



Arbitration CAS 2014/A/3562 Josip Simunic v. Fédération Internationale de Football Association (FIFA), award of 29 July 2014 (operative part of 12 May 2014)

Panel: Mr Hendrik Willem Kesler (Netherlands), President; Prof. Luigi Fumagalli (Italy); Mr Marco Balmelli (Switzerland)

Football

Disciplinary sanctions for behaviour offending the dignity of a group of persons after the conclusion of the match

Standard of proof

Interaction with the supporters as aggravating factor

Discriminatory connotation of the wording expressed by the player

Measure of the sanction

- 1. The standard of proof of “personal conviction” established by article 97(3) of the FIFA Disciplinary Code (DC) coincides with the “comfortable satisfaction” standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of “balance of probability” but lower than the criminal standard of “proof beyond a reasonable doubt.**
- 2. The fact that a player was interacting with the supporters in the stadium and by his actions involved the supporters in his disparaging behaviour is to be considered as an aggravating factor. As such, an expression of discriminatory nature and offending the dignity of persons, pronounced partly by the player and partly by the spectators in reply, can be attributed to the player as if he had pronounced the entire expression himself.**
- 3. It has been established according to the applicable standard of personal conviction, i.e. comfortable satisfaction, that the wording “*za dom – spremni*” has a discriminatory connotation. Indeed, the wording can be associated with the Ustaše regime which was responsible for the atrocities of various ethnic groups in Croatia during World War II and can undisputedly be related to fascism.**
- 4. Under the consistent CAS jurisprudence the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence.**

I. PARTIES

1. Mr Josip Simunic (hereinafter: the “Player” or the “Appellant”) is a professional football player of Croatian and Australian nationalities. The Player regularly played for the national football team of Croatia.
2. The Fédération Internationale de Football Association (hereinafter: “FIFA” or the “Respondent”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental federations, national associations, clubs, officials and players worldwide.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings and during the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. On 19 November 2013, the return leg of the national football teams of Croatia and Iceland took place in Zagreb, Croatia, as part of the play-off of the preliminary competition European zone of the 2014 FIFA World Cup Brazil. Croatia won the match with the final score of 2-0 and thereby qualified for the 2014 FIFA World Cup Brazil.
5. Around forty minutes after the conclusion of the match and after having waited for some minutes for a microphone, the Player went to the centre of the pitch, without any of his teammates, with a microphone in his right hand and a shirt in his left hand. While making “rising arm movements” with his left hand, he first pronounced, at least two times, the words “*u boj, u boj*” (“to the battle”), replied by the spectators in the stadium with the words “*za narod svoj*” (“for your people” or “for your nation”) and then repeatedly, *i.e.* four times, the words “*za dom*” (“for the homeland”), replied by the spectators at each occasion with the word “*spremni*” (“we are ready”).
6. On 20 November 2013, the FARE network, which according to its website is “*an umbrella organisation that brings together everyone driven to combat inequality in football and to send out a unified message against discrimination*”, sent a report to FIFA about the incidents that occurred after the aforementioned match. In its report, the FARE network maintained that the expression “*za dom spremni!*” is a “*Croatian salute that was used during World War II by the fascist Ustaše movement*”.

B. Proceedings before the Disciplinary Committee of FIFA

7. On 22 November 2013, the FIFA Disciplinary Committee initiated a disciplinary procedure against the Player.
8. On 28 November 2013, in a joint statement with the Croatian Football Federation (hereinafter: “CFF”), the Player dissociated himself from any form of undemocratic behaviour.
9. On 12 December 2013, the Disciplinary Committee of FIFA passed Decision 131046 CRO MAR (hereinafter: the “FIFA DC Decision”) whereby it found the following:

“1. The player Josip Simunic is regarded as having breached art. 58 par. 1 lit. a) of the FIFA Disciplinary Code [hereinafter: the “FIFA DC”] by offending the dignity of a group of persons through discriminatory words concerning, inter alia, race, religion or origin in the preliminary competition match of the 2014 FIFA World Cup Brazil played between Croatia and Iceland on 19 November 2013.

2. The player Josip Simunic is suspended for ten (10) official matches.

The first matches of the ten-match suspension have to be served during the final competition of the 2014 FIFA World Cup Brazil.

Depending on the stage at which the final match of the representative team of Croatia takes place in the scope of the final competition of the 2014 FIFA World Cup Brazil, the remaining matches of the ten-match suspension are carried over to the representative team’s subsequent official matches, in accordance with art. 38 par. 2 a) of the [FIFA DC].

3. The player Josip Simunic is banned from entering the confines of the stadiums with regard to the ten (10) matches for which he is suspended, in application of art. 58 par. 1 lit. a) and in accordance with art. 21 of the [FIFA DC].

4. The player Josip Simunic is ordered to pay a fine to the amount of CHF 30,000 in application of art. 58 par. 1 lit. a) of the [FIFA DC]. (...)

5. The costs of these proceedings are not to be borne by the player Josip Simunic”.

10. On 30 January 2014, the grounds of the FIFA DC Decision were communicated to the Player.

C. Proceedings before the Appeal Committee of FIFA

11. On 31 January 2014, the Player announced his intention to lodge an appeal against the FIFA DC Decision with the Appeal Committee of FIFA.

