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SUD BOSNE I HERCEGOVINE **СУД БОСНЕ И ХЕРЦЕГОВИНЕ**

COURT OF BOSNIA AND HERZEGOVINA

Case No.: **X-KR/06/275**

Date: **28 February 2008**

Original: **Bosnian-Croatian-Serbian**

Before: **Judge Hilmo Vučinić, Presiding**
Judge Paul Melchior Brilman
Judge Shireen Avis Fisher

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MITAR RAŠEVIĆ and SAVO TODOVIĆ

VERDICT of 28 FEBRUARY 2008

Counsel for the Prosecutor's Office:

Ms. Vesna Ilić

Counsel for the Accused Mitar Rašević:

Mr. Slaviša Prodanović
Mr. Milan Vujin

Counsel for the Accused Savo Todović:

Mr. Mladen Šarenac
Mr. Jovan Debelica

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Number: X-KR/06/275

Sarajevo, 28 February 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel comprising Judge Hilmo Vučinić as the Presiding Judge, and Judges Shireen Avis Fisher and Paul M. Brilman, as members of the Panel, with the participation of Legal Advisor Dženana Deljkić-Blagojević as the record-taker, in the criminal case against the accused Mitar Rašević and Savo Todović for the criminal offence of Crimes against Humanity in violation of Article 172(1) of the Criminal Code of BiH, deciding upon the Indictment of the Prosecutor's Office of BiH No. KT-RZ-162/06 of 22 December 2006, following the public and main trial wherein the public was excluded from a part of the trial, in the presence of the Prosecutor with the Prosecutor's Office of BiH, Vesna Ilić, and the accused Mitar Rašević and his *ex officio* Defense Counsel, attorneys Slaviša Prodanović and Milan Vujin, and the accused Savo Todović and his *ex officio* Defense Counsel, attorneys Mladen Šarenac and Jovan Debelica, having deliberated and voted, on 28 February 2008 rendered and publicly pronounced the following:

V E R D I C T

ACCUSED:

MITAR RAŠEVIĆ, a.k.a. Mićo, son of Đorđe and Smilja, nee Badnjar, born on 15 November 1949 in the village of Čagošta, Municipality of Foča, residing in …, … by ethnicity, citizen of …, Teacher of Sociology by profession, married, father of three children, served in the military from 1970 to 1972 in Travnik and Kumanovo, no rank or decoration, no previous convictions,

SAVO TODOVIĆ, son of Vladimir and Dušanka, nee Topalović, born on 11 December 1952 in the village of Rijeka, Municipality of Čelebići, his family residing at …, Municipality of …, whereas he still does not have his place of residence registered at the referenced address as he had to register in person but could not do that because of pre-trial custody ordered in The Hague, and does not have his place of residence or dwelling registered in the territory of BiH, … by ethnicity, citizen of …, the renouncement of … citizenship has been underway, retired, married, father of two children of age, low income, served in the military in 1972/73 in Tetovo, no rank or decoration, no previous convictions,

ARE GUILTY

Of the following:

During the period from April 1992 to October 1994, as part of a widespread and systematic attack by the military and the police of Republika Srpska and the paramilitary formations targeting the non-Serb civilians in the wider area of the Foča Municipality, knowing of the attack, Mitar Rašević, as the commander of the prison guards, and Savo Todović, as a deputy warden in KP Dom Foča, together with the warden of KP Dom Foča, Milorad Krnojelac, and

prison guards and other members of the prison staff, and members of the Yugoslav People's Army (JNA), the Serb Territorial Defense, the civil and the military police force of Republika Srpska and paramilitary formations, participated in a joint criminal enterprise the purpose of which was to imprison Muslims and other non-Serb civilians from Foča and the surrounding areas in inhumane conditions in KP Dom Foča, which had all the characteristics of a camp, by: persecuting non-Serb civilians on political, national, ethnic and religious grounds by torture, beatings, killings, inhumane treatment, inflicting bodily and health harm, forced labour, enforced disappearances, deportations and imprisonment, and, also, Mitar Rašević and Savo Todović, as superior and officials in charge, failed to take necessary and reasonable measures to prevent the commission of the aforesaid acts and to punish the perpetrators of those acts, in a way that:

in the Foča KP Dom, which had all the characteristics of a camp, in which at least 700 non-Serb detainees, particularly Bosniaks, were unlawfully detained,

Mitar Rašević, as the commander of the prison guards, in charge of supervising at least 37 prison guards for whom he prepared guard duty schedule and work assignments, exercising effective control over the guards, in charge of the cells and solitary confinement cells and with the power to release detainees from the solitary confinement cells and return them to cells, while the guards selected detainees and took them to interrogation rooms in which they subjected them to physical mistreatment,

Savo Todović, as the assistant warden of Foča KP Dom, the second in command in the prison hierarchy, with the similar powers and duties as the camp commander, supervising the subordinate prison staff, in charge of selecting detainees for forced labour and solitary confinement, wherein they

1. From April 1992 to October 1994, they participated in maintaining a system of punishment and mistreatment of detainees by

1b) From June 1992 to May 1993, detainee Dž.B. was beaten up and locked in a solitary confinement cell for about one month in inhumane conditions, two guards called out detainee FWS-71, took him out of his cell and into the solitary confinement cell and beat him for about 20 minutes until he fainted, on at least two occasions soldiers severely tortured Nurko Nišić, officer from the municipality administration and … member, and then returned him to the cell covered in blood and bruised, military policemen tortured and beat detainee S.M., having mistaken him for another detainee selected for interrogation; they threatened to take out his eye, they stopped at the moment Mitar Rašević appeared saying they had discovered a mistake and ordered the guards to return the seriously injured and bloody S.M. to the cell.

1c) In early July 1993, after detainee FWS 216 had escaped and was then recaptured and returned to the KP Dom, one of the guards beat him; the detainee was confined in an isolation cell for 28 days during which time Savo Todović and other guards mistreated and beat him with a chain and bare hands all over his body; on the said day, Savo Todović informed all the detainees that, as a collective punishment for the escape of FWS 216, their food rations would be reduced, while work and medical treatment would be denied and forbidden.

2. From June to August 1992, in the manner described under Count 1 of the Indictment, the guards under the command of Mitar Rašević and civil and military policemen and the military who entered the KP Dom from the outside with the knowledge of Mitar Rašević and

Savo Todović, beat detainees with batons, axe-handles and fists on the premises of the administration building, asking the detainees if they had hidden weapons; they would wrap some of them in blankets and dragged them out of the administration building; a number of detainees died due to the beatings or were shot dead; the following detainees died due to the described reasons: Alija (Omer) Altoka, born on 7 April 1972, Salem Bičo, Abdurahman Čankušić, Enko Čedić, Kemal (Halim) Dželilović, born on 25 January 1954, Mate (Mirko) Ivančić, Halim (Ahmet) Konjo, Adil Krajčin, Mustafa (Bećir) Kuloglija, born on 15 May 1945, Krunoslav (Pero) Marinović, born on 6 April 1946, Nurko (Salko) Nišić, born on 7 May 1949, Husein (Ramo) Rikalo, born on 18 November 1957, Midhat (Ramo) Rikalo, born on 19 November 1966, Zaim (Ramo) Rikalo, born on 6 November 1963, Ševa (Edhem) Šoro, born on 27 August 1956, Kemal (Aziz) Tulek, born on 21 October 1958, Munib (Edhem) Veiz, born on 31 January 1952 and Zulfo (Ibro) Veiz, born on 30 October 1950, as well as an unknown number of other unidentified detainees.

3. From April 1992 to October 1994, Mitar Rašević and Savo Todović contributed to the establishing and maintaining of poor living conditions in the camp, and Savo Todović threatened prisoners with serious bodily harm if they violated the prison rules, attempted to escape or refused to work; all the time they kept the detainees locked in their cells, except when they were lined up and taken to the canteen to eat or to work duties; they used solitary confinement cells as a means of intimidation and threats, hence, from April 1992, the cells were overcrowded, with insufficient facilities for bedding and personal hygiene, and the detainees were fed starvation rations; during the winter they did not have appropriate clothes and heating, due to which the health of many detainees was seriously deteriorated; due to the said conditions and the lack of proper medical care, detainee Esed Hadžić died in April or May 1992 from …; Šefko Kubat succumbed after belated medical help, Omer Kunovac died after beating, and Juso Džamalija committed suicide by hanging because of the aforementioned conditions, while detainees FWS 71, FWS 139, FWS 162, FWS 111, FWS 85, FWS 86, FWS 82, as well as many others, suffered the symptoms of malnutrition and psychological symptoms of stress disorder.

4. From late May 1992 to October 1994, Mitar Rašević and Savo Todović participated in the establishment of a system of forced labour, Mitar Rašević by monitoring their assignments inside and outside the KP Dom and assigning guards that would take them to work, cooperating with the civilian authorities and external military authorities to which he handed over the detainees, and Savo Todović by making lists of which detainees would be working at certain locations, personally assigning the detainees to their work duties by calling out the groups of detainees from their cells, threatening those who refused to work for reasons of illness or weakness, and by cooperating with external military and civilian authorities handing them over the detainees, hence:

4a) Within the KP Dom, the detainees had to work in the furniture factory and the metal and mechanical workshop, which was the kind of forced labour performed by FWS 71, D.M., K.Š., A., as well as many other detainees.

4b) Outside the KP Dom, the detainees were forced to perform farming jobs at the prison outpost "Brioni", to work in mills and the Miljevina mine, to clean up rubble of damaged buildings at various places in Foča, to repair the private house of Milorad Krnojelac, the warden of the KP Dom; in addition to other works, the following detainees performed forced labour at the Miljevina mine: FWS 142, R.T., Z.A., and others, FWS 216 and FWS 83 who worked at Milorad Krnojelac's estate, while on several occasions detainee FWS 141 was

forced, under supervision of armed persons, to drive a truck to the frontline ahead of convoys in order to detect land mines.

4c) From September 1992 to March 1993, after detainees FWS 109 and K.G. on 18 September 1992 were called out for an exchange and during the said period they used them on several occasions as drivers for the detection of land mines by driving ahead of Serb convoys.

