anyone else beating them except D.

472. Witness M.Č. also confirmed that five or six detainees, including M.B. and S.B., were once taken out of the premises of SJB B. and when they were brought to Đ., they were unrecognizable due to the baton-beating, but he did not know who beat them up.

473. Witness A.Č. also personally saw when S.B. and another B. were brought to Đ., that they were black-and-blue and not administered medical aid, but he does not know who beat them, which was also confirmed by witness S.M.

474. With respect to the mistreatment of S.B., witness A8 also described the event when S.B. was beaten together with E.B. since they hated them from the start, and they were beaten up by the Accused D., which they said in front of everybody.

475. Witness A3 also testified about the mistreatment of S.B. who was in Đ. The witness said that he was not an eyewitness to his mistreatment as the witness used to be called out and taken out of there, but whenever he returned he said that he had been beaten and that D. had participated in it.

476. Therefore, irrespective of the number of witnesses who testified about the circumstances in the referenced Count of the Indictment, the Trial Panel could not conclude with certainty that the Accused Ž.I. participated in the beating of S.B.

477. The Trial Panel stressed in the contested Judgment that all witnesses confirmed consistently that the Accused M.D. participated in the beatings of S.B., which S.B. also told them but did not mention the Accused Ž.I. on that occasion.

478. What was important for the Trial Panel was that in his statement about the event referred to in Count 17a of the Indictment (Exhibit T-45), S.B. stated that on one occasion in Đ. the Accused Ž.I. beat him together with policemen N.K., R.No. and M.I., but did not

mention that the Accused I. pushed a baton into his mouth then.

479. Given that Count 17a of the Indictment charged the Accused Ž.I. with having participated alone in the beating of S.B., whereas the witness testified about an event when Ž.I. participated in his beating together with three policemen, the Trial Panel inferred that it was not one and the same event, especially since the witness did not mention a baton.

480. With respect to the beating in the SJB B., described in Count 17 of the Indictment, the Trial Panel properly observed that in the statement of 16 July 2008, S.B. did not say at all that the Accused Ž.I. participated in his beating together with other policemen, but mentioned Ž.I. aka K. On the other hand, in the statement of 22 June 2009, the witness mentioned Ž.I. among the participants in the beating in the SJB B.

481. Mindful of all inconsistencies in witness S.B.'s statements as to whether the Accused Ž.I. participated in his beating at the SJB B. and Đ., and especially of the fact that no other witness confirmed that S.B. had mentioned Ž.I. to them, but had only mentioned M.D., due to lack of evidence the Trial Panel could not infer beyond reasonable doubt that the Accused Ž.I. had committed the acts referred to in Counts 17 and 17a of the Indictment.

482. Based on the foregoing, the Appellate Panel has concluded that, given that after the evaluation of all adduced evidence the Trial Panel still had doubts about whether Counts 17 and 17a of the Indictment were proven, it rendered a proper decision to acquit the Accused Ž.I. of the charges. The Prosecution also did not point in its Appeal at some facts and circumstances, that is, evidence that would have convinced this Panel that the state of the facts was incorrectly or incompletely established in the contested Judgment.

483. The Accused Ž.I. was also acquitted of the charges for the acts described in Count 21 of the Indictment because the Trial Panel could not conclude, based on the statements of the examined witnesses, that the Accused Ž.I. threw in smoke grenades into the premises of Đ. and the SJB B. where the detained persons were held. The Appellate Panel reviewed the Prosecution appeal grievances concerning this part of the contested Judgment as well.

484. When rendering its decision, the Trial Panel primarily evaluated the statements of witnesses A3, B1, M.Č., N.Đ., Z.B., R.P. and M.B. In that respect, the contested Judgment

properly reads that only witness R.P. said that, while he was hiding in a warehouse, he personally saw Ž.I. and D. appearing from the upper side, and when they came near Ž. told D.: *"Let's set them on fire tonight."* D. did not answer, but someone then threw in a grenade and the prison was set on fire. However, none of the other witnesses who were on the premises of Z. on the relevant evening confirmed the averments of witness R.P., thus the contested Judgment reads that witness A3 recognized the voice of D., which was confirmed by witness M.Č. as well, while witness Z.B. said that he remembered that on that occasion some people saw D. and that they talked about it afterward.