12. On 7 February 2014, the Player provided the reasons for the appeal against the FIFA DC Decision as well as several enclosures.
13. On 21 February 2014, the Appeal Committee of FIFA passed Decision 131046 APC CRO ZH (hereinafter: the “Appealed Decision”)¹ with the following operative part:
 - “1. *The appeal lodged by the player Josip Simunic is rejected and the decision of the FIFA Disciplinary Committee rendered on 12 December 2013 is confirmed in its entirety.*
 2. *The costs and expenses of these proceedings in the amount of CHF 3,000 are to be borne by the player Josip Simunic. This amount is set off against the appeal fee of CHF 3,000 already paid by the player Josip Simunic.*”
14. On 19 March 2014, the grounds of the Appealed Decision were communicated to the Player.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 9 April 2014, the Appellant filed a Statement of Appeal, which was designated as the Appeal Brief, with the Court of Arbitration for Sport (hereinafter: the “CAS”). In this submission, the Appellant nominated Prof. Luigi Fumagalli, professor and attorney-at-law in Milan, Italy, as arbitrator. The Statement of Appeal/Appeal brief also contained a request from the Appellant for a stay of the Appealed Decision. The Appellant challenged the Appealed Decision taken by the Appeal Committee of FIFA on 21 February 2014, submitting the following requests for relief:
 - “4. *The substantive relief requested by the Appellant is that the CAS shall*
 - 4.1. ***uphold this Appeal*** and cancel the Decision (including the decision of the FIFA Disciplinary Committee which was confirmed by the Decision);
 - 4.2. ***alternatively***: in the case of imposing any sanction to pronounce a ***suspension of the sanction*** and a probation period of one year;
 - 4.3. ***order*** the Respondent to pay all the costs of the arbitration as well as the legal costs incurred by the Appellant.
 5. *The Appellant also requests, by means of Provisional Measures that are effective until the award of the CAS becomes enforceable, that the CAS shall*
 - 5.1. ***grant this Appeal suspensive effect***;

¹The cover letter of the Appealed Decision mistakenly reads “Decision of the FIFA Disciplinary Committee”, the Panel considers this to be a typographic mistake as the decision is undoubtedly rendered by the Appeal Committee of FIFA, which is evidenced by the reference on the same cover letter to “the appeal against the decision passed by the FIFA Disciplinary Committee on 12 December 2013 (Decision 131046 CRO MAR)”.

5.2. **declare** that the Appellant shall not be suspended from any official matches of the Croatian National Team, and he shall not be banned from entering the confines of the stadiums with regard to the matches for which he was suspended”.

16. On 15 April 2014, the CAS Court Office informed the parties that the proceedings may be expedited in accordance with Article R52 of the Code of Sports-related Arbitration (the “CAS Code”) and asked the parties if they expressly agreed to such expedited proceedings.
17. On the same date, the Appellant informed the CAS Court Office that he expressly agreed to an expedited procedure.
18. On 17 April 2014, the Respondent informed the CAS Court Office that it agreed with an expedited procedure and proposed a time schedule. In light of this, the Respondent considered the Appellant’s request for a stay of the Appealed Decision as moot. Finally, the Respondent nominated Dr Marco Balmelli, attorney-at-law in Basel, Switzerland, as arbitrator.
19. On the same date, further to the Appellant’s approval, the CAS Court Office informed the parties that the Appellant’s request for a stay shall not be dealt with in view of the implementation of the following expedited procedural calendar:
 - Respondent’s answer due by 6 May 2014.
 - Hearing to be held on 8 May 2014.
 - Operative part of the award to be rendered by 12 May 2014.
20. On 1 May 2014, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:
 - Mr Hendrik Willem Kesler, attorney-at-law in Enschede, the Netherlands, as President;
 - Professor Luigi Fumagalli, professor and attorney-at-law in Milan, Italy, and;
 - Dr Marco Balmelli, attorney-at-law in Basel, Switzerland, as arbitrators
21. On 5 May 2014, the Respondent filed its Answer, whereby it requested CAS to decide the following:
 - “1. To reject all the reliefs sought by the Appellant.
 2. To confirm in its entirety the decision of the FIFA Appeal Committee.
 3. To order the Appellant to bear all costs incurred in connection with these proceedings and to cover all legal expenses of the Respondent in connection with these proceedings”.
22. On 8 May 2014, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

23. In addition to the Panel and Mr William Sternheimer, Managing Counsel & Head of Arbitration to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr Davor Prtenjača, Counsel;
- Mr Zlatko Prtenjača, Counsel;
- Mr Josip Simunic, Player;
- Ms Kristina Marević, Interpreter.

For the Respondent:

- Mr Marc Cavaliero, Counsel;
- Mr Thomas Hug, Counsel;
- Mr Bernard Palmeiro, Counsel.

24. The Panel heard the following persons in order of appearance:

- Professor Martin Nolte, expert called by the Appellant, professor at the Sports Institute for Sports Economy and Sports Management in Cologne on the field of sportive law (by video-conference);
- Professor Josip Jurčević, expert called by the Appellant, professor at the IVO PILAR Institute of Humanities in Zagreb as a professor Univ. of the Contemporary World and National History with the Croatian Studies of the Zagreb University;
- Mr Niko Kovač, witness called by the Appellant, coach of the Croatian national football team (by telephone conference);
- Professor Božo Repe, expert called by the Respondent, Ph.D., Full professor, University of Ljubljana, Faculty of Arts, Department of History.

25. Although the Player initially intended to hear Mr Lucien Favre, former coach of the German football club Hertha BSC Berlin at the time when the Player was a starting defender at this club, at the hearing, the Player withdrew this witness but referred to his witness statement that was enclosed to the Statement of Appeal/Appeal Brief.
26. Each witness and expert heard by the Panel was invited by its President to tell the truth subject to the sanctions of perjury.
27. Before the hearing was concluded, the parties had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel. In addition, both parties expressly stated that they did not have any objection to the procedure adopted by the Panel and that their right to be heard had been respected.

28. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.
29. On 12 May 2014, the operative part of the award was communicated to the parties, dismissing the appeal.