5. From July 1993 to October 1994, about 80 detainees were transported from the Foča KP Dom to detention facilities in Kalinovik, Rudo and *Kula* until the end of September 1994; in October 1994, the remaining detainees were transferred to the said facilities and no detainee remained at the Foča KP Dom, because on 4 or 5 October 1994, Mitar Rašević personally transported about 60 detainees to the *Kula* detention facility and Savo Todović saw off this last group of detainees from the KP Dom, after the two had participated in the enforced disappearance and deportation of detainees from Foča KP Dom by telling them they would be exchanged, whereas they were deported to the localities outside the territory of the Foča Municipality, hence they:

- in late August 1992, Savo Todović personally saw off a group of 55 detainees to a destination in Montenegro and instructed them not to look out of the bus windows upon leaving the KP Dom; at the border with Montenegro the bus was intercepted by military personnel and returned to the KP Dom; on the following day, 35 elderly or ill detainees were again deported by bus to Rožaje in Montenegro, while the remaining 20 Muslim detainees were taken in an unknown direction,

- on or about 17 September 1992, between 35 and 60 detainees were taken out of the KP Dom compound for the alleged purpose of picking plums but were taken in an unknown direction,

- from June 1992 to March 1993, at least 200 Muslim and other non-Serb detainees were transferred to unknown places, and among the detainees who were taken in an unknown direction and to unknown places and who have never been seen alive ever since are: Nedžib Aljukić, son of Šaban, born in 1964, Salko Srnja, son of Atif, born in 1965, Muamer Srnja, son of Esad, born in 1965, Omer Šljivo, son of Salko, born in 1967, Hamdo Šljivo, son of Salko, born in 1971, Sulejman Šošević, son of Izet, born in 1960, Edin Zametica, son of Avdo, born in 1968, Elvedin Zametica, son of Avdo, born in 1968, Ekrem Šalaka, son of Avdo, born in 1971, Edhem Balić, son of Šerif, born in 1963, Jasmin Šukalo, son of Šaban, born in 1967, Ramiz Karović, son of Mujo, born in 1961, Esad Kovačević, son of Džemal, born in 1963, Nijaz Kurtović, son of Osman, born in 1971, Edin Kurtović, son of Husnija, born in 1971, Derviš Čankušić, son of Nasko, born in 1940, Rasim Kajgana, son of Alija, born in 1950, Suad Borovina, son of Edhem, born in 1959, Suad Klapuh, son of Sulejman, born in 1964, Esad Šoro, son of Tahir, born in 1955, Husein Korjenić, son of Hajdar, born in 1968, Džemal Balić, son of Meho, born in 1937, Edib Muminović, son of Himzo, born in 1956, Kasim Mušanović, son of Murat, born in 1945, Izet Šoro, son of Memija, born in 1962, Edhem Mušanović, son of Hasan, born in 1955, Nezir Karović, son of Mujo, born in 1957, Ramiz Džano, son of Halim, born in 1953, Sulejman Čelik, son of Uzeir, born in 1941, Suljo Šoro, son of Edhem, born in 1951, Uzeir Muratović, son of Šaban, born in 1956, Mirsad Srnja, son of Abdulah, born in 1955, Ferid Šabanović, son of Mušan, born in 1958, Ekrem Čengić, son of Avdo, born in 1940, Fahrudin Malkić, son of Nazif, born in 1948, Ibrahim Kafedžić, son of Avdo, born in 1948, Halim Dedović, son of Hasan, born in 1935, Nazif

Lagarija, son of Salko, born in 1937, Edin Ćemo, son of Meho, born in 1970, Meho Ćemo, son of Salih, born in 1930, Munib Divović, son of Sejmen, born in 1961, Smail Đozo, son of Ibro, born in 1956, Hakija Džinić, son of Murat, born in 1929, Atif Hambo, son of Ibro, born in 1937, Ferid Krajčin, son of Hasan, born in 1965, Hasan Krajčin, son of Huso, born in 1932, Vejsil Lepir, son of Ahmet, born in 1958, Šaban Mazić, son of Sulejman, born in 1964, Kasim Mekić, son of Ramo, born in 1940, Vahid Mekić, son of Šerif, born in 1959, Zulfo Mekić, son of Kasim, born in 1967, Rasim Musić, son of Ragib, born in 1964, Halil Oruč, son of Mujo, born in 1926, Ramiz Ramić, son of Himzo, born in 1962, Murat Rizvanović, son of Alija, born in 1932, Nedžib Rizvanović, son of Murat, born in 1963, Mirsad Subašić, son of Salko, born in 1968, Salko Subašić, son of Halil, born in 1947, Vehid Ahmetspahić, son of Osman, born in 1965, Mehmed Čerimagić, son of Avdo, born in 1935, Šefik Čerimagić, son of Baso, born in 1937, Ramiz Dedović, son of Hamid, born in 1972, Dževad Hajrić, son of Džafer, born in 1958, Ibrahim Isanović, son of Fehim, born in 1960, Rasim Kobiljar, son of Nedžib, born in 1958, Senad Kovač, son of Edhem, born in 1974, Kemal Krkalić, son of Rasim, born in 1965, Salih Kuloglija, son of Agan, born in 1949, Alija Matuh, son of Mujo, born in 1969, Mujo Murguz, son of Aziz, born in 1962, Huso Reko, son of Hasib, born in 1946, Nusret Salčinović, son of Osman, born in 1954, Zijad Softić, son of Mujo, born in 1964, Abdulah Suljević, son of Alija, born in 1962, Elvir Šabanović, son of Ferid, born in 1974, Mehmedalija Šljivo, son of Hakija, born in 1966, Enes Šoro, son of Tahir, born in 1975, Remzija Alibašić, son of Ibro, born in 1947, Ismet Pašović, son of Hasan, born in 1926, Dženan Karabegović, son of Asim, born in 1959, Mirsad Hadžimešić, son of Avdo, born in 1957, Salih Lagarija, son of Nazif, born in 1965, Amer Karabegović, son of Ahmed, born in 1967, while the following detainees were taken from the KP Dom *Foča* in an unknown direction: Sejad Nikšić, son of Vehbija, born in 1956, Kemo Nikšić, son of Munir, born in 1959, Mustafa Nikšić, son of Adem, born in 1957, Salko Šljivo, son of Omer, born in 1944, Jusuf Srnja, son of Mustafa, born in 1968, Enes Bičo, son of Mustafa, born in 1962, Bego Jahić, son of Nurif, born in 1969, Alija Dželil, son of Ramiz, born in 1955, Dževad Džinić, son of Hakija, born in 1960, Šaban Aljukić, son of Smajil, born in 1938, Ramiz Borovina, son of Edhem, born in 1962, Jasmin Sudar, son of Mustafa, born in 1962, Ismet Čaušević, son of Bećir, born in 1950, Murat Granov, son of Nedžib, born in 1958, Esad Mezbur, son of Šaćir, born in 1957, Nedžib Mulavdić, son of Avdo, born in 1962, Ibrahim Ovčina, son of Šaban, born in 1950, Avdo Muratović, son of Selim, born in 1963, Munib Aljukić, son of Hasan, born in 1957, Šefik Hodžić, son of Halil, born in 1950, Rrahim Istrefi, son of Sherif, Hilmo Dedović, son of Ramiz, born in 1961, Emin Kršo, son of Sulejman, born in 1960, Fadil Žuga, son of Šemso, born in 1975, Ramiz Babić, son of Asim, born in 1962, Mirsad Borovac, son of Husein, born in 1964, Amil Mušanović, son of Muharem, born in 1968, Enes Musić, son of Nazif, born in 1970, Muradif Musić, son of Redžo, born in 1942, Fehim Mulahasanović, son of Suljo, born in 1919, Džemil Melez, son of Huso, born in 1958, Juso Bašić, son of Avdica, born in 1959, Adnan Berberkić, son of Nedžad, born in 1967, Fikret Kovačević, son of Mujo, born in 1961, Izet Džomba, son of Osman, born in 1962, Muharem Kibrić, son of Ahmet, born in 1970, Muhamed Kibrić, son of Ahmet, born in 1969, Fadil Divjan, son of Ramiz, born in 1961, Safet Dudić, son of Asim, born in 1958, Munib Huko, son of Avdo, Imšir Konaković, son of Ibrišim, born in 1934, and Murat Jusufović, son of Suljo, and were found and exhumed during 2004 at the Rudnik-Miljevina-Foča location from the mass graves I and II and identified during November 2006.

By doing so they committed the criminal offence of

Crimes against Humanity – persecution in violation of Article 172(1)(h) of the Criminal Code of Bosnia and Herzegovina in conjunction with:

- items k) and f) of CC BiH for Count 1, including sub-Counts 1.b) and 1.c) of the Indictment;
- item a) of CC BiH for Count 2 of the Indictment;
- items e) and k) of CC BiH for Count 3 of the Indictment;
- item c) of CC BiH for Count 4, including sub-Count 4.a), and with items c) and k) of CC BiH for sub-Counts 4b) and 4c) of the Indictment;
- d) and i) of CC BiH for Count 5 of the Indictment.

  As read with Article 29 and Article 180(1) and (2) of CC BiH.

Therefore, pursuant to Article 285 of CPC BiH, applying Articles 39, 42, 48, and Article 49 of CC BiH with respect to the accused Rašević, the Panel of the Court of BiH hereby

S E N T E N C E S

1. The accused Mitar Rašević to IMPRISONMENT FOR A TERM OF 8 (EIGHT) YEARS AND 6 (SIX) MONTHS, and

2. The accused Savo Todović to IMPRISONMENT FOR A TERM OF 12 (twelve) YEARS and 6 (six) months

Pursuant to Article 56 of CC BiH and Article 2(4) of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH, the time which the Accused persons spent in custody under the Decision of ICTY and the Decision of this Court, that is, from 15 August 2003 and from 15 January 2005 respectively, shall be credited towards the pronounced sentence of imprisonment against the accused Mitar Rašević and the accused Savo Todović, pending the referral to serve their sentences.

Pursuant to Article 188(4) of CPC BiH, the accused persons are relieved of the duty to reimburse the costs of the criminal proceedings, and the costs shall therefore be paid from within the budget of the Court of BiH.

On the other hand, pursuant to Article 284(1)(3) of CPC BiH, the accused persons are

ACQUITTED OF THE CHARGES

That they:

1. From April 1992 until October 1994, participated in establishing and maintaining a system of punishment and mistreatment of detainees by the guards and the civil and military police and the military who, with their knowledge and permission, entered the Foča KP Dom, whereby the guards under the command of Mitar Rašević selected the detainees according to the lists provided by Savo Todović and took them to the administration building to interrogation rooms in which they were subjected to

interrogation, beatings, torture, even killings by the guards, civil and military police and the military, as follows:

1a) During April and May 1992, after the military policemen arrested and apprehended to the Foča KP Dom civilians FWS 03, H.D. and S.H., they interrogated and beat them to force them to confess that they were members of the Party of Democratic Action (SDA); the beatings caused S.H. to faint twice; on at least two occasions, the guards and military policemen tortured and beat detainee A.S., as a result of which he suffered three broken ribs; they physically mistreated detainees Enes Uzunović, member of the …, and Vahid Džemal, policeman, due to which the latter's jaw was broken, after which they were taken to the solitary confinement cell, and on several occasions the guards physically mistreated detainees Č.M., D.A., K.K., FWS 198 and FWS 82 during evenings.