485. Multiple witnesses testified about the smoke grenades in Đ., namely, A8, E.B., S.B., R.B., M.Č., I.B., A6, A5, A2, E.A. and R.B.

486. The contested Judgment reads that witness A8 personally saw that D. fired shots toward a window. There were some other policemen there as well, but the witness did not mention Ž.I. Witnesses E.B., S.B. and I.B. also confirmed these averments saying that they personally saw D. in front of Đ. shooting toward its interior.

487. The Trial Panel stated that A5 was the only witness who said that he had heard someone shouting that evening: "*These are not White Eagles, there go D., I., and N.R."* The witness specified that the referenced I. was actually Ž.I., the same generation as M., and there was also a third person, S.I., whereupon the witness stressed that that evening he personally saw R.N. only, and learned about the presence of the others from S.B.

488. All other witnesses said that they heard from others that that evening M.D. was throwing grenades into Đ. and they did not mention Ž.I. Only witness R.B. said that he heard that those were D. and I., while in addition to D. witness I.B. also saw M.I., who opened the door when the grenades were thrown in.

489. Based on the foregoing, the Trial Panel reached a proper and logical conclusion that, with respect to the smoke grenades in Đ., none of the quoted witnesses personally saw Ž.I. in front of Đ. on the relevant evening, but that witness R.B. said that he heard that I. was with D., not saying the name, which is an important fact as it is obvious that there were several persons with surname I. in the SJB B. who were seen that evening in front of D., which is confirmed by witness I.B. who saw M.I. Witness A5 stated that he heard from S.B. that Ž.I. was also there, in addition to D., although witness A5 personally saw only R.N.

490. Therefore, given the fact that nobody personally saw the Accused Ž.I. and that some witnesses confirmed that they learned from others that one I. was seen that evening (and there were several persons surnamed I. in the SJB B.), the Trial Panel could not infer with certainty that the Accused Ž.I. committed the acts under Count 21 of the Indictment.

491. All of the foregoing clearly indicates that the Prosecution appeal grievances are unfounded, as the Appeal did not contest or call into question the Trial Panel's properly established state of the facts.

492. When all reasons for the acquittal are reviewed insofar as contested by the Prosecution Appeal, the Appellate Panel concludes that the Trial Panel properly evaluated all evidence in the case at hand, pursuant to the provisions of the CPC B-H, having primarily applied the principle of presumption of innocence under Article 3 of the CPC B-H, which embodies a general principle of law according to which the Prosecution bears the burden of proof. Given that at the main trial the Prosecution did not adduce the evidence of such quality that would not leave any doubt as to whether the Indictment was proven, and did not convincingly point in its Appeal at Trial Panel's omissions, the Appellate Panel has dismissed the Prosecution Appeal as unfounded.

493. It should be stressed that whenever the Trial Panel had the slightest of doubts about whether a Count of the Indictment was proven, it rendered an acquittal and thus demonstrated impartiality in the conduct and adherence to the principle of *in dubio pro reo*.

494. Finally, the Appellate Panel concludes that the state of facts was properly and completely established in the contested Judgment and that a lawful and proper Judgment was rendered.

V. VIOLATIONS OF THE CRIMINAL CODE

A. STANDARDS OF REVIEW

495. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of his claim, and explain how the error affects the decision resulting in its unlawfulness

496. Where an error of law arises from the application in the Judgment of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate

Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the case file in the absence of supplementary evidence and must determine whether it is satisfied beyond any reasonable doubt in the factual finding contested by the Defense prior to confirming it.

497. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Judgment in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314(1) and 308 of the CPC B-H.

B. APPEAL GRIEVANCES

1. The Appeal by the Defense for the Accused G.V.

498. According to the Defense, if the Trial Panel had decided to fully comply with the principle of legality, then it would not have been able to avoid application of one of the fundamental principles of criminal law, contained in Article 4 of the CC B-H, which addresses the time concerns regarding applicability.