IV. SUBMISSIONS OF THE PARTIES

30. The following outline of the parties' positions is illustrative only and does not necessarily encompass every contention put forward by the parties. However, the Panel has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summaries.
31. The submissions of the Player, in essence, may be summarized as follows:
 - The Player argues that FIFA relied on incorrect facts in respect of two issues. First, the Player not only told the words "*za dom*". He preceded these words with "*u boj, u boj*" ("to the battle"). This sequence of words is known from the Croatian opera "Nikolce Subic Zrinski" of 1876, in which the former words express a positive patriotic disposition without any fascist background. Second, the official slogan of the Ustaše members was not "*za dom spremni*", but rather "*za poglavnika i za dom spremni*" ("ready for the leader and for the home"), whereby especially the reference to the cult of the leader made the difference. The Player maintains that against this background he cannot be accused of having violated article 58(1)(a) of the FIFA DC.
 - The Player maintains that apart from the errors relating to the facts, the Appealed Decision is seriously affected by significant errors of law. It contains grave deficiencies relating to the interpretation and application of the applicable law. When comprehensively assessing the facts as well as their application to the relevant provision of article 58(1)(a) of the FIFA DC, the sanctions against the Player thus prove to be inadmissible.
 - The Player's behaviour does not meet the requirements of article 58(1)(a) of the FIFA DC. While this provision prohibits discriminatory statements or actions of any kind by which the human dignity of individuals or a group of persons is violated, this is not what the Player did. His behaviour cannot be classified as a discriminatory act, nor did he offend the human dignity of a person or a group of persons in an objective and also subjective way.
 - The sanctions are also inadmissible with regards to their scope. Even in the event that – contrary to the view represented here – the elements of article 58(1)(a) of the FIFA DC should be affirmed, the sanction is disproportionate and does in no way reflect the (lack of) seriousness of the Player's behaviour.

32. The submissions of FIFA, in essence, may be summarised as follows:

- FIFA maintains that it vehemently rejects the Player's allegation that the Appealed Decision was "politically motivated". The Appealed Decision as well as the FIFA DC Decision were taken by said committees in total independence, without influence from anyone whatsoever, and in total compliance with the regulations of FIFA.
- FIFA submits that the Player relied on statements of the expert appointed by him in referring to principles of law that are being used and applied in criminal law (objective observer, standard of balance of probabilities and reference to the European Convention of Human Rights). In this respect, FIFA argues that, bearing in mind that the present matter is not of a criminal nature where livelihood is at stake, still less liberty, private associations like FIFA have the right to impose sanctions on persons subject to their jurisdiction. However, the implementation of this right does not constitute an exercise of criminal powers like the ones an ordinary national criminal court has. Rather, the respective actions are to be considered as measures of disciplinary nature taken in the context of relations between subjects of civil law. These relations, as well as the disciplinary measures concerned, are not governed by criminal law but by civil law.
- FIFA avers that the wording used by the Player, and his behaviour in general, is being associated with the Ustaše regime. FIFA is of the opinion that the wording "*zla dom – spremni*" is of discriminatory character as such wording is being associated to the Ustaše, it has been used by the Ustaše and, above that, it was even (at least one of) the official slogans of the Ustaše. Even if the Panel would conclude that the wording "*zla dom – spremni*" was not an official slogan of the Ustaše, *quod non*, such assumption could in no way lead to the conclusion that the mentioned wording lacks discriminatory character.
- FIFA finds that the wording used by the Player is today perceived as being related to fascism and refers to articles published by media all over the world. A possible different application of the wording "*zla dom – spremni*" cannot exclude its fascist-connected use. Additionally, the circumstances of the matter clearly corroborate that the behaviour of the Player has to be connected to the Ustaše. FIFA refers to incidents that occurred in the course of the international match played between the representative teams of Switzerland and Croatia on 5 March 2014, from which it should allegedly be derived that the wording "*zla dom – spremni*" is today being associated to the Ustaše.
- Based on the above, FIFA concludes that on the basis of the legal arguments and conclusions drawn by FIFA in the context of the matter at hand, it is rightfully that the Player was declared in violation of article 58(1)(a) of the FIFA DC by offending the dignity of a group of persons through discriminatory words concerning, *inter alia*, race, religion or origin in the preliminary competition match of the 2014 FIFA World Cup Brazil played between Croatia and Iceland on 19 November 2013 and that the sanction imposed on the Player in the Appealed Decision is proportionate.

V. ADMISSIBILITY

33. The appeal was filed within the deadline of 21 days set by article 67(1) of the FIFA Statutes (2013 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.
34. It follows that the appeal is admissible.

VI. JURISDICTION

35. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes as it determines that “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question” and Article R47 of the CAS Code.
36. It follows that CAS has jurisdiction to decide on the present dispute.

VII. APPLICABLE LAW

37. Article R58 of the CAS Code provides the following:
- “The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
38. The Panel notes that article 66(2) of the FIFA Statutes provides the following:
- “The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*
39. The Player did not make any statements regarding the law to be applied in the present proceedings; he relies however on an expert statement of Professor Martin Nolte in which reference is made to the applicability of the Swiss Federal Constitution and the European Convention on Human Rights.
40. FIFA maintains that according to article 66(2) of the FIFA Statutes (2013 edition), the provisions of the CAS Code shall apply to the proceedings. Pursuant to the same article, CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law. In the present matter, it is not in dispute that the rules and regulations of FIFA are applicable in this arbitration, in particular the FIFA Statutes, the FIFA DC and the Resolution on the fight against Racism and Discrimination. FIFA further avers that the European Convention on

Human Rights is not applicable as these are not criminal law proceedings, but disciplinary proceedings and that such dispute is not governed by criminal law, but by civil law.