REASONING

I. PROCEDURAL HISTORY

By the decision dated 7 April 2006, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") adopted the ICTY Office of the Prosecutor's ("OTP") Second Amended Joint Indictment against Mitar Rašević and Savo Todović as the operative indictment in the case *Prosecutor v. Savo Todović and Mitar Rašević*. *Prosecutor v. Savo Todović and Mitar Rašević*, IT-97-25/1-PT, Order on Operative Indictment, 7 April 2006. The Indictment charged the accused Mitar Rašević and Savo Todović with participating in a joint criminal enterprise the purpose of which was to imprison Muslim and other non-Serb civilians from Foča and the surrounding areas in inhumane conditions and subject them to beatings, torture, enslavement, deportations and forcible transfers. According to the Indictment, the accused Savo Todović was the Deputy Warden of the KPD Foča, while the accused Mitar Rašević was the Commander of Guards of the KPD Foča. The Accused were therefore charged on the basis of both individual and command responsibility with the crimes of persecution, torture, inhumane acts, murder, imprisonment and enslavement as crimes against humanity, and torture, cruel treatment, murder and slavery as violations of the laws or customs of war.

On 4 September 2006, the ICTY Appeals Chamber confirmed the decisions of the Referral Bench of the ICTY on the referral of case under Rule 11 *bis* dated 8 July 2005 and 31 May 2006. *Prosecutor v. Savo Todović and Mitar Rašević*, IT-97-25/1-AR11*bis*.1, Decision on Savo Todović's Appeal Against Decisions on Referral under Rule 11*bis*, 4 September 2006. Pursuant to that decision, on 3 October 2006 this case was transferred to the judicial authorities of Bosnia and Herzegovina and the accused persons were transferred from the ICTY detention facility to the territory of BiH and handed over to this Court as the court of jurisdiction.

On 22 December 2006, the Prosecutor's Office of BiH (the "Prosecutor") filed the adapted Indictment number KT-RZ-162/06 charging the Accused with the commission of the criminal offence of persecution as a Crime against Humanity in violation of Article 172(1)(h) of the Criminal Code of BiH ("CC of BiH") in conjunction with items a), d), e), f), k) and i) of that Article, as read with Article 29 and Article 180(1) and (2) of the CC of BiH. On 29 December 2006, the Preliminary Proceedings Judge of this Court accepted the adapted Indictment.

On 15 January 2007, the Accused failed to appear before the Court and enter a plea before the Court of BiH, so the Court, pursuant to Article 229(a) of the Criminal Procedure Code of BiH ("CPC of BiH"), recorded that the accused entered a plea of not guilty.

During the proceedings on 24 April 2007, 14 May 2007, 9 October 2007 and 22 February 2008, the public was excluded from a part of the main trial pursuant to Article 235 of the CPC of BiH. The public was excluded for the reason of the need to clarify the requests by certain witnesses (FWS 111, 119, 83 and 76) in relation to whom the identity protection measures were granted, wherein they requested the public to be excluded from the trial. The Panel rendered a decision to partially exclude the public from the trial, considering that these are the witnesses placed under the protection measures, pursuant to the required protection of the interest of the witnesses as referred to in Article 235 of the CPC of BiH, which might be

undermined if the witnesses had to publicly state in the courtroom their identity and the reasons for modification of the examination method.

The public was also partially excluded on 27 November 2007, 11 December 2007 and 5 February 2008 during the deliberation of the motion for exclusion of the public and in a part of the testimony of the accused Rašević and Todović as witnesses. The Panel rendered a decision to exclude the public pursuant to Article 235 of the CPC of BiH, that is, due to the existence of the circumstances that suggest that the presence of the public is not in the interest of security of the witnesses and their families.

On the basis of its jurisprudence hitherto, the Panel notes that is impossible to always foresee and entirely control the dynamics of the presentation of views about a legal matter. Also, the BiH public has been informed in detail about the proceedings conducted before the Court of BiH through the media. Such a thorough informing of the public about all trial details may be an insurmountable obstacle for the witnesses to make their statements freely. Therefore, by balancing between the witness's right to the protection of privacy and the right of the public to be appropriately and timely informed, and also by noting that the exclusion of the public always constitutes an exception to the rule of public proceedings, the Panel holds that the desired aim is achieved by excluding the public to the extent that the irreparable damage to the witness may be prevented and the public informed in other, more acceptable manners.

During the evidentiary proceedings, the Court adduced evidence through the examination of witnesses and the presentation of the documentary evidence of the prosecution. During the main trial, the following Prosecution witnesses testified: FWS 138, FWS 115, FWS 15, FWS 111, FWS 120, FWS 146, FWS 153, FWS 119, FWS 76, FWS 142, FWS 139, the witness under the pseudonym E, witnesses 172 and 141, FWS 250, witnesses under the pseudonyms A, B, C, D, FWS 182, FWS 65, FWS 58, FWS 85, FWS 113, FWS 162, FWS 71, FWS 08, FWS 03, FWS 104, FWS 83, FWS 82, FWS 210, FWS 86 and FWS 02, Ekrem Zeković and Amor Mašović.

The Panel also reviewed the following documentary evidence of the Prosecutor's Office of BiH: Official Gazette of the Serb People in BiH, No. 3/92 – the Constitution; Official Gazette No. 6, Amendments to the Constitution of the Serb Republic of BiH, Constitution of Republika Srpska, consolidated text – Official Gazette of RS 21/92 (**P-05**); Layout of Foča KP Dom (**P-06**); Map of Foča (**P-07**); List of persons subjected to forced labour at Foča – Srbinje KPD in the period from April 1992 to the end of October 1994, submitted under No.01-328/98 of 26 October 1998 by warden Zoran Sekulović (**P-09**); Request of Foča KPD No. 12/92 of 9 June 1992, submitted to the War Presidency of the Serb Municipality of Foča for the purpose of laying a minefield and replacing of weapons, signed by the acting warden Milorad Krnojelac, with an attached list of conscripts - members of the Foča KPD Unit, related to the month of October 1992 (**P-10**); Request for taking over the premises of the KP Dom of 8 May 1992 (**P-11**); Decision on temporary ceding of Foča KP Dom premises in order to transfer prisoners of war and detainees, signed by Milorad Krnojelac, Serb Municipality of Foča, KZP Dom Foča of 16 May 1992, No. 03-240/92 (**P-12**); List of persons deployed to Foča KPD who were to be issued military equipment, No. 16/92 of 15 June 1992 (**P-13**); Document of Foča KPD, No. 35/92 of 11 July 1992, submitted to the Ministry of Justice of the Serb Republic of BiH, with regard to the implementation of the Decision on Organization of Correctional Organizations in the Territory of the Serb Republic of BiH (**P-14**); Document of the Ministry of Justice and Administration of the Serb Republic of BiH, No. 04/2-1/92 of 25 July 1992, submitted to the KP Dom, in response to the query about the

status of Foča KP Dom (**P-15**); Decision of Foča KPD No. 85/92 of 21 October 1992, on appointment of the Commission to make an inventory of capital goods, whereby Mitar Rašević was appointed the Commission Chairman (**P-16**); A letter of the warden of Foča KP Dom, Milorad Krnojelac, of 15 November 1992, submitted to the Ministry of Finance and the Ministry of Justice (**P-17**); A letter of the President of the Security Council to the Secretary General of 25 November 1992 (**P-18**); Report on activities related to the organization of the judicial authorities in the Municipality of Foča, signed by Branka Mandić and Igor Velašević (**P-19**); Review of classification of employees in Foča KP Dom per groups and coefficients as referred to in Article 2 of the Decision on Classification, signed by warden Zoran Sekulović (**P-20**); Review of information on appointment of Heads of services (**P-21**); Data on employees of Foča KP Dom, with regard to their duties, the date of commencement of their work in the KP Dom, ethnicity and educational background (**P-22**); Document of Foča KP Dom No. 73/93 of 31 May 1993 submitted to the Tactical Group "Foča" and the Ministry of Defense – Military Department Foča (**P-23**); Document of the Ministry of Justice and Administration of RS, No. 04/02-16/93 of 1 July 1993, whereby Savo Todović was appointed the Assistant Warden, Mitar Rašević the Assistant Warden for Security, and Radojica Tešević the Director of P.J. "Drina" (**P-24**); Drawing of the KP Dom and the organizational chart of Foča KP Dom from approximately 17 April 1992 to approximately August 1993 (**P-25**); Order of the warden of the KP Dom, Zoran Sekulović, dated 26 October 1993 (**P-26**); Data on salaries of the employees of Srbinje KPD in January, February and March 1994, signed by warden Zoran Sekulović (**P-27**); A letter of Srbinje KPD No. 01-176/95 of 15 August 1995, submitted to the Ministry of Justice and Administration of Republika Srpska, signed by warden Zoran Sekulović (**P-28**); Document of the Ministry of Justice of the Federation of BiH, No. 05-24-2724/95 of 17 November 1995, addressed to the Ministry of Internal Affairs - Security Service Centre Sarajevo, with the list of employees of Foča KP Dom (**P-29**); Personal file of prisoner FWS-111 (**P-30**); Certificates issued by the Police Station Commander – Security Centre Herceg Novi, of 25 May 1992 with regard to FWS – 08 and Enes Bićo (**P-31**); ICRC Certificate with regard to FWS – 111 of 1 July 1994 (**P-32**); ICRC Certificate with regard to FWS – 138 of 24 October 1994 (**P-33**); ICRC Certificate with regard to FWS – 249 of 27 October 1994 (**P-34**); Certificate issued by the Crisis Staff of the Serb Municipality of Foča, No. 6/92 of 3 May 1992 with regard to FWS – 05 (**P-35**); ICRC Recommendation dated 21 December 1992, with regard to FWS – 113 (**P-36**); Certificate issued by the Republic of BiH, State Commission for Exchange of Prisoners of War, dated 10 October 1994, with regard to FWS – 249 (**P-37**); Certificate issued by the Republic of BiH, State Commission for the Exchange of Prisoners of War, No. 05-277-R/94 dated 11 November 1994, with regard to FWS – 111 (**P-38**); Certificate issued by the Republic of BiH, State Commission for the Exchange of Prisoners of War, No. 05-161-R/94 dated 26 October 1994, with regard to FWS – 138 (**P-39**); Certificate issued by the Republic of BiH, State Commission for the Exchange of Prisoners of War, No. 05-108-R/94 dated 10 October 1994, with regard to FWS – 139 (**P-40**); Certificate issued by the Crisis Staff of the Serb Municipality of Foča, No. 03-240-2/92 of 26 April 1992 with regard to Hasan Pilav (**P-41**); Permission of the Security Service Centre Foča dated 13 August 1992, with regard to Ramiza Čolo (**P-42**); Permission of the Security Service Centre Foča dated 26 June 1992, with regard to Asim Pilav (**P-43**); Permission of the Security Service Centre Foča dated 26 June 1992, with regard to Hasan Pilav (**P-44**); Permission of the Security Service Centre Foča dated 26 June 1992, with regard to Arman Pilav (**P-45**); Permission of the Security Service Centre Foča dated 26 June 1992, with regard to Lejla Pilav (**P-46**); Permission of the Security Service Centre, Public Security Station Foča No. 129/92, with regard to Izet Veiz (**P-47**); Medical documentation with regard to FWS-146 of 6 October 1994 (**P-48**); Permission of the Security Service Centre Foča dated 7 July 1992, with regard to Dudija Pandža (**P-49**);