499. The Defense is of the opinion that in the case at hand the Criminal Code in effect at the time of the alleged perpetration of the acts that the Accused G.V. is charged with is to be applied, which is the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), adopted pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the SFRY.

2. Appeal by the Defense for the Accused M.D.

500. The Appeal does not contain reasons for these grievances.

3. Appeal by the Defense for the Accused Ž.I.

501. Given that the principle of the right to a fair trial is one of the fundamental principles of criminal procedure, also contained in Article 6 of the ECHR, the Defense is of the opinion that in order for it to be complied with, the principle of the more lenient law should be applied in every proceedings, that is, of the law which is more lenient to the perpetrator according to Article 4 of the CC B-H. In that respect, the Defense considers the CC SFRY

to be more lenient to the Accused and that it should be applied in the case at hand.

502. The Defense points at the rule that the law that was in effect at the time of the perpetration is the one that is to be primarily applied to the perpetrator, and that this principle may be departed from only in the interest of the Accused, that is, only if the law has been amended after the perpetration and is, as such, more lenient to the perpetrator.

503. In the case at hand, both the law that was in effect at the time of the perpetration and the law that is currently in effect set forth the criminal acts that the Accused is charged with. Therefore, the acts in Count 1 of the Indictment that the Accused Ž.I. is charged with are referred to in Article 142(1) of the CC SFRY – War Crimes against Civilians.

504. Based on the foregoing, the Defense voiced a general objection to the application of Article 172 of the CC B-H arguing that the Accused may not be prosecuted for the criminal offense of Crimes against Humanity in application of the law that came into effect in 2003 (CC B-H), as that would be contrary to Article 4 of the CC SFRY, Article 4(2) of the CC B-H, and Article 181 of the CC SFRY, but can only be prosecuted for the criminal offense referred to in Article 142(1) of the CC SFRY.

C. DECISION OF THE APPELLATE PANEL

505. When considering which law is to be applied to the perpetrator, the Court shall start from the principle of time constraints regarding applicability of the law set forth in Article 4 of the CC B-H, which stipulates that the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the offense, and if the law has been amended on one or more occasions after the offense was perpetrated, the law that is more lenient to the perpetrator shall apply. Also, the Court should be mindful of the principle of legality under Article 3 of the CC B-H stipulating that criminal offenses and criminal sanctions shall be prescribed only by law.

506. Departure from the referenced principles is envisaged in Article 4a) of the CC B-H, stipulating that Articles 3 and 4 of the CC B-H shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. With this Article, provisions of Article 7(2) of the ECHR and Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) were taken over, and exceptional departure from the principle

referred to in Article 4 of the CC B-H was allowed.

507. Based on the foregoing, the Appellate Panel has concluded that the Trial Panel properly qualified the relevant acts of the Accused as Crimes against Humanity, that is, properly applied the CC B-H and provided a valid and sufficient argumentation for its decision.

508. The Trial Panel properly stated that departure from the principle of time constraints regarding applicability of the Criminal Code actually concerns the criminal offense of Crimes against Humanity under Article 172 of the CC B-H, which is why it was proper to apply Article 4a) of the CC B-H. It is a criminal offense which, as such, was not stipulated and sanctioned by the Criminal Code that was in effect at the time of the perpetration (CC SFRY). However, as it is an incrimination that includes a violation of rules of international law by the acts that satisfy the essential elements of the criminal offense of Crimes against Humanity in violation of Article 172(1) of the CC B-H, the requirements stipulated in Article 4a) of the CC B-H have been met.

509. Therefore, based on the foregoing, it follows clearly that in 1992 crimes against humanity constituted part of customary international law and that their formalization in the national legislation through the CC B-H, and the application of the CC B-H, do not constitute a violation of the rights guaranteed by the ECHR. At the time of the perpetration the acts of the Accused contained a criminal offense defined with sufficient availability and foreseeability under international law. In that respect, application of the 2003 CC B-H does not call into question the guarantees referred to in Article 7 of the ECHR, as the offense that the Accused were found guilty of was regulated by international law at the time of perpetration.