41. The applicability of the various regulations of FIFA is not disputed. The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

A. The Main Issues

42. The main issues to be resolved by the Panel are the following:
- i. Are the facts established in the Appealed Decision correct?
 - ii. What is the correct standard of proof to be applied?
 - iii. Can the words expressed by the supporters be attributed to the Player?
 - iv. Does the wording expressed by the Player have a discriminatory connotation?
 - a) Is the reference to “*poglavnik*” essential for the wording to be related to the Ustaše regime?
 - b) Does the reference to the words “*u boj, u boj*” exclude any association to the Ustaše regime?
 - c) Conclusion
 - v. Did the Player act intentionally or negligently?
 - vi. If so, is the sanction imposed on the Player disproportionate?
43. The Panel observes that the Player mainly relies on three arguments in sustaining that he did not violate article 58(1)(a) of the FIFA DC. First, he argues that the Disciplinary Committee of FIFA and the Appeal Committee of FIFA based their sanctions on incorrect facts. Second, he maintains that the Appealed Decision contains grave deficiencies relating to the interpretation and application of the applicable law. Third, the Player finds that the requirements of proving a violation on the basis of article 58(1)(a) of the FIFA DC are not met and that the sanctions imposed are therefore inadmissible.
44. The Panel observes that article 58(1)(a) of the FIFA DC reads as follows:

“Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000”.

i. Are the facts established in the Appealed Decision correct?

45. The Player maintains that the Appealed Decision relied on incorrect facts in two aspects.
46. First, the Player submits that he not only said the words “*za dom*” but that he preceded these words with “*u boj, u boj*”, which was admitted in the Appealed Decision. Based on this combination of words, the Player maintains that this sequence of words is known from the famous Croatian opera “Nikolce Subic Zrinski” of 1876, in which the former words alone, like today, allegedly express a positive patriotic disposition without any fascist background.
47. Second, the Player argues that the slogan of the members of the Ustaše regime was not “*za dom, spremni*” but rather “*za poglavnika i za dom spremni*”, whereby especially the reference to the cult of the leader allegedly made the difference.
48. The Panel observes that it is specifically established in §20 of the considerations of the Appealed Decision that “(…) [*w*]hile making “rising arm movements” with his left hand, he [*i.e.* the Player] first pronounced the words “*u boj, u boj*”, which were replied by the spectators in the stadium with “*za narod svoj*”, and then repeatedly the words “*za dom*”, replied by the spectators with the word “*spremni*””. The Appeal Committee of FIFA however, *inter alia*, found in §52 of the considerations of the Appealed Decision that “bearing in mind the foregoing and considering that the reference to an Opera in a football stadium seems to be far-fetched, the Committee states that in any case the Player failed to establish a compelling grammatical identity between the two concepts in question”.
49. The Panel also observes that in §37 of the considerations of the Appealed Decision reference is made to the Player’s argument that “the official salute of the Ustaše regime was “*za poglavnika I za dom spremni*” and not merely “*za dom spremni*”, but that this argument was rejected in §38 of the considerations of the Appealed Decision because, *inter alia*, the Appeal Committee of FIFA “wishes[d] to underline at this point that it is not decisive, whether or not the wording used by the Player was the complete “official” salute of the Ustaše regime. What is clear and undisputed is that the Player used, at least part of, the slogan of the Ustaše”.
50. In light of the above, the Panel is not convinced that the Appeal Committee of FIFA based the Appealed Decision on incorrect facts. Rather, the Panel observes that the Appeal Committee of FIFA rejected the Player’s arguments and interpretations based on the facts.
51. Although the Panel will address the arguments and interpretations advanced by the Player in respect of the question whether the exact combination of words used by the Player indeed constitutes a violation of article 58(1) (a) of the FIFA DC, for now the Panel finds that it suffices to conclude that the Appealed Decision is not based on incorrect facts.

ii. What is the correct standard of proof to be applied?

52. The Player maintains that FIFA would have had to demonstrate by the necessary standard of proof that the Player actually and intentionally discriminated and offended a certain person or

an identified group of persons. The Player finds that this was not done and could not be done because no discrimination took place or was intended by the Player.

53. In this respect, FIFA maintains that the standard of proof which applies to proceedings of the FIFA judicial bodies is that the members of FIFA's judicial bodies decide on the basis of their "personal conviction" and argues that CAS jurisprudence has consistently equalled this standard to the standard of "comfortable satisfaction". Therefore, as a principle, the strict standards which apply to criminal proceedings before public authorities and ordinary courts of law do not have to be observed in disciplinary proceedings carried out by private associations like the present one.

54. As to the standard of proof, the Panel observes that article 97(3) of the FIFA DC determines the following:

"They [the judicial bodies of FIFA] decide on the basis of their personal conviction".

55. The Panel observes that a previous CAS panel determined the following about this standard of proof:

"The Panel is of the view that, in practical terms, this standard of proof of personal conviction coincides with the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of "balance of probability" but lower than the criminal standard of "proof beyond a reasonable doubt" (cf. CAS 2010/A/2172 [...], para. 53; CAS 2009/A/1920 [...], para. 85). The Panel will thus give such a meaning to the applicable standard of proof of personal conviction" (CAS 2011/A/2426, §88).

56. The Panel observes that according to Swiss Civil procedure law the standard of proof to be applied is in line with such jurisdiction (see STAEHELIN/STAEHELIN/GROLIMUND, Zivilprozessrecht, § 18, N 38) and fully adheres to the above-mentioned reasoning in CAS 2011/A/2426 and will therefore also give such meaning to the applicable standard of "personal conviction"/"comfortable satisfaction". Whether the Panel is convinced to its personal conviction that the Player intentionally and/or negligently discriminated and/or offended a certain person or group of persons in line with article 58(1)(a) will be assessed below. The burden of proof necessarily lies with FIFA.

iii. Can the words expressed by the supporters be attributed to the Player?

57. The Player argues that he did not call "*spremní*", but that the supporters did. In this respect, the Player finds that FIFA wrongly attributed something to the Player which he actually did not say.

58. FIFA maintains that the Player was clearly interacting with the supporters and, in particular, was even longing for the replies of the supporters. FIFA also submits that by using this line

of defence, *i.e.* trying to distance himself from the words used by the supporters, the Player implicitly recognises that the expression used could be of discriminatory nature and offend the dignity of persons. Finally, with reference to the report of its expert witness, FIFA argues that in many occasions, in which the wording “*z̄a dom – spremni*” was used by the Ustaše, it was a single person shouting the wording “*z̄a dom*” and a crowd pronouncing the thereto related reply “*spremn*”.