Permission of the Security Service Centre Foča No. 332/92 of 27 June 1992, with regard to Munevera Čaušević (**P-50**); Lists of imprisoned and missing persons from Foča KP Dom made by the Agency for Investigation and Documentation Sarajevo (**P-51**); List of missing persons from Foča KPD made by the Federation Commission for Missing Persons No. 01-41-2710/2006 of 2 June 2006 (**P-52**); Book of missing persons in the territory of BiH published by ICRC (**P-53**); Certificate issued by the Crisis Staff of the Serb Municipality of Foča No. 24/92 of 8 May 1992, with regard to Rašid Muratović, and the Contract signed by Rašid Muratović and Vlatko Jegdić dated 30 June 1992 (**P-54**); Certificate issued by the Crisis Staff of the Serb Municipality of Foča No. 240/92 of 7 July 1992, with regard to FWS-03, whereby the said person was released from the KP Dom (**P-55**); ICRC Certificate with regard to FWS – 08 of 30 August 1994 (**P-56**); ICRC Certificate with regard to FWS – 139 of 27 October 1994 (**P-57**); ICRC Certificate of 27 October 1994, Certificate issued by the State Commission for Exchange of Prisoners of War dated 18 October 1994, and Certificate of Recognition of the Status of Camp Inmate of BiH for Muhamed Ahmetkadić (**P-58**); ICRC Certificate of 27 October 2004 and a Certificate issued by the State Commission for Exchange of Prisoners of War dated 13 October 2004 with regard to FWS-210 (**P-59**); Certificate issued by the State Commission for Exchange of Prisoners of War dated 10 October 1994, Certificate issued by the Association of Camp Inmates and ICRC Certificate dated 24 October 1994, all with regard to FWS-198 (**P-60**); A letter of the State Commission for Exchange of Prisoners of War of the Republic of BiH, No. 12-970/95 of 24 November 1995, with an attached list of exchanged citizens from the region of the Municipality of Foča (**P-61**); Decision of the Cantonal Court in Sarajevo No. Kri-94/02 of 14 August 2002, ordering exhumation, autopsy, forensic expert evaluation and identification of mortal remains of an unidentified number of unknown persons from the mass grave at the location of "Miljevina Mine" (Grave I) in the Municipality of Foča (**P-62**); Order for exhumation, autopsy, forensic expert evaluation and identification of mortal remains of human bodies at the Rudnik-Miljevina-Foča location, from the mass graves I, II and III, issued by the Cantonal Court in Sarajevo, No. KPP-148/04 of 9 August 2004 (**P-63**); Record on exhumation made by the Cantonal Prosecutor's Office Sarajevo, No. KTA-5/02-RZ, KTA-6/02-RZ, KTA-7/02-RZ of 9 August 2004, at the site in the area of the Miljevina mine within the region of the village of Budanj, Municipality of Foča, for the reason of exhumation of mortal remains of 73 bodies from the mass graves I and II (**P-64**); Document of the Ministry of Internal Affairs of BiH – General Crime Department Sarajevo No: 02/2.2-288704 of 17 August 2004, produced with regard to exhumation conducted at the location of brown coal mine in Miljevina, Municipality of Foča (**P-65**); Document of the Ministry of Internal Affairs of BiH – General Crime Department Sarajevo No: 02/2-2-394/04 of 16 December 2004, produced with regard to autopsy of mortal remains of the bodies exhumed from two mass graves at the location of the brown coal mine in Miljevina, Municipality of Foča (**P-66**); Records on taking over the objects from the exhumed bodies, made by the "Gradska groblja" Public Utility Company in Visoko, No. 61/2004 of 7 December 2004, 60/2004 of 6 December 2004, 36/04 of 17 September 2004 (**P-67**); Forensic analysis of firearms traces by the Sarajevo Canton Ministry of Internal Affairs, Crime Investigation Department, No. 02/2-6-04-09-2689 of 8 March 2005 and No. 02/2-6-04-09-2691 of 14 March 2005 (**P-68**); Record on takeover of DNA samples, made on 9 October 2006 (**P-69**); Record on taking and takeover of samples for DNA analysis No: 02/2-2-443/06 of 9 October 2006 (**P-70**); Order issued by the Cantonal Prosecutor's Office Sarajevo, No: KTA-99/06-RZ (re. KTA-5/02-RZ) of 10 November 2006 (**P-71**); Record on Identification made by the Cantonal Prosecutor's Office Sarajevo, No. KTA-99/06-RZ (re. KTA-5/02-RZ) of 30 November 2006 (**P-72**); DNA Report for possible identities of Kemo (Munib) Nikšić, Salko (Omer) Šljivo, Juso (Avdica) Bašić, Muhamed (Ahmed) Kibrić, Muharem (Ahmed) Kibrić, Fehim (Suljo)

Mulahasanović, Imsir (Ibrišim) Konaković, Muradif (Redžo) Musić, Mustafa (Adem) Nikšić, Džemil (Huso) Melez, Šaban (Smail) Aljukić, Sead (Vehbija) Nikšić, Rrahim (Sherif) Istrefi, Nedžib (Avdo) Mulavdić, Mirsad (Husein) Borovac, Ismet (Bećir) Čaušević, Ibrahim (Saban) Ovčina, Murat (Suljo) Jusufović, Munib (Hasan) Aljukić, Enes (Mustafa) Bićo, Emin (Sulejman) Kršo, Jusuf (Mustafa) Srnja, Avdo (Selim) Muratović, Ramiz (Asim) Babić, Fadil (Ramiz) Divjan, Jasmin (Mustafa) Sudar, Fikret (Mujo) Kovačević, Izet (Osman) Džomba, Ramiz (Edhem) Borovina, Enes (Nazif) Musić, Amil (Muharem) Mušanović, Hilmo (Ramiz) Dedović, Edin (Avdo) Zametica, Elvedin (Avdo) Zametica, Bego (Nurif) Jahić, Dževad (Hakija) Džinić, Fadil (Šemso) Žuga, Munib (Avdo) Huko, Safet (Asim) Dudić, Šefik (Halil) Hodžić, Esad (Šaćir) Mezbur, Alija (Ramiz) Dželil, Murat (Nedžib) Granov (**P-73**); Autopsy Records of the Institute of Forensic Medicine dated 9 September 2004, 10 September 2004, 13 September 2004, 16 September 2004 and 11 November 2004, written by Hamza Žujo, MD, specialist in forensic medicine, and related to mass grave I Miljevina Mine, Foča, specifically bodies No. 1, 2, 4, 22, 6, 8, 9, 14, 17, 19, 20, 13 (**P-74**); Autopsy Records of the Institute of Forensic Medicine dated 10 November 2004, 11 November 2004, 23 November 2004, 29 November 2004, 30 November 2004, 3 December 2004, 4 December 2004, written by Hamza Žujo, MD, Forensic, and related to mass grave II Miljevina Mine in Foča, specifically bodies No. 3, 6, 7, 9, 10, 12, 13, 16, 17, 18, 19, 20, 21, 26, 27, 28, 29, 30, 31, 33, 35, 36, 41, 46, 42, 43, 44, 45 (**P-75**); Document of the Sarajevo Canton Ministry of Internal Affairs, Crime Police Sector, General Crime Department, dated 30 November 2006, No: 02/2-2-537/06 detailing the identification of mortal remains of 41 bodies exhumed from two mass graves at the Miljevina Dark Coal Mine site, Foča Municipality (**P-76**); Body Identification Record No: 02/2-2-537-1/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko, for Nikšić (Munib) Kemo including a DNA Report (**P-77**); Body Identification Record No: 02/2-2-537-2/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Šljivo (Omer) Salko including a DNA Report (**P-78**); Body Identification Record No: 02/2-2-537-3/06 written on 27 November 2006 at the „Gradska groblja" Utility Company in Visoko for Bašić (Avdica) Juso including a DNA Report (**P-79**); Body Identification Record No: 02/2-2-537-4/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Kibrić (Ahmet) Muhamed including a DNA Report (**P-80**); Body Identification Record No: 02/2-2-537-5/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Kibrić (Ahmet) Muharem including a DNA Report (**P-81**); Body Identification Record No: 02/2-2-537-6/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company for Mulahasanović (Suljo) Fehim including a DNA Report (**P-82**); Body Identification Record No: 02/2-2-537-7/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Konaković (Ibrišim) Imšir including a DNA Report (**P-83**); Body Identification Record No: 02/2-2-537-8/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Musić (Redžo) Muradif including a DNA Report (**P-84**); Body Identification Record No: 02/2-2-537-9/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Nikšić (Adem) Mustafa including a DNA Report (**P-85**); Body Identification Record No: 02/2-2-537-10/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Melez (Huso) Džemil including a DNA Report (**P-86**); Body Identification Record No: 02/2-2-537-11/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Nikšić (Vehbija) Sead including a DNA Report (**P-87**); Body Identification Record No: 02/2-2-537-12/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Aljukić (Smail) Šaban including a DNA Report (**P-88**); Body Identification Record No: 02/2-2-537-13/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for

Mulavdić (Avdo) Nedžib including a DNA Report (**P-89**); Body Identification Record No: 02/2-2-537-14/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Borovac (Husein) Mirsad) including a DNA Report (**P-90**); Body Identification Record No: 02/2-2-537-15/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Istrefi (Sherif) Rrahim including a DNA Report (**P-91**); Body Identification Record No: 02/2-2-537-16/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Čaušević (Bećir) Ismet, including a DNA Report (**P-92**); Body Identification Record No: 02/2-2-537-17/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Ovčina (Šaban) Ibrahim including a DNA Report (**P-93**); Body Identification Record No: 02/2-2-537-18/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Jusufović (Suljo) Muat including a DNA Report (**P-94**); Body Identification Record No: 02/2-2-537-19/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Aljukić (Hasan) Munib including a DNA Report (**P-95**); Body Identification Record No: 02/2-2-537-20/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Bićo (Mustafa) Enes including a DNA Report (**P-96**); Body Identification Record No: 02/2-2-537-21/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Kršo (Sulejman) Emin including a DNA Report (**P-97**); Body Identification Record No: 02/2-2-537-22/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Srnja (Mustafa) Jusuf including a DNA Report (**P-98**); Body Identification Record No: 02/2-2-537-23/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Muratović (Selim) Avdo including a DNA Report (**P-99**); Body Identification Record No: 02/2-2-537-24/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Babić (Asim) Ramiz including a DNA Report (**P-100**); Body Identification Record No: 02/2-2-537-25/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Divjan (Ramiz) Fadil including a DNA Report (**P-101**); Body Identification Record No: 02/2-2-537-26/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Sudar (Mustafa) Jasmin including a DNA Report (**P-102**); Body Identification Record No: 02/2-2-537-27/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Kovačević (Mujo) Fikret including a DNA Report (**P-103**); Body Identification Record No: 02/2-2-537-28/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Džomba (Osman) Izet including a DNA Report (**P-104**); Body Identification Record No: 02/2-2-537-29/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Borovina (Edhem) Ramiz including a DNA Report (**P-105**); Body Identification Record No: 02/2-2-537-30/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Musić (Nazif) Enes including a DNA Report (**P-106**); Body Identification Record No: 02/2-2-537-31/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Mušanović (Muharem) Amil including a DNA Report (**P-107**); Body Identification Record No: 02/2-2-537-32/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Dedović (Ramiz) Hilmo including a DNA Report (**P-108**); Body Identification Record No: 02/2-2-537-33/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Mezbur (Šaćir) Esad including a DNA Report (**P-109**); Body Identification Record No: 02/2-2-537-34/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Dželil (Ramiz) Alija including a DNA Report (**P-110**); Body Identification Record No: 02/2-2-537-35/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Granov (Nedžib) Murat including a DNA Report (**P-111**);