510. This Panel has, therefore, concluded that the Trial Panel provided adequate and specific reasons for the averment that Crimes against Humanity were part of customary international law at the relevant time, which suggests that the appeal grievances by the Defense Counsel for the Accused are ill-founded.

511. It should be noted that the referenced determinations of the Trial Panel are in line with the positions taken by the Constitutional Court of B-H in its Decisions number AP

519/07, 1785/06, 3620/07, 2789/08, 2143/11, 311/11 and 2947/09, and upheld by the decisions of the European Court of Human Rights[22].

512. For the foregoing reasons, the Appellate Panel has concluded that the appeal grievances by the Defense Counsel for the Accused were unfounded and has upheld the contested Judgment in the part concerning the application of the Criminal Code as well.

VI. DECISION ON CRIMINAL SANCTION

A. STANDARDS OF REVIEW

513. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC B-H.

514. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

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

516. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant

[22] For example, *B.Š. v. Bosnia and Herzegovina*, Application 51552/10, Decision of 10 April 2012; *M. and D. v. Bosnia and Herzegovina*, Applications 2312/08 and 34179/08, Decision of 18 July 2013.

considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

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

B. APPEAL GRIEVANCES

1. Appeal by the Prosecutor's Office of B-H

518. The Prosecutor stated in the Appeal that all foregoing reasons suggest that the contested Judgment contained essential violations of the criminal procedure provisions and that it was rendered on the basis of an incompletely and incorrectly established state of facts, which gives a sufficient ground for the appeal grievance concerning the decision on criminal sanction, whereby it is completely incorrect. According to the Prosecutor, it is nevertheless important to emphasize that even if the Appellate Panel does not accept the foregoing appeal grievances, it should be mindful of the fact that when determining the scope of the criminal sanctions, in particular for the Accused M.D. and Ž.I., the Trial Panel did not evaluate with due attention all circumstances that bear on their magnitude.

519. The Appeal also argued that although the Trial Panel concluded in the contested Judgment that the acts committed by the Accused G.V. equaled the acts of perpetration, it nevertheless inferred that the extenuating circumstances by far exceeded the aggravating ones, due to which the Accused was imposed an insignificant sentence of six years in prison. It is simply impossible, as the Prosecution claims, that the Trial Panel concluded in the contested Judgment that the facts concerning the marital status of the Accused V. and I., their proper conduct before the Court and their financial condition prevailed over the facts which indicate that dozens of persons were unlawfully imprisoned, tortured, physically mistreated and subsequently deported under direct responsibility of the Accused G.V. The Prosecution considers that, when rendering such decision, the Trial Panel did not at all take into account that many of the imprisoned Bosniaks also had families, that they were peaceful and law-abiding citizens who lived in the Municipality of B. and that their

actions did not in any way provoke the acts that the Accused committed against them.

520. The Prosecution therefore considers that the facts that the Trial Panel accepted as extenuating circumstances could not bear on the reduction of the punishment to the Accused in any way, let alone decisively, as the contested Judgment reads, and that neither general nor special purpose of prevention can be achieved with the imposed lesser punishments.

2. Appeal by the Defense for the Accused G.V.

521. The Defense argues in the Appeal that the Trial Panel stated in the reasoning of the contested Judgment that there was only one aggravating circumstance for the Accused -- his duty as the Chief of the SJB B. at the relevant time -- whereas there were multiple extenuating circumstances cited in detail. However, when meting out the punishment the Trial Panel certainly did not evaluate properly the degree of all those indisputably established extenuating circumstances, and if the Trial Panel had done so, it would have imposed on him a punishment considerably more lenient than the one imposed, that is, a punishment below the statutory minimum for the criminal offense he was charged with.

3. Appeal by the Defense for the Accused M.D.

522. The Defense stressed in the Appeal that in paragraph 619 the Trial Panel completely departed from the statutory framework and established a practically non-existing fact, that is, prior punishment, and qualified it as an aggravating circumstance.