59. The Panel fully agrees with FIFA in this respect. The Panel finds that the Player was clearly interacting with the remaining supporters in the stadium and longing for their reply. The Panel finds it even an aggravating factor that the Player by his actions involved the supporters in his disparaging behaviour instead of pronouncing the words himself. As such, the Panel finds that the entire expression “*z̄a dom – spremni*” can be attributed to the Player as if he had pronounced the word “*spremn*” himself.

iv. Does the wording expressed by the Player have a discriminatory connotation?

60. The Player submits that parts of the slogan of the Ustaše were also used in the past with a patriotic instead of a fascist meaning. This is especially true for the only words which are attributed to the Player “*z̄a dom*”. This wording has an ancient meaning that goes back to the 16th century and was also used in the Croatian War of Independence of the 1990’s.
61. The Player maintains that he wanted to dedicate the words “*z̄a dom*” to his home Croatia and which he wanted to be understood as such: speak love and attachment to his homeland and the joy and euphoria over the successful qualification for the final round of the FIFA World Cup Brazil.
62. The Player does not deny that “*z̄a dom – spremni*” was used at the time as part of the salutation by the Ustaše who demonstrably was responsible for the atrocities of various ethnic groups, mainly Serbs, Jews and Roma, as well as for the murder of many members of the political opposition, but what the Player shouted was different in several respects.
63. The Player finds that FIFA insufficiently analysed the words which had actually been used by the Player and justified the semantic content of the words “*z̄a dom – spremni*” essentially with an expert opinion and a search entry in “Google”. The Player argues that FIFA’s motive for sanctioning the Player is to set a rather general signal against racism. Although FIFA’s motive is certainly laudable, it cannot dispense it from correctly assessing the Player’s behaviour. It is definitely not enough that a certain wording may, under certain circumstances, be perceived as possibly discriminatory or offending. The wording “*z̄a dom*” cannot simply be equated with the Ustaše regime. To interpret it exclusively as salutation of the Ustaše without weighing the primary meaning of the words, the circumstances when they were said and the transformations after the 1940’s, is simply not admissible.
64. Additionally, the Player avers that although FIFA in its Appealed Decision concluded that the waving of the arm could not be regarded as a comparable behaviour by the members of Ustaše but as an expression of joy and exuberance, FIFA disregarded this important circumstantial

aspect and based its finding exclusively on its (erroneous) belief that the words used by the Player had still to be understood as an expression of sympathy for the Ustaše regime.

65. Finally, the Player contends that article 58(1)(a) of the FIFA DC applies only if the behaviour leads to the success of an offence or discrimination against human dignity. However, the Player's behaviour did not result in an actual offence or discrimination. The Appealed Decision neither identifies one single person or group of persons offended or discriminated, nor does it say in what respect "they" could have been offended. The Player finds that it is not sufficient and that it does not meet the necessary standard of proof if FIFA simply refers to the hearsay of the international media or to possible descendants of victims of the Ustaše regime without any further identification.
66. In light of the above, the Player concludes that FIFA failed to demonstrate to the necessary standard of proof that the Player actually and intentionally discriminated and offended a certain person or an identified group of persons.
67. FIFA makes reference to a brief submitted by its expert witness and contends that it is evident that the Ustaše established a terrorist regime in Croatia, which, amongst others, was responsible for the planned mass murder on different groups of the population based on a deeply repugnant ideology and that the wording used by the Player can be associated with this regime.
68. FIFA maintains that the Player himself affirmed in his Appeal Brief that the Appeal Committee of FIFA should not have "*focus[ed] exclusively on the fascist abuse of [the words used by the Player]*" and that the Player by such affirmation clearly admits that there is (at least) a fascist interpretation of the words used by the Player.
69. Independently of the above, FIFA also finds that the connotations and interpretations as well as the Player's general behaviour in the course of the incident and the related circumstances demonstrate that all these elements clearly confirm and corroborate the connections between the Player's behaviour and the Ustaše.
70. FIFA submitted a video of the incident, recorded by one of the supporters in the stadium. FIFA finds that this video reflects in an unambiguous, distressing and even shocking way the situation in the stadium at the moment the incident occurred. FIFA submits that the video causes feelings of suffocation and repugnance to a person contemplating it, in particular someone who is aware of the historical background of the words and gestures displayed by the Player and the spectators.
71. FIFA also maintains that the wording used by the Player is today perceived as being related to fascism; the meaning of the words in the past (*i.e.* before the Ustaše started using these words) is not relevant. FIFA refers to publications in the international media about the incident, even before FIFA had instigated any disciplinary proceedings and that these publications undeniably associate the words used by the Player with the Ustaše. FIFA finds that these articles demonstrate in an unequivocal manner the associations and connections

that were made all over the world, immediately after the incident took place. Finally, FIFA also refers to incidents that occurred during a match between the national team of Switzerland and Croatia on 5 March 2014 that the same Croatian fans, who displayed Ustaše symbols and shouted the wording “*ajmo Ustaše*” (“get started Ustaše”) and the words used by the Player in the present matter, *i.e.* “*za dom – spremni*”. FIFA finds this be an additional element which underlines that the wording used by the Player is today being associated to the Ustaše.