Body Identification Record No: 02/2-2-537-36/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Jahić (Nurif) Bego including a DNA Report (**P-112**); Body Identification Record: 02/2-2-537-37/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Džinić (Hakija) Dževad including a DNA Report (**P-113**); Body Identification Record No: 02/2-2-537-38/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Žuga (Šemso) Fadil including a DNA Report (**P-114**); Body Identification Record No: 02/2-2-537-39/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Huko (Avdo) Munib including a DNA Report (**P-115**); Body Identification Record No: 02/2-2-537-40/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Dudić (Asim) Safet including a DNA Report (**P-116**); Body Identification Record No: 02/2-2-537-41/06 written on 27 November 2006 at the "Gradska groblja" Public Utility Company in Visoko for Hodžić (Halil) Šefik including a DNA Report (**P-117**); DNA Report with possible identity in the name of Berberkić (Nedžad) Adnan (**P-118**); Sarajevo Cantonal Prosecutor's Office Order Ref. No: KTA-22/05-RZ (Reference KTA-5/02-KTA-6/02 and KTA-7/02) dated 25 March 2005, related to forensic identification of the mortal remains of a war victim exhumed at the Miljevina Dark Coal Mine site in the village of Budanj related to exhumation of body under number NN 11, grave 2, based on DNA analysis preliminarily identified as (Nedžad) Berberkić (**P-119**); Document of the Sarajevo Canton Ministry of Internal Affairs, General Crime Department No: 02/2-2-77/05 dated 25 March 2005 related to the identification of Berberkić (Nedžad) Adnan (**P-120**); Sarajevo Canton Ministry of Internal Affairs, Crime Police Sector, Identification Record written on 25 March 2005 under number 02/2-2-77-1/05 related to the identification of Adnan (Nedžad) Berberkić and a DNA Report attached thereto (**P-121**); Autopsy Record of the Institute of Forensic Medicine dated 4 December 2004 for mass grave II, Miljevina Mine, Foča, body marked with number 11 (**P-122**); Autopsy Records written by the Institute of Forensic Medicine detailing the exhumation of bodies from mass grave II – Miljevina Mine, which remain unidentified to date, specifically bodies marked with numbers 1, 2, 4, 5, 8, 14, 15, 22, 23, 24, 25, 32, 34, 37, 38, 40, 47 (**P-123**); Autopsy Records written by the Institute of Forensic Medicine detailing the exhumation of bodies from mass grave I – Miljevina Mine, which remain unidentified to date, specifically bodies marked with numbers 26, 25, 24, 23, 21, 18, 16, 15, 11, 12, 10, 7, 3 (**P-124**); Video tape marked with marked/sic!/ mass graves I and II Miljevina, Mine KPP 148/04 (**P-125**); Report on Forensic Scene Examination number: 3374/04 dated 9 August 2004 written by the Sarajevo Canton Ministry of Internal Affairs, Crime Scene Sketch number: 3374/04 dated 9 August 2004 and Photo Documentation number: 3374/04 developed on 8 March 2005 – parts I and II, showing the exhumation and autopsy at "Grave I" KPP 148/4, place marked as Foča, Miljevina, open pit dark coal mine site (**P-126**); Report on Forensic Scene Examination number Č 3374/04 dated 9 August 2004 written by the Sarajevo Canton Ministry of Internal Affairs, Crime Scene Sketch number: 3374/04 dated 9 August 2004 and Photo Documentation number: 3374/04 developed on 2 March 2005 – parts I and II, III and IV, showing the exhumation and autopsy at "Grave II" KPP 148/4, place marked as Foča, Miljevina, open pit dark coal mine site (**P-127**); Death Certificates for 42 identified bodies submitted by the "Groblja" Public Utility Company DOO Visoko specifically: Nikšić Sejad son of Vehbija born in 1956, Nikšić Kemo son of Munir born in 1959, Nikšić Mustafa son of Adem born in 1957, Šljivo Salko son of Omer born in 1944, Srnja Jusuf son of Mustafa born in 1968, Bičo Enes son of Mustafa born in 1962, Jahić Bego son of Nurif born in 1969, Dželil Alija son of Ramiz born in 1955, Džinić Dževad son of Hakija born in 1960, Aljukić Šaban son of Smajil born in 1938, Borovina Ramiz son of Edhem born in 1962, Sudar Jasmin son of Mustafa born in 1962, Čaušević Ismet son of Bećir born in 1950, Granov Murat son of Nedžib born in 1958,

Mezbur Esad son of Sačir born in 1957, Mulavdić Nedžib son of Avdo born in 1962, Muratović Avdo son of Selim born in 1963, Aljukić Munib son of Hasan born in 1957, Hodžić Šefik son of Halil born in 1950, Istrefi Rrahim son of Sherif, Dedović Hilmo son of Ramiz born in 1961, Kršo Emin son of Sulejman born in 1960, Žuga Fadil son of Šemso born in 1975, Babić Ramiz son of Asim born in 1962, Borovac Mirsad son of Husein born in 1964, Mušanović Amil son of Muharem born in 1968, Musić Enes son of Nazif born in 1970, Musić Muradif son of Redžo born in 1942, Mulahasanović Fehim son of Suljo born in 1919, Melz Džemil son of Huso born in 1958, Bašić Juso son of Avdica born in 1959, Berberkić Adnan son of Dedžad born in 1967, Kovačević Fikret son of Mujo born in 1961, Džomba Izet son of Osman born in 1962, Kibrić Muharem son of Ahmet born in 1970, Kibrić Muhamed son of Ahmet born in 1969, Divjan Fadil son of Ramiz born in 1961, Dudić Safet son of Asim born in 1959, Huko Munib son of Avdo, Konaković Imšir son of Ibrišim born in 1934, Jusufović Murat son of Suljo (**P-128**); Guards State Exam Certificate number: 02-152-101 dated 11 July 1973 in the name of Mitar Rašević (**P-129**); Mostar District Prison Decision number: 01-12-166/76-2 dated 7 December 1976 in the name of Rašević Mitar (**P-130**); Mostar District Prison Decision number: 01-12-166/76-5 dated 26 January 1977 in the name of Mitar Rašević on the termination of the employment status at the Mostar District Prison (**P-131**); Foča KPD Decision number: 01-12-13 dated 23 February 1977 in the name of Mitar Rašević assigning him to the post of a security service guard (**P-132**); Foča KPD Decision number: 01-12-29 dated 1 November 1977 in the name of Rašević Mitar employing him as a Trainee Rehabilitation Officer – at the Rehabilitation Ward (**P-133**); Foča KPD Decision number: 01-12-116 dated 28 December 1978 appointing Mitar Rašević to the position of Rehabilitation Officer – Trainee (**P-134**); Decision on the appointment of Mitar Rašević as Chief of Guards at the Foča KP Dom number: 12-27 dated 30 March 1987 (**P-135**); Foča KPD Document number: 119-3/223 dated 11 May 1990 in the name of Rašević Mitar – Chief of Guards, representing information on the performance appraisal for 1989 (**P-136**); Consent of the Sarajevo Ministry of Justice and Administration dated 30 September 1991 appointing Mitar Rašević Acting Chief of Guards at the Foča KP Dom (**P-137**); Order of the KP Dom Provisional Warden, Milorad Krnojelac, number: 03-7-92 dated 27 April 1992 related to the assignment of Mitar Rašević to the post of the Commander of the Guards at the Foča KP Dom under war conditions (**P-138**); Foča KPD Certificate number: 267/93 dated 8 November 1993 issued in the name of Rašević Mitar (**P-139**); Srbinje KPD Decision number: 01-224/96-1 dated 15 July 1996 in the name of Rašević Mitar assigning him to the post of Assistant Warden (**P-140**); Republika Srpska Ministry of Justice Certificate number: 04/1-182/97 dated 1 August 1997 issued in the name of Mitar Rašević (**P-141**); RS Ministry of Justice Decision number: 04/1-182/97 dated 1 August 1997 issued in the name of Rašević Mitar terminating his employment at the Srbinje KPD (**P-142**); Photocopy of the ID card file in the name of Todović Savo (**P-143**); Guards State Exam Certificate number: 02-153-199 dated 30 June 1974 in the name of Todović Savo (**P-144**); Foča KPD Decision number: 01-12-55 dated 15 September 1979 in the name of Todović Savo (**P-145**); Decision on assignment to a post in Foča KPD number: 01-112-17/89 dated 29 April 1989 in the name of Todović Savo (**P-146**); Decision on assignment of Savo Todović issued by Foča KPD number: 112-1/107 dated 24 December 1990 (**P-147**); Foča KPD Decision number: 01-240-7/91 dated 11 March 1991 in the name of Savo Todović (**P-148**); Ministry of Justice and Administration Decision number: 01/2-244/92 dated 16 December 1992 in the name of Todović Savo (**P-149**); Srbinje KPD Certificate number: 01-48/95 dated 28 February 1995 issued in the name of Todović Savo and signed by the Warden, Sekulović Zoran (**P-150**); Republika Srpska Ministry of Justice Certificate number: 04/1-183/97 dated 31 July 1997 issued in the name of Todović Savo (**P-152**); Republika Srpska Ministry of Justice Decision number: 04/1-183/97 dated 31 July 1997 in the name of Todović Savo (**P-153**); BiH