523. According to the Defense, the situation is actually different. The failure to properly and lawfully evaluate the adduced Defense Exhibit O2-14 led to an unlawful aggravation of the position of the Accused M.D. in terms of the scope of the punishment that the Trial Panel opted for. The Trial Panel's failure to describe clearly and corroborate with arguments why an expunged fine became an aggravating circumstance in the case at hand, was used by the Defense of the Accused M.D. as a springboard to argue that the punishment is too stringent.

524. The Defense also states that the Trial Panel established in paragraph 618 of the Trial Judgment that it regarded "*the exceptionally proper conduct and respect for the Court*" as an extenuating circumstance for the Accused G.V. The Defense does not

deny it, as it thinks and claims the same, but it has remained unclear and worrying that the Trial Panel failed to identify such circumstance on the part of the Accused M.D. as well.

525. For that reason the Defense considers justified the concern of the Accused M.D regarding the individualization of the punishment he received in the first instance, as an imperative standard which the Trial Panel failed to apply fully and properly with respect to Defense Exhibit O2-14.

526. The Defense emphasizes that paragraph 619 of the Trial Judgment also consists of the circumstances which the Criminal Code does not lay down as the basis for meting out and individualizing a punishment. It is thus clear that the Trial Panel considered as an aggravating circumstance for the Accused M.D. the fact that he committed the alleged offense against "*his former neighbors",* whereby the Panel definitively opted for a more subjective approach to individualization of punishment. Such stigma, as the basis for determining the scope of prison sentence is unacceptable and unlawful.

527. Further, the same paragraph also addressed the issue of "cruelty" which the Trial Panel found to have existed in the actions of the Accused M.D. However, the Court did not provide explanation as to when the relevant act (objective act) developed into and reached the threshold of cruelty in the conduct of the Accused M.D., but just said that it happened often. The Court must provide reasons for it, even in this segment of the Judgment, given the fact that it had not previously made any reference to cruelty in the acts of the Accused M.D., and must identify the acts. On the other hand, qualification of cruelty definitively adds weight to the grounds for meting out punishment. The Accused M.D. therefore has the right to be informed about it in an adequate and well-argumented reasoning of his cruelty in conduct, but also of the number of instances when his conduct may qualify as cruel.

528. According to the appeal grievances, what is determined in the Judgment is the elements of the criminal offense, and these elements cannot be qualified as an aggravating circumstance.

529. The Defense considers that proportion in such specific criminal offenses should also contribute to creation of legal security, as it inherently requires that similar offenses should be punished similarly.

530. Based on the foregoing, the Defense considers that such sentence for the Accused

M.D. is too stringent and disproportionate and that, from the aspect of legal security, it completely contradicts the hitherto jurisprudence.

4. Appeal by the Defense for the Accused Ž.I.

531. Given the appeal grievances addressing the application of law, that is, the misapplication of the CC B-H and the determination that the Accused Ž.I. committed the criminal offense of Crimes against Humanity, and especially given the fact that at the time of the alleged perpetration by the Accused Ž.I. the law in effect was the CC SFRY, in the application of which his alleged criminal acts would be qualified as Crimes against Civilians, the Defense considers that in the case the CC SFRY were applied the Accused could be imposed a more lenient sentence, which might be proportionate to his exceeding of authorities. The foregoing would be possible if the Appellate Panel made an inference that the state of the facts was not incorrectly and incompletely established, as the Defense argued in the Appeal.

532. The Defense is of the opinion that the prison sentence of five years was imposed despite the Court's determination that the extenuating circumstances for the Accused Ž.I. had the character of highly extenuating circumstances, that the sentence is too stringent and regarded as unjust in a small community as is the Municipality of B.

C. DECISION OF THE APPELLATE PANEL

533. Contrary to the appeal grievances, the Appellate Panel considers as proper and complete the arguments in the contested Judgment concerning the manner of determination and the scope of criminal sanction imposed on the Accused in the criminal proceedings at hand.

534. Having evaluated the decision on the criminal sanction in the context of appeal grievances, the Appellate Panel established that the Trial Panel had evaluated all circumstances of the case at hand, as well as all extenuating and aggravating circumstances, including all circumstances referred to in the Appeal, and had taken into account all subjective and objective factors related to the criminal offense and its perpetrator, as stipulated under Article 48 of the CC B-H.