72. The Panel observes that it remained undisputed between the parties that the Ustaše regime can be related to fascism and that it was “*responsible for the atrocities of various ethnic groups, mainly Serbs, Jews and Roma, as well as for the murder of many members of the political opposition*”. As such, the Panel has no doubt that, if the words pronounced by the Player can be related to the Ustaše regime, the Player violated article 58(1)(a) of the FIFA DC because it finds that a public expression of association with such regime “*offends the dignity of (...) a group of persons [i.e. the groups of persons suppressed by the Ustaše regime in the past] through (...) discriminatory (...) words (...) concerning race (...) or origin (...)*”.
73. On this basis, the Panel finds that in order to come to a conviction of the Player for a violation of article 58(1)(a) of the FIFA DC, the only remaining question to be answered is whether the words pronounced by the Player (*i.e.* “*za dom – spremni*”) can be associated with the Ustaše regime.
74. In the following two sub-chapters, the Panel will deal with two remaining specific arguments relied upon by the Player. After these two sub-chapters, the Panel will render its general conclusion as to whether it finds that the words “*za dom – spremni*” can be associated with the Ustaše regime.
- a) *Is the reference to “poglavnik” essential for the wording to be related to the Ustaše regime?*
75. The Player maintains that the sanction imposed on him is inadmissible because, from an objective point of view, what he did had neither a discriminatory character, nor did it offend the human dignity of a group of persons.
76. The Player submits that the Ustaše salute was “*za poglavnik i dom – spremni*” (“ready for the leader and the homeland”), whereby the word “leader” was referring to Ante Pavlevic, who during the Second World War 1941-1945 was Dictator of the independent State of Croatia. The Player maintains that the reference to leader was essential. However, the Player did not refer to any fascist or other leader and did cautiously not use the words “*za poglavnik*” or the like.
77. With reference to two decision of Croatian courts, the Player argues that it has been consistent jurisprudence of the Croatian courts that the mere use of the words “*za dom – spremni*” (even in public) cannot be equated with the salutation of the Ustaše regime and do not constitute an offence or discriminatory statement especially if it is not accompanied by other decisive elements like typical gestures, symbols or words which allow a clear identification with the fascist movement.

78. FIFA disagrees with this contention and finds that the wording used by the Player is of discriminatory character as such wording is being associated to the Ustaše, it has been used by the Ustaše and, above that, it was even (at least one of) the official slogans of the Ustaše. However, even if the Panel would deem that it was not an official slogan of the Ustaše, such assumption could in no way lead to the conclusion that the mentioned wording lacks discriminatory character.
79. Regarding the two decisions of Croatian criminal courts acquitting the accused for the use of the wording “*za dom – spremni*”, FIFA makes reference to the brief of its expert witness and maintains that the Croatian press documented 13 cases in which the courts imposed penalties for such offences.
80. In view of the foregoing consideration, FIFA concludes that it is more than clear that the wording “*za dom – spremni*” is being associated to the Ustaše and that it has officially been used by such regime.
81. The Panel finds that the words “*za dom – spremni*” are generally and objectively associated with the Ustaše regime. In this respect, the Panel refers to the *Encyclopaedia Britannica* where one can read the following after using the entry “Ante Pavelić”:
- “Under the Ustaše regime, whose slogan was “Za dom Spremni” (“Ready for the fatherland”), a brutal program of oppression was conducted against the Orthodox Serbs and the Jews”.*
82. The Panel also observes that the salute “*za dom spremni*” is generally referred to the controversial use of this expression by the Ustaše movement, as indicated by the website “Wikipedia.org”, which even points out that “*during World War II, the salute was used by the Ustaše as their official salute*”.
83. Additionally, the Panel refers to the multiple press releases that were published by the international media in the days following the match qualifying the actions of the Player as a “*pro-Nazi salute*” and a “*fascist slogan*”. The association of the words with the Ustaše regime is also proven by the questions posed to the Player by a Croatian journalist immediately after the incident took place. The journalist asked the Player if he was not afraid for a possible ban being imposed by FIFA. All the above took place even before FIFA instigated disciplinary proceedings. Regarding the jurisprudence of the Croatian courts, the Panel finds that this jurisprudence is inconsistent and depends on the specific circumstances of the case. Nonetheless, the Panel finds that the imposition of a fine on the Player by a public prosecutor in Croatia is no indication that the Player would undoubtedly have been acquitted in case the public prosecutor would have taken the case to the Croatian courts.
84. In respect of the testimony of and the report submitted by Professor Josip Jurčević, expert witness called by the Player, the Panel finds that it may well be that the expression “*za dom – spremni*” has other connotations and is not solely linked with the Ustaše regime, nevertheless, the Panel is not convinced, and neither is it contended, that this expression can in no way be linked to the Ustaše regime, leading the Panel to the conclusion that certain groups of persons

or relatives of people that were suppressed by the Ustaše regime were offended by the Player's words.

85. Consequently, the Panel finds that the reference to "*poglavnik*" is not essential for the wording "*za dom – spremni*" to be related to the Ustaše regime.

b) *Does the reference to the words "u boj, u boj" exclude any association to the Ustaše regime?*

86. The Player also maintains that he preceded the words "*za dom*" with the expression "*u boj, u boj*" which allegedly made clear that this statement was purely patriotic and definitely not fascist. According to the Player "*u boj, u boj*" was not used by the Ustaše, but has its roots in the opera "Nikolce Subic Zrinski".

87. In this respect, FIFA submits that whereas these words are used directly after each other in the opera, the Player did not use these words directly after each other and that the words used by the supporters do not appear in this part of the opera at all. Also, with reference to an incident that occurred in the course of a match played in the Croatian national championship between Hajduk and Osijek in Split, Croatia, FIFA argues that it appears that even the wording "*u boj, u boj*" is being used by certain groups of football fans in direct connection with the Ustaše.

88. The Panel observes that it remained undisputed that the Player expressed the words "*za dom*" and that the crowd replied with the word "*spremi*". As established *supra*, the Panel finds that these words are generally associated with the Ustaše regime and therefore have a fascist connotation. The Panel is not convinced by the argument of the Player that the fascist connotation of these words falls away because other words are expressed beforehand. Besides the fact that the Panel deems it highly unlikely that the Player would intentionally cite certain phrases of an opera in a football stadium to celebrate a victory, the Panel finds that even if the Player did so and if the words "*za dom – spremni*" are placed in a wider context of patriotic expression, still the Panel finds that the Player should have abstained from expressing these individual words in view of their generally known fascist connotation.