Republika Srpska Citizenship Certificate dated 18 January 2005 in the name of Todović Savo (**P-154**); List of Prisoners of War assigned to work in the Miljevina Dark Coal Mine dated 16 August 1995 indicating that it was approved by Savo Todović, and agreed to by Warden Zoran Sekulović (**P-155**); List of Prisoners of War assigned to work at the Miljevina Mine dated 24 November 1993 including an indication that it was approved by Savo Todović (**P-156**); List of Prisoners of War assigned to work at the metal workshop dated 4 July 1994 including an indication that it was approved by Savo Todović (**P-157**); List of Prisoners of War assigned to work on the KP Dom Farm dated 22 August 1994 including an indication that it was approved by Savo Todović (**P-158**); List of Prisoners of War assigned to work in the Miljevina Mine dated 22 August 1994 including an indication that it was approved by Savo Todović (**P-159**); List of Prisoners of War assigned to work in the Miljevina Mine dated 31 October 1995 including an indication that it was approved by Savo Todović (**P-160**); Srbinje KPD Letter number: 01-349/96-1 dated 1 September 1996 submitted to the Ministry of Justice and Administration for Rašević Mitar and Todović Savo for the purpose of a Decision on termination of employment due to needs of service, signed by the Warden Sekulović Zoran (**P-161**); Republika Srpska Ministry of Internal Affairs Document number: K/B-2006/04 dated 8 June 2004 marked as strictly confidential and submitted to the ICTY Office of the Prosecutor and titled "Report on Investigations against Persons Indicted for War Crimes by the ICTY" (**P-162**); Republika Srpska Ministry of Internal Affairs Document number: K/B-str.pov. -13/04 dated 21 June 2004 marked as strictly confidential and submitted to the ICTY Office of the Prosecutor and titled "Report on Investigations against Persons Indicted for War Crimes by the ICTY" (**P-163**); Republika Srpska Ministry of Internal Affairs Document number: K/B-str.pov.-15/04 dated 24 June 2004 marked as strictly confidential and submitted to the ICTY Office of the Prosecutor and titled as "Report on Investigations against Persons Indicted for War Crimes by the ICTY"(**P-164**); Republika Srpska Ministry of Internal Affairs Document number: K/B-str.pov.-17/04 dated 26 June 2004 marked as strictly confidential and submitted to the ICTY Office of the Prosecutor and titled "Report on Investigations against Persons Indicted for War Crimes by the ICTY"(**P-165**); Sketches of the KP Dom "Foča" attached to the Records on Examinations of the following witnesses before the ICTY: FWS 115, FWS 214, FWS 216, FWS 54 and FWS 210 wherein it is noted that they are attached to the Records on Examination (**P-166**); Rule Book on House Rules of July 1990 (**P-168**); Rule Book on House Rules of August 1992 (**P-169**).

During the trial, Nijaz Smajić, expert witness in ballistics, and Dr Hamza Žujo, forensic expert, presented their findings and opinions as expert-witnesses for the Prosecutor's Office of BiH.

The defense for the first-accused also presented evidence by examining the witness Pjano Zufer, witnesses under the pseudonyms O, E and T, witness Milutin Tijanić, and the accused Mitar Rašević, and it also presented the following documentary evidence that was admitted into evidence by the Panel under the following exhibit numbers: Information on Situation, Events and Activities at ATDP "Fočatrans" Foča (**O-I-01**); Interview of Halid Čengić in the magazine *Ljiljan* from 1998 (**O-I-02**); List of 98 convicted men transferred from Karakaj to the District Court Tuzla (**O-I-03**); List of conscripts deployed to serve conscription by securing those imprisoned in the KP Dom "Foča", having a status of a military unit and with the rights and duties equalised with those of the soldiers at the frontline (**O-I-04**); Document of the KP Dom Warden referring to the Ministry of Justice, wherein the subject of the document was data on the sentenced persons serving their term of imprisonment at the KPD Foča (**O-I-08**); Letter to the Foča Crisis Staff number: 5/92 of 22 May 1992 (**O-I-09**); Certificate of the Crisis Staff of the Serb Municipality of Foča number: 03-240-2/92 of 26

April 1992 issued in the name of Pilav Hasan (**O-I-10**); Order to release war prisoners from prison, strictly confidential, number: 03/24-8 of 20 March 1995 (**O-I-11**); List of persons present to be released from the KP Dom Foča in the exchange (**O-I-12**); List of detainees of 29 August 1992 – 55 persons (**O-I-13**); List of detained Muslims to be released from KPD Foča on 30 August 1991 (**O-I-14**); Certificate in the name of Ramiz Kurtović of 19 May 1992, detained from 4 May to 19 May 1992 (**O-I-15**); Certificate in the name of Avdo Šarmadija (**O-I-16**); Certificate in the name of Miralem Dedović number: 03-240/92 of 7 May 1992, detained from 18 April to 7 May 1992 (**O-I-17**); Certificate for Šaban Muratović, number: 23/92 of 8 May 1992, detained from 28 April to 8 May 1992 (**O-I-18**); Order strictly confidential number: 03/52-10-Military Post 7141 Srbinje, document of 19 September 1994, based on the SFOR command, ordering that a detainee should be transferred from the KPD Foča to KPD Butmir to be exchanged (**O-I-19**); Approval by the Command of the Tactical Group *Drina* for the exchange of captured persons, strictly confidential number: 03-10 of 13 March 1994, signed by Commander Mirko Broćeta (**O-I-20**); Certificate of release of Hako Džamalija from prison, dated 19 October 1992, who was imprisoned from 14 October to 19 October 1992 - signed by Marko Kovač on behalf of the War Presidency (**O-I-21**); Certificate in the name of Dževad Dedović number: 03-240/92 of 7 May 1992, by which he is released from prison (**O-I-22**); Telegram number: 76-56 of 19 July 1993 – the Herzegovina Corps Command – Order to implement the exchange agreed between the HC Commission and HVO at the Stoga region point (**O-I-23**); Telegram strictly confidential, number: 19-546, Order of the Command of the Herzegovina Corps of 16 May 1995 – transfer of Jovanović (Andrija) Marko from KP Dom Srbinje to KP Dom Butimir (**O-I-24**); Certificate of taking over the war prisoner Amir Berberkić of 12 August 1993, based on the order issued by Marko Kovač, exchanged for Mišo Kuliš from Foča, signed by Predrag Tribun, Commander of the Third Battalion (**O-I-25**); Certificate number: 03-240/92 in the name of Zuko Enes of 21 May 1992, signed by the Crisis Staff and the Commission, detained from 20 May to 21 May 1992 (**O-I-26**); Transfer of the captive Seid Selimović, to be exchanged for three persons, of 19 January 1994 (**O-I-27**); Certificate of KPZ (Correctional Facility) Kula number: 01-168/94 of 13 May 1994, certifying that Seid Selimović was properly handed over (**O-I-28**); Telegram Order of 12 October 1992 by which the Commander, Colonel Marko Kovač orders that Ekrem Selimović should be taken to Čačak (**O-I-29**); Certificate of 13 October 1992 in the name of Ekrem Selimović (**O-I-30**); Order of the Command of the Tactical Group Drina, number: 01/169/93 of 30 October 1993, to transfer the witness under the pseudonym FWS 162 from Foča to Butmir to be exchanged, signed by Marko Kovač (**O-I-31**); Approval of the Tactical Group Commander, a list of Muslims – prisoners of war, 23 persons to be exchanged for persons from Konjic (**O-I-32A**); Order of the Command of the II Light Infantry Brigade number: 44-61 of 5 December 1992, to take over the war prisoners, signed by Boro Antelj (**O-I-32B**); Order of the Command of the Tactical Group Foča of 21 October 1993 - FWS 119 to be transferred from KP Dom Foča to Butimir for exchange, signed by Marko Kovač (**O-I-33**); List of persons released from the KP Dom Foča of 31 July 1993 – Commander Kovač and the Certificate that the prisoners of war were taken over in the KP Dom Foča (**O-I-34**); Telegram Order of 14 January 1993 forwarded to the Command of the TG Foča to release Nazib Čengić, Hilmo Čengić and Fehim Čengić, signed by Radovan Grubač (**O-I-35**); List of prisoners of war in the KP Dom Foča, 55 names, made on 25 August 1994, signed by the Commander Novak Paprica, Colonel (**O-I-36**); Order of the Command 11. HPBR number: 3/52-4 of 16 August 1994, forwarded to KP Dom Srbinje to release from prison certain persons, signed by Lieutenant Boro Ivanović (**O-I-37A**); Document stating that 4 persons should be released from prison as ordered, and the prisoners were taken over by the Military Police from Lukavac in the presence of Boro Ivanović (**O-I-37B**); List of detainees to be released from the KP Dom Foča for exchange (**O-I-38**); Authority to take over the

prisoners of war of 22 August 1993, 4 wounded captives of Croat ethnicity, for the purpose of exchange with HVO, signed by Radovan Grubač (**O-I-39**); Military Prison 7141 Srbinje, transfer of the prisoner Čomor Saliha Ševko of 8 February 1995, from Srbinje to Lukavica, signed by the Commander Novak Paprica (**O-I-40**); Order, RS Government, Central Commission for Exchange of Prisoners and Civilians number: 01-252/94 of 7 July 1994, Subject: takeover and transfer of war prisoners, Mujin Fahrudin to be transferred from KP Dom Foča to Butmir for exchange (**O-I-41A**); Certificate of 7 July 1994 to certify that Mujin Fahrudin was taken over (**O-I-41B**); Certificate of the ICRC of 14 March 1995, to certify that ICRC transferred the Maslo family (**O-I-42**); Order to takeover the prisoners of war number: str.pov. 19-1104, that 12 prisoners should be handed over to Lubara Branislav- issued by the Command of the Herzegovina Corps of 13 September 1995, it is stated on the back of the document that the documents on takeover should be made and that the transportation should be carried out by a motor vehicle escorted by the military police – the Certificate was signed by Major Lubura Branislav (**O-I-43**); List of 48 prisoners in the KP Dom Foča of 24 August 1994 (**O-I-44**); Certificate number: 240/92 about FWS 03, standard certificate, stayed in the Dom from 24 May to 7 July 1992, Mandić Radovan signed as representative of the Crisis Staff (**O-I-45**); Certificate number: 240/92 about release from prison of Sadika Demirović, to be released from prison on 9 August 1992, the Certificate signed by Marko Kovač (**O-I-46**); Evidence on the approved release from prison of Mirsad Alić, signed by Marko Kovač of 18 July 1992 (**O-I-47**); List of prisoners of war to be released from the KPD Foča, since it was established during the proceedings that they had not committed the crimes against the Serb people, of 18 September 1992 (**O-I-48**); List of 18 persons to be released without being interrogated, at the request of the Miljevina Crisis Staff of 9 May 1992 (**O-I-49**); List of 20 persons who may be released from the KP Dom of 7 May 1992 - they are released for the reason of illness and old age, all the operational procedures applied (**O-I-50**); Letter of the Warden Krnojelac to the Military Post 7141 of 3 March 1993 (**O-I-51**); Request of the KPD Foča Warden of 21 October 1992 forwarded to the Red Cross to provide food within the Red Cross assistance programme (**O-I-52**); Order number: 06/495-2 signed by Milan Maljković, ordering that due to food shortage in the unit, food will be distributed into two meals (**O-I-53**); Record number: KRI: 33/94, made on 11 July 1994 (**O-I-54**); Decision number: KP 24/02 of 9 August 2003, in which it is evident that Rašević voluntarily turned himself in (**O-I-55**); Instructions on treatment of prisoners (**O-I-56**); Decision on establishment of correctional facilities in the territory of Srpska Republika BiH, Official Gazette of the Serb People in BiH, page 236, 12-17 May 1992, No. 6 (**O-I-57**); Order number 57/93 of the Commander of the Herzegovina Corps to relocate the prison from Bileća to Foča, of May 1993 (**O-I-58**); Letter of the Ministry of Justice number: 01-021-108/92 of 20 April 1992 (**O-I-59**); Rule Book on House Rules of September 1978 (**O-I-60**); Instructions on the guard service pertaining to the guard duties and assignments, Foča, January 1991 (**O-I-61**).