535. In that respect the Trial Panel evaluated and reasoned in the Judgment the degree

of guilt of the Accused, the motives for perpetrating the offense, the degree of danger or injury to the protected object, the circumstances in which the offense was perpetrated, the past conduct of the perpetrators, their personal situation and conduct after the perpetration, as well as other circumstances related to the personalities of the perpetrators.

536. Based on the foregoing, the Trial Panel took into account the fact that the Accused G.V. was a family man, without prior conviction, that he demonstrated an exceptionally proper conduct and respect for the Court, and that at the time of the perpetration of the acts he was found guilty of he did not demonstrate cruelty in his acts or behave violently, as well as the fact that he was found guilty of omission for the majority of the Counts. The Trial Panel considered as an aggravating circumstance the fact that the Accused held the office of the Chief of the SJB B. at the relevant time, whose duty was to take care of the safety of his fellow citizens. Having evaluated all referenced circumstances, the Trial Panel properly concluded that the extenuating factors exceeded the aggravating ones, especially the ones concerning the manner of perpetration, and that these factors constituted highly extenuating circumstances and that the purpose of punishment could be achieved with the reduced sentence of 6 (six) years of prison.

537. It follows clearly from the foregoing that the Trial Panel evaluated all circumstances on the part of the Accused properly, and attached to them the appropriate significance, which guided it to reduce the sentence below the statutory limit. The Appellate Panel therefore considers the sentence imposed to be adequate and appropriate, and the appeal grievances to be ill-founded.

538. The Trial Panel found that the extenuating circumstance for the Accused M.D. was the fact that he was a family man, married with three children, whereas among the aggravating circumstances were the degree of injury to the protected object and the related multitude of the victims and the grave consequences that stemmed from his acts, and the fact that he played an active role and demonstrated persistence and resolve in the continued undertaking of a multitude of criminal acts, described in the enacting clause of the Trial Judgment, in which he often demonstrated particular cruelty against his former neighbors – non-Serb civilians who lived in the Municipality of B. The Trial Panel was also mindful of the fact that in the majority of the cases the Accused D. was a direct perpetrator of the acts he was found guilty of, that in the relevant period he also carried out the duty of the Commander of the SJB B. which obliged him to protect those same civilians,

and that he had been sentenced for the criminal offense of Bodily Injury under Article 155(1) of the Criminal Code of Republika Srpska.

539. It should be noted here that the Appellate Panel considers the Defense appeal grievance regarding the Accused's prior conviction to be well-founded. The Panel states that it follows clearly from the Decision of the Basic Court in Trebinje, No. 95 0 K 039097 15 Kbs of 15 September 2015, that a fine imposed on M.D. under the final Judgment of that Court, No. 95 0 K 039097 11 K of 28 December 2011, would be spent. However, that circumstance has not changed anything substantial, given the fact that this Panel also considers the imposed sentence of imprisonment of 12 (twelve) years to be adequate and proportionate to the gravity of the perpetrated offense. For that reason, although the Appellate Panel considers this grievance of prior conviction to be well-founded, it has no effect on the scope of the punishment, as it did not prevail over the other facts and circumstances when the Trial Panel deliberated on it, either, which is clear from the reasoning of the contested Judgment. The issue of prior conviction as an aggravating circumstance would have a greater significance if it concerned some other criminal offense, not the crimes committed in the war, and if the Accused repeated the same or similar criminal offense which would definitely have effect on the scope of the punishment. As indicated earlier, a light bodily injury was at issue here.

540. Proper is the conclusion in the contested Judgment that in the case at hand there did not exist highly extenuating circumstances for the Accused M.D. which would have constituted the basis for reduction of punishment below the statutory limit pursuant to Article 49 of the CC B-H. The fact that the Trial Panel did not qualify the extenuating circumstances as highly extenuating circumstances does not mean that they were not evaluated properly and that the Accused was thus damaged.

541. The Appellate Panel concludes that Defense Counsel unjustifiably made a comparison between the respective punishments for this Accused and the co-Accused, all the while disregarding the multiple criminal acts and the manner of their perpetration, which does not constitute essential elements of the criminal offense anyway, as the Defense wrongly claims in the Appeal, but only the factors important for the determination of the scope of criminal sanction and distinction between the Accused.