89. Consequently, the Panel finds that the expression of the words "*u boj, u boj*" before expressing the words "*za dom – spremni*" does not exclude any association to the Ustaše regime.

c) *Conclusion*

90. In view of all the above, the Panel finds that the wording expressed by the Player can be associated with the Ustaše regime. The Panel finds it of particular relevance that, as argued by FIFA and as seen in the video, the spectators located before the person that made the video, lift their right hands when pronouncing the reply "*spremi*". The hands of those spectators are extended in a way that can be identified as a Nazi salute.

91. The Panel also took into account the reported incidents in other matches where fans showed sympathy for the Ustaše regime and expressed the words "*za dom – spremni*". This is a clear

indication that the two are related to certain groups of football fans in Croatia. Although these matches took place after the incident in question, it undoubtedly corroborates the view that such connotation is given to these exact words today.

92. The Panel finds the Player's behaviour even more condemning because it was not a spontaneous action. The incident occurred some forty minutes after the end of the match, leaving the Player some time to think and to reconsider his plan. Furthermore, the Player had to wait some minutes to obtain a microphone, again giving him the chance to reconsider his plans. The particularity of the actions of the Player was also observed by Mr Kovač, as he indicated at the hearing that he never in his career had seen a player asking for a microphone to address the audience. Also, the Player entered the pitch without any teammates, walking towards the remaining supporters in the stadium and only then started shouting the words, through a microphone, to the supporters.
93. Consequently, the Panel is satisfied to its personal conviction that the wording expressed by the Player (*i.e.* "za dom – spremni") has a discriminatory connotation.

v. Did the Player act intentionally or negligently?

94. The Player also maintains that the sanction imposed on him is inadmissible because, from a subjective point of view, he did not act intentionally or negligently and, as such, did not violate article 58(1)(a) of the FIFA DC.
95. In this respect, the Player asserts that he would have acted with intent if he had known the offensive potential of his statement and if he still wanted to offend or discriminate a person or group of persons. This required also knowledge of the addressees of the potential discrimination. There is no evidence that the Player had actual knowledge of any of these requirements.
96. The Player also finds it absurd – or at least predominantly unlikely – that he in his joy of Croatia's victory and qualification for the 2014 FIFA World Cup Brazil just risked performing a discriminatory act and putting the sporting triumph at risk. It never occurred to the Player that his celebration could all of a sudden be perceived as offensive or discriminatory.
97. Regarding negligence, the Player purports that negligence is characterised by not applying the necessary diligence which is required under the circumstances. Neither conscious negligence, nor unconscious negligence can be applied in the present case.
98. The Player avers that conscious negligence can only be assumed if he considered the possibility that this conduct was discriminatory within the meaning of article 58(1)(a) of the FIFA DC but nevertheless went on because he thought that the risk would not materialise. The Player finds that his behaviour was non-discriminatory by objective standards and was therefore not obliged to evaluate the discriminatory potential of his behaviour.

99. Finally, the Player asserts that unconscious negligence means that a wrongdoer did not know but could have known that his behaviour was discriminatory or offensive. Again, the Player maintains that his behaviour was not offensive nor discriminatory within the meaning of article 58(1)(a) of the FIFA DC.
100. FIFA refers to article 7(1) of the FIFA DC and maintains that according to such provision infringements are punishable regardless of whether they have been committed deliberately or negligently.
101. FIFA adheres with the Player that indeed from an outside perspective the Player's behaviour might be considered absurd and one might indeed struggle to understand the reasons for which a football player must make public reference to one of the darkest and most shameful periods of our history after having successfully terminated a football match. Nevertheless, the allegation brought forward by the Player can definitely not be an argument to sustain the absence of intent of the Player.
102. FIFA continues by arguing that the Player admitted that he consciously and deliberately did not use the wording "za poglavnika i za dom – spremni" but only the wording "za dom – spremni". In light of this FIFA argues that the relation of the words used by the Player must have been perfectly clear to him.
103. In respect of the Player's statement with regard to a possible negligent behaviour, FIFA indicates that such statement consists in a mere, short, analysis of the theoretical concept of negligence and the affirmation that, as the behaviour was objectively not offensive or discriminatory, the Player was "not obliged to evaluate the discriminatory potential of his behaviour".
104. Lastly, FIFA asserts that at no point the Player clearly and unequivocally dissociated himself publicly from the Ustaše regime, much less he condemned such regime or anyone expressing still today any kind of sympathy for it. Neither is FIFA aware of any public expression of excuse towards the victims of the Ustaše, not even for the case of misinterpretation of his words. FIFA finds that the Player's attitude after the incident has to be interpreted as self-confident and not aware of any wrongdoing and in particular the statement that people should learn history underlines such attitude.
105. The Panel observes that article 7(1) of the FIFA DC determines as follows:
- "Unless otherwise specified, infringements are punishable regardless of whether they have been committed deliberately or negligently".*
106. The Panel observes that the Player was apparently perfectly aware of his exact expressions as he maintains that he did "cautiously not use the words "Za Poglavnika" or the like". Also at the hearing, the Player showed no remorse of his actions; to the contrary, he determinately expressed the view that the wording he used did not have any correlation with the Ustaše regime, but was rather intended as an expression of joy and patriotism.