The defense for the second-accused also presented evidence by examining the witnesses under the pseudonyms R, M, D and P and the accused Savo Todović as a witness, and it also presented the following documentary evidence that was admitted into evidence by the Panel under the following exhibit numbers: Excerpt from the Instructions for the operation of the Crisis Staffs of the Serb People in the municipalities, of 1 May 1992 (**O-II-01**); Decision on establishment of correctional facilities in Srpska Republika BiH, Official Gazette of the Serb People in BiH, 12-17 May, page 236, No. 6 (**O-II-02**); Order to remove Momčilo Kovač from the military payroll and transfer him to the KP Dom Foča, No.: 02-236 of 27 May 1993 (**O-II-03**); Decision of the Serb Municipality of Foča approving the introduction of the compulsory work service in KPD Foča number: 01/111-012-92 of 26 April 1992(**O-II-04**);

Information on transfer of detainees from KP Dom Bileća to KP Dom Foča number: 57/93 of May 1993 (**O-II-05**); Order VP7141 Foča, entitling Military Police Commander and the Head of Security to deprive of liberty of all persons who committed offences, at request of the Unit Commander or on the basis of their own knowledge (**O-II-06**); Information from interviews and proposal to the Tactical Group Foča to release certain persons from the prison in the KP Dom Foča of 1 May 1992 (**O-II-07**); Petitions of the Muslim detainees to be released from the KP Dom Foča, which were forwarded to the Crisis Staff of the Serb Municipality of Foča by the KP Dom Foča of 30 July 1992 (**O-II-08**); Letter of KP Dom Foča, to the Tactical Group Foča suggesting that certain persons of Serb ethnicity should be released so as to join the VRS combat units, of 27 July 1992 (**O-II-09**); Order for escorting the prisoners of war, number: 44-30 of 29 October 1992 (**O-II-10**); Seven statements of the prisoners of the KP Dom Foča, given to the KP Dom Foča interrogators on 20 April 1992 (**O-II-11**); Telegram of the Herzegovina Corps, signed by Milivoje Samardžić – pertaining to the exchange of the prisoners of war (**O-II-12A**); Order on exchange of war prisoners in the exchange procedure agreed at the highest level of authority(**O-II-12B**); Agreement to release prisoners (**O-II-12C**); Agreement for the implementation of the exchange (**O-II-12D**); RS, RS Government, Central Commission for exchange of prisoners and civilians, Goražde list of 27 September 1994 (**O-II-12E**); RS, RS Government, Central Commission for exchange of prisoners and civilians Višegrad list of 27 September 1994 (**O-II-12F**); RS, RS Government, Central Commission for exchange of prisoners and civilians Rudo list of 27 September 1994 (**O-II-12G**); RS, RS Government, Central Commission for exchange of prisoners and civilians, Foča list of 27 September 1994 (**O-II-12H**).

Also, on 2 October 2008, pursuant to Article 4 of the LoTC, the Panel rendered a decision upon the motions of the parties and the Defense Counsel on the acceptance of facts established in ICTY proceedings, namely *Prosecutor v. Milorad Krnojelac* (IT-97-25), *Prosecutor v. Dragoljub Kunarac et al*. (IT-96-23 & 23/1), and *Prosecutor v. Momčilo Krajišnik* (IT-00-39).

The Panel accepted the following facts proposed by the Prosecutor:

1. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foča, and both groups established Crisis Staffs along ethnic lines. (*Krnojelac* Trial Judgment, paragraph 17)

2. The Muslim Crisis Staff was based in the Donje Polje neighborhood of Foča. (*Krnojelac* Trial Judgment, paragraph 17)

3. The Serb Crisis Staff operated from a location in the Serb neighborhood of Čerežluk, with Miroslav Stanić, President of the SDS-Foča, as Chairman and so-called "First War Commander" in Foča. (*Krnojelac* Trial Judgment, paragraph 17)

4. On 7 April 1992, following pressure from the SDS leadership, the local police were divided along ethnic lines and stopped functioning as a neutral force. (*Krnojelac* Trial Judgment, paragraph 17)

5. Even for those [Muslims] who did get away, leaving Foča was not easy, with frequent military checkpoints en route to different destinations. (*Krnojelac* Trial Judgment, paragraph 18)

7. Complete ostracism [of Muslims] soon followed with their freedom to move about and to gather critically curtailed. (*Kunarac* Trial Judgment, paragraph 571)

8. …[T]he outbursts of violence and house-burning [became] more frequent. (*Kunarac* Trial Judgment, paragraph 572)

9. By 7 April 1992 there was a Serb military presence in the streets, and some people failed to report to work, fearful of the rising tensions in the town. A number of Serbs were mobilized on that day and issued with weapons. That night, Serbs took over the Foča radio station, the warehouse of the regional medical center and the Territorial Defense warehouse where weapons were stored. (*Krnojelac* Trial Judgment, paragraph 19)

10. [On 8 April 1992] [r]oadblocks were set up throughout the town. (*Krnojelac* Trial Judgment, paragraph 20)

11. Sometime between 8.30 and 10.00 am, the main Serb attack on Foča town began, with a combination of infantry fire and shelling from artillery weapons in nearby Kalinovik and Miljevina. Serb forces included local soldiers as well as soldiers from Montenegro and Yugoslavia, and in particular the paramilitary formation known as the White Eagles. (*Krnojelac* Trial Judgment, paragraph 20)

12. Most of the shooting and shelling was directed at predominantly Muslim neighborhoods, in particular Donje Polje, but the Serbs also attacked mixed neighborhoods such as Čohodor Mahala. (*Krnojelac* Trial Judgment, paragraph 20)

13. Despite Muslim resistance, consisting mostly of infantry concentrated in Donje Polje and Šukovac, Serb forces proceeded to take over Foča area by area, including eventually the hospital and the KP Dom prison facility. (*Krnojelac* Trial Judgment, paragraph 20)

16. It took about a week for the Serb forces to secure Foča town and about ten more days for them to be in complete control of Foča municipality. (*Kunarac* Trial Judgment, paragraph 567)

17. During the conflict, many civilians hid in their houses, apartments, basements of their apartment buildings, or with relatives in other areas of town; others left Foča altogether, thinking they would be safer. (*Krnojelac* Trial Judgment, paragraph 21)

18. Foča town fell to the Serbs somewhere between 15 and 18 April 1992, with many of the Muslims who had remained in Foča during the fighting fleeing at that time. (*Krnojelac* Trial Judgment, paragraph 21)

19. Following the successful military take-over of Foča town, the attack against the non-Serb civilian population continued. (*Krnojelac*, paragraph 22)

21. The village of Brod, four kilometers from Foča, was attacked on 20 April 1992, after the village authorities did not respond to a Serb Crisis Staff demand that the village surrender. (*Krnojelac* Trial Judgment, paragraph 24)

22. Jeleč, about 22 kilometers from Foča near Miljevina, was shelled and then attacked by infantry and taken over by Serb forces on 4 or 5 May 1992. (*Krnojelac* Trial Judgment, paragraph 24)

23. From Jeleč it was possible to see houses burning, and to see people fleeing from other villages. (*Krnojelac* Trial Judgment, paragraph 24)

24. On 3 July 1992, the Muslim village of Mješaja/Trošanj, situated between Foča and Tjienstište, was attacked by Serb soldiers. …Three villagers were killed during the initial attack and, after capturing a group of about 50 Muslim villagers, a further group of seven male villagers were beaten and shot. (*Krnojelac* Trial Judgment, paragraph 26)

25. After the Serb take-over in and around Foča, there was a noticeable presence of Serb soldiers and Serb paramilitary formations. (*Krnojelac* Trial Judgment, paragraph 27)

26. From April 1992, Muslims were laid off from their jobs or were prevented or discouraged from reporting to work. (*Krnojelac* Trial Judgment, paragraph 28)

27. Although the Serb Crisis Staff ordered Serbs to return to work sometime at the end of April or beginning of May 1992, Muslims were not allowed to do so. (*Krnojelac* Trial Judgment, paragraph 28)

28. Muslims were forbidden to meet with each other, and had their phone lines cut off. (*Krnojelac* Trial Judgment, paragraph 29)

29. In April and May 1992, Muslims stayed in apartments in Foča under virtual house arrest, either in hiding or at the order of Serb soldiers. (*Krnojelac* Trial Judgment, paragraph 29)

30. People wishing to leave Foča were required to get papers from the SUP (Secretariat of the Interior) permitting them to go. (*Krnojelac* Trial Judgment, paragraph 29)

31. Several mosques in Foča town and municipality were burned or otherwise destroyed. (*Krnojelac* Trial Judgment, paragraph 33)

32. The Aladža mosque dating from 1555 and under UNESCO protection was blown up, and the mosque in the Granovski Sokak neighborhood was destroyed. (*Krnojelac* Trial Judgment, paragraph 33)

33. Following the Serb take-over of Foča town, non-Serb civilians were physically beaten by Serb soldiers and military police. (*Krnojelac* Trial Judgment, paragraph 34)

34. Civilians were beaten upon arrest and during transportation to detention facilities from neighborhoods in town or from villages in the municipality. (*Krnojelac* Trial Judgment, paragraph 34)

36. Non-Serbs were arrested throughout the municipality of Foča. Muslim men were rounded up in the streets, separated from the women and children and from the Serb population. (*Krnojelac* Trial Judgment, paragraph 36)

37. Others were arrested in their apartments or in the houses of friends and relatives, taken away from their workplaces, or dragged from their hospital beds. (*Krnojelac* Trial Judgment, paragraph 36)

38. During the conflict, many of the Muslims arrested were taken to be detained at the Territorial Defense military warehouses at Livade. (*Krnojelac* Trial Judgment, paragraph 37)

39. Between 14 and 17 April 1992, Muslim civilians from other areas of Foča town were arrested and detained in Livade, including several doctors and medical staff from Foča hospital. (*Krnojelac* Trial Judgment, paragraph 38)

40. During the arrests, several of the detainees were severely beaten up and injured. (*Krnojelac* Trial Judgment, paragraph 38)