542. Therefore, in the opinion of the Appellate Panel, all circumstances that bear on the magnitude of punishment were properly evaluated by the Trial Panel, which properly used

its discretion when evaluating them, and concluded that they justified the imposed sentence of imprisonment of 12 years.

543. With respect to the Accused Ž.I., the Trial Panel considered as extenuating circumstances for him the facts that he was a father of three children, that he behaved with decorum before the Court and that he had no prior conviction. The Trial Panel also took into account the gravity of the perpetrated criminal offenses. Although undoubtedly grave and, as such, falling into the category of criminal offenses covered by the provisions of both national and international law, for whose prosecution there is no statute of limitations, they certainly do not fall into the category of the most grave criminal offenses of this kind, given the nature of the acts undertaken and the ensuing consequences.

544. When meting out punishment to this Accused, the Trial Panel was particularly mindful of the number of the injured parties whom the Accused treated inhumanely. In the situation when the Trial Panel did not find aggravating circumstances for this Accused, it was of the opinion that the referenced extenuating circumstances had the character of highly extenuating circumstances which justified the reduction of punishment below the statutory minimum.

545. This Panel has also accepted the referenced arguments and thus considered the Defense appeal grievances to be unfounded, given that the prison sentence for the referenced criminal offense cannot be further reduced. The Appellate Panel has thus concluded that the Accused I. received an adequate punishment, in line with the statute.

546. The Appellate Panel therefore considers that the punishment was not too stringent, as the Defense claims, and that the Trial Panel had evaluated all circumstances of the case at hand and reduced the punishment below the statutory minimum. Based on the foregoing, this Panel has concluded that the Appeal did not justifiably argue an incorrectly determined criminal sanction, and has considered that the purpose of punishment would be achieved with the sentence of imprisonment of 5 (five) years.

547. Based on the foregoing, the Appellate Panel has concluded that the purpose of punishment, that is, of general and special prevention, may be achieved with all imposed sentences. For that reason, the Appeal by the Prosecutor's Office of B-H arguing an inadequate sentencing is not well-founded, either.

548. For the foregoing reasons the Appellate Panel has dismissed as ill-founded the

Prosecution Appeal concerning the imposed criminal sanction, as well as the respective Appeals by the Defense Counsel for the Accused G.V., M.D. and Ž.I.

549. Finally, this Panel has the need to note that the Trial Panel rendered a decision instructing the injured parties *"to pursue their potential claims under property law in a civil action"*, pursuant to Article 198 of the CPC B-H. Given that the Appellate Panel reviews the Judgment only insofar as contested by Appeals (Article 306 of the CPC B-H), and that the referenced part of the contested Judgment was not subject of appeal, the Appellate Panel did not deliberate on whether such position of the Trial Panel was justified. However, the Appellate Panel concludes that a decision on claims under property law, including instruction to injured parties to take civil action as one of the manners of adjudication, may be rendered only in case the claim under property law was requested. In the opposite case, the Court shall not render a decision pursuant to Article 198 of the CPC B-H. The questionable nature of the Trial Panel's decision is emphasized by the fact that the Panel also indirectly doubts the existence of such claim as it refers to it as *"potential"*. Article 198 of the CPC B-H is entitled *Ruling on the Claims under Property Law*. The inference that the Court shall render a decision on a claim under property law only if such claim exists is made primarily through the linguistic, and then the logical and teleological interpretation of this Article's title and of its opening part that sets forth that *"the Court shall render a judgment on claims under property law"*.

550. Based on the foregoing, the Appellate Panel fully dismissed the Appeals as unfounded and, pursuant to Article 310(1), as read with Article 313 of the CPC B-H, rendered the decision cited in the enacting clause of this Judgment

RECORD-TAKER	**PRESIDING JUDGE**
Legal Advisor	**JUDGE**
Neira Tatlić	Hilmo Vučinić

LEGAL REMEDY: No appeal lies from this Judgment.