107. As the Player showed knowledge of the fact that the expression “*za poglavnika i za dom – spremni*” has a fascist connotation, the Panel finds it highly unlikely that the Player was not aware of the fact that the words “*za dom – spremni*” are also identified with the Ustaše regime and fascism. The Panel finds that, although not strictly required to do so under article 7(1) of the FIFA DC, the Player should have known about the fascist connotation of these words, or at least that the groups of people that had been suppressed by the Ustaše regime would feel discriminated by the Player’s public association with this fascist regime, thus constituting negligent behaviour.
108. Consequently, without basing its findings on the expert reports filed, the Panel is satisfied to its personal conviction, *i.e.* to its comfortable satisfaction, that the expression used by the Player was a clear and unequivocal reference to the salutation used by the Ustaše regime and that such expression has to be sanctioned in accordance with article 58(1)(a) of the FIFA DC.
- vi. If so, is the sanction imposed on the Player disproportionate?*
109. The Player finds that the sanctions imposed are disproportionate. Even in the event that the Player’s behaviour should be considered offensive and discriminatory, the sanctions exceed the scope of permissible legal consequences significantly and confirm the political motive of the Appealed Decision.
110. The Player argues that if the Panel finds that the Player violated article 58(1)(a) of the FIFA DC, it must start with the evaluation of the Player’s individual wrongdoing under the circumstances before it takes considerations of general deterrence and political aspects into account. Thus, it has to be considered that the Player has a clean slate when it comes to offensive or discriminatory behaviour. He has no record of any misconduct towards people with a different background of whatever nature.
111. The Player concludes that under these circumstances, the sanction should be revoked or at least be substantially reduced and suspended for a period of one year probation to allow the Player to prove FIFA’s insinuation wrong.
112. FIFA maintains that it is of the firm opinion that shouting any words or expressions associated with Nazism or fascism, especially in a football stadium filled with people, including children, does not only represent an infringement of the relevant FIFA regulations (in particular article 58(1)(a) of the FIFA DC), but is also a horrifying remembrance, for those who have lived through that troubling time, a dark episode in our history that nobody should be proud of, much less so mention or even promote. This kind of behaviour is shameful, revolting and represents an intolerable attitude.
113. Also, FIFA argues that the way in which this act of discrimination was committed has to be taken into account. In particular, FIFA refers to the fact that the Player, sometime after the final whistle went onto the pitch on his own. On this basis, FIFA finds that the conclusion that has to be drawn is that the Player was well aware of what he was doing and did not act out of an instantaneous emotion.

114. FIFA submits that the images are being associated with football in general and with the 2014 FIFA World Cup Brazil in particular and that this generates an immense harm to the sport.
115. Furthermore, FIFA finds that professional athletes, such as professional football players, should be aware of their role in society. The position of a professional football player comprises a high degree of responsibility. The expressions they use and the attitudes they adopt will be copied and seen as acceptable.
116. FIFA also deems that the Player did not show any kind of awareness for the importance of the question, for its impact, for its sensitivity or for the victims of the Ustaše as well as of the friends and families of such victims. In this regard, FIFA would like to make reference to the elements described above in this context and, in particular, to the fact that the Player at no point publicly condemned the Ustaše regime in a clear and unequivocal way or apologised to the victims of such regime.
117. Regarding the clean slate of the Player, FIFA finds that the gravity of the infringements committed largely outweighs the possible application of such a circumstance to have a mitigating effect on the sanctions to be imposed. On the other hand, and for the sake of completeness, FIFA underlines that any disciplinary record of the Player with FIFA would have been regarded as an aggravating circumstance to be considered when deciding on the sanction to be imposed.
118. The Panel observes that article 58(1)(a) of the FIFA DC determines as follows in respect of the sanction that can be imposed for a violation of this provision:
- “Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000”.*
119. As such, the Panel observes that the disciplinary bodies of FIFA enjoy a certain amount of discretion in the determination of the sanction. In this latter respect, the Panel agrees with the consistent CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (CAS 2009/A/1817 and CAS 2009/A/1844, §174, with further references to: CAS 2004/A/690, §86; CAS 2005/A/830, §10.26; CAS 2006/A/1175, §90 and the advisory opinion CAS 2005/C/976 & 986, §143).
120. Although the clean slate of the Player in respect of discriminatory behaviour could be taken into account as a mitigating circumstance, the Panel finds that this is overshadowed by the aggravating circumstances of the case. The Panel deems that the Player’s actions were particularly severe because he undertook the action by himself without any teammates and only some forty minutes after the match, thus having had sufficient time to rethink or reconsider his plan to express the words “*za dom – spremni*” to the remaining supporters in the

stadium through a microphone. The Player also confirmed that he had to wait some minutes before obtaining a microphone, again giving him the time to reconsider his plans. Also the fact that the Player showed no remorse of his action or publicly dissociated himself from the Ustaše regime is considered as an aggravating circumstance by the Panel. Finally, the Panel considers the fact that the Player involved the remaining supporters in the stadium in his disparaging behaviour to be an aggravating circumstance.

121. Consequently, the Panel finds that the sanction of, *inter alia*, a ten match suspension without any suspensive effect for official matches of the national team of Croatia and a fine of CHF 30,000 is not disproportionate in respect of the severity of the offence committed.

B. Conclusion

122. Based on the foregoing, and after taking into due consideration the applicable regulations, all the evidence produced and all arguments submitted, the Panel finds that:
- i. the Appealed Decision is not based on incorrect facts.
 - ii. the standard of proof to be applied is the standard of personal conviction, which coincides with the standard of comfortable satisfaction.
 - iii. the entire expression “*za dom – spremni*” can be attributed to the Player as if he had pronounced the word “*spremi*” himself.
 - iv. the wording expressed by the Player (*i.e.* “*za dom – spremni*”) has a discriminatory connotation.
 - v. it is satisfied to its personal conviction, *i.e.* to its comfortable satisfaction, that the expression used by the Player was a clear and unequivocal reference to the salutation used by the Ustaše and that such expression has to be sanctioned in accordance with article 58(1)(a) of the FIFA DC.
 - vi. the sanctions as pronounced in the FIFA DC Decision and as confirmed in the Appealed Decision are not disproportionate.
123. Consequently, the Panel confirms the Appealed Decision in full. Any other prayers and requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 April 2014 by Mr Josip Simunic against the decision adopted by the FIFA Appeal Committee on 21 February 2014 is dismissed.
2. The decision adopted by the FIFA Appeal Committee on 21 February 2014 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.