41. Initially there was a military order preventing citizens from leaving Foča. However, most of the non-Serb civilian population was eventually forced to leave Foča. (*Krnojelac* Trial Judgment, paragraph 49)

42. In May 1992 buses were organized to take civilians out of town, and around 13 April 1992 the remaining Muslims in Foča town, mostly women and children, were taken away to Rožaj, Montenegro. (*Krnojelac* Trial Judgment, paragraph 49)

43. In exhumations conducted in the Foča area, 375 bodies were identified by the State Commission for the Tracing of Missing Persons. All but one of these were Muslim. The remaining one was a Montenegrin man who had been married to a Muslim. (*Krnojelac* Trial Judgment, paragraph 49)

46. In January 1994, the Serb authorities renam[ed] Foča "Srbinje", literally "the town of the Serbs". (*Kunarac* Trial Judgment, paragraph 577)

47. …[T]here was an attack by the Serb forces targeting the Muslim civilian population in the area [of Foča] and for the period [between April 1992 and February 1993]. The attack encompassed the municipalities of Foča, Gacko and Kalinovik. (*Kunarac* Trial Judgment, paragraph 570)

51. Muslim houses were set ablaze by Serb soldiers during the battle for control of the town as well as after the town had been secured. (*Krnojelac* Trial Judgment, paragraph 31)

60. During the relevant period, prisoners numbered between 350 and 500 with peaks at about 750. (*Kunarac* Trial Judgment, paragraph 26)

64. At its peak in the summer of 1992, there were about 500-600 detainees in the KP Dom. The number decreased from the autumn of 1992 until 1993 when about 200-300 detainees remained. Around October 1994, the last detainees, by then numbering less than 100, were released. (*Krnojelac* Trial Judgment, paragraph 41, footnote 142)

65. While some Serbs were also held in the KP Dom, they were held legally, having been convicted by courts of law prior to the outbreak of the conflict or having been detained for military offenses during the conflict. (*Krnojelac* Trial Judgment, paragraph 438)

71. The detainees ranged in age from 15 years to almost 80 years. (*Krnojelac* Trial Judgment, paragraph 118)

77. During the first 2-4 weeks after the start of the conflict, the KP Dom was "policed" by military units, apparently from the Užice Battalion. (*Krnojelac* Trial Judgment, paragraph 102, footnote 298)

78. From about 18 or 19 April 1992 onwards, at around the same time that [Milorad Krnojelac] was appointed warden, former Serb guards from the KP Dom returned to carry out their work assignments. (*Krnojelac* Trial Judgment, paragraph 102, footnote 298)

91. …[M]edical care was inadequate and medicine in very short supply. A basic medical service was provided but those in need of urgent medical attention were left unattended or given insufficient treatment. (*Krnojelac* Trial Judgment, paragraph 44)

124. …[G]roups of detainees were transferred from the KP Dom to other camps in Bosnia and Herzegovina, including the camps in Kula, Kalinovik and Rudo. (*Krnojelac* Trial Judgment, paragraph 478)

125. …[D]etainees were taken out of the KP Dom on exchanges during the period [from April 1992 to August 1993]. (*Krnojelac* Trial Judgment, paragraph 479)

126. On at least one occasion, detainees were taken across a national border. A group of approximately 55 men were taken for exchange in Montenegro around 30 August 1992, but the bus on which they were being transported was intercepted in Nikšić, Montenegro, by Pero Elez, a Bosnian-Serb soldier, who sent the group back to the KP Dom. (*Krnojelac* Trial Judgment, paragraph 482)

The Panel accepted the following facts proposed by the Defense for the Accused Rašević:

6. [I]n addition to the mainly civilian population at the KP Dom, there were a small number of Muslim soldiers kept in isolation cells separately from the civilian Muslim detainees. (Krnojelac Trial Judgment, paragraph 117)

8. The detainees ranged in age from 15 years to almost 80 years. (Krnojelac Trial Judgment, paragraph 118)

15. During the first 2-4 weeks after the start of the conflict, the KP Dom was "policed" by military units, apparently from the Užice Battalion. (Krnojelac Trial Judgment, paragraph 102, footnote 298)

18. From about 18 or 19 April 1992 onwards, at around the same time that [Milorad Krnojelac] was appointed warden, former Serb guards from the KP Dom returned to carry out their work assignments. (Krnojelac Trial Judgment, paragraph 102, footnote 298)

26. A general consequence of the conflict situation was that guards assigned to the KP Dom who were of military age and in good health were required from at least 30 September 1992 until 2 September 1993 to spend time on the frontline. (Krnojelac Trial Judgment, paragraph 104)

35. …[M]edical care was inadequate and medicine in very short supply. A basic medical service was provided but those in need of urgent medical attention were left unattended or given insufficient treatment. (Krnojelac Trial Judgment, paragraph 44)

55. …[G]roups of detainees were transferred from the KP Dom to other camps in Bosnia and Herzegovina, including the camps in Kula, Kalinovik and Rudo. (Krnojelac Trial Judgment, paragraph 478)

56. …[D]etainees were taken out of the KP Dom on exchanges during the period [from April 1992 to August 1993]. (Krnojelac Trial Judgment, paragraph 479)

58. On at least one occasion, detainees were taken across a national border. A group of approximately 55 men were taken for exchange in Montenegro around 30 August 1992, but the bus on which they were being transported was intercepted in Nikšić, Montenegro, by Pero Elez, a Bosnian-Serb soldier, who sent the group back to the KP Dom. (Krnojelac Trial Judgment, paragraph 482)

63. As in much of Bosnia and Herzegovina, Foča Municipality was affected at the beginning of the 1990s by the rise of opposing nationalist sentiments which accompanied the disintegration of the Socialist Federal Republic of Yugoslavia ("SFRY"). (Krnojelac Trial Judgment, paragraph 14)

64. Tensions between the two major ethnic groups in Foča were fuelled by the Serb Democratic Party ("SDS") on behalf of the Serbs and the Party for Democratic Action ("SDA") on behalf of the Muslims. (Krnojelac Trial Judgment, paragraph 14)

65. Both the SDA and the SDS organized rallies or "promotional gatherings" in Foča, similar to those being organized throughout Bosnia. (Krnojelac Trial Judgment, paragraph 15)

66. Administrative bodies in Foča, previously jointly controlled by Muslims and Serbs, ceased to function as had been envisaged by March 1992. (Krnojelac Trial Judgment, paragraph 17)

67. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foča, and both groups established Crisis Staffs along ethnic lines. (Krnojelac Trial Judgment, paragraph 17)

68. The Muslim Crisis Staff was based in the Donje Polje neighborhood of Foča. (Krnojelac Trial Judgment, paragraph 17)

69. The Serb Crisis Staff operated from a location in the Serb neighborhood of Čerežluk, with Miroslav Stanić, President of the SDS-Foča, as Chairman and so-called "First War Commander" in Foča. (Krnojelac Trial Judgment, paragraph 17)

70. On 8 April 1992, an armed conflict between the Serb and Muslim forces broke out in Foča. (Kunarac Trial Judgment, paragraph 567)

71. [On 8 April 1992] [r]oadblocks were set up throughout the town. (Krnojelac Trial Judgment, paragraph 20)

The Panel accepted the following facts proposed by the Defense for the Accused Todović:

1. According to the 1991 census, the population of Foča consisted of 40,513 persons; 51.6% were Muslim, 45.3% Serb and 3,1% of other ethnicities. (*Krnojelac* Trial Judgment, paragraph 13)

2. Before the multi-party elections held in Foča in 1990, inter-ethnic relations appear to have been relatively normal, but afterwards the inhabitants of Foča began to split along ethnic lines and inter-ethnic socializing ceased. (*Krnojelac* Trial Judgment, paragraph 14)

3. Both the SDA and the SDS organized rallies or "promotional gatherings" in Foča, similar to those being organized throughout Bosnia. (*Krnojelac* Trial Judgment, paragraph 15)

4. The SDA rally was attended by Alija Izetbegović, leader of the Bosnian SDA, while the SDS rally attracted leading party members such as Radovan Karadžić, Biljana Plavšić, Vojislav Maksimović, Ostojić, Kilibarda and Miroslav Stanić. Nationalist rhetoric dominated both rallies. (*Krnojelac* Trial Judgment, paragraph 15)

6. On 7 April 1992, following pressure from the SDS leadership, the local police were divided along ethnic lines and stopped functioning as a neutral force. (*Krnojelac* Trial Judgment, paragraph 17)

7. In the days before the outbreak of the conflict, the first roadblocks appeared in Foča…. (*Krnojelac* Trial Judgment, paragraph 19)

9. People wishing to leave Foča were required to get papers from the SUP (Secretariat of the Interior) permitting them to go. (*Krnojelac* Trial Judgment, paragraph 29)

14. The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. (*Krnojelac* Trial Judgment, paragraph 47)

15. Initially there was a military order preventing citizens from leaving Foča. However, most of the non-Serb civilian population was eventually forced to leave Foča. In May 1992 buses were organized to take civilians out of town, and around 13 August 1992 the remaining Muslims in Foča town, mostly women and children, were taken away to Rožaj, Montenegro. (*Krnojelac* Trial Judgment, paragraph 49)

17. The deputy warden, the commander of the guards, the chief of service for rehabilitation and the head of the economic unit were all subordinate to the warden. Each of these persons was required to report to the warden with respect to the management of their areas of responsibility. (*Krnojelac* Trial Judgment, paragraph 97)

29. Both parties established so-called Crisis Staffs. (*Kunarac* Trial Judgment, paragraph 17)

The Panel accepted the following facts proposed by the Accused Todović:

1. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foča, and both groups established Crisis Staffs along ethnic lines. (*Krnojelac* Trial Judgment, paragraph 17)

2. The Muslim Crisis Staff was based in the Donje Polje neighborhood of Foča. (*Krnojelac* Trial Judgment, paragraph 17)

3. The Serb Crisis Staff operated from a location in the Serb neighborhood of Čerežluk, with Miroslav Stanić, President of the SDS-Foča, as Chairman and so-called "First War Commander" in Foča. (*Krnojelac* Trial Judgment, paragraph 17)

4. [On 8 April 1992] [r]oadblocks were set up throughout the town. (*Krnojelac* Trial Judgment, paragraph 20)

5. During the first 2-4 weeks after the start of the conflict, the KP Dom was "policed" by military units, apparently from the Užice Battalion. (*Krnojelac* Trial Judgment, paragraph 102, footnote 298)

6. From about 18 or 19 April 1992 onwards, at around the same time that [Milorad Krnojelac] was appointed warden, former Serb guards from the KP Dom returned to carry out their work assignments. (*Krnojelac* Trial Judgment, paragraph 102, footnote 298)

7. On at least one occasion, detainees were taken across a national border. A group of approximately 55 men were taken for exchange in Montenegro around 30 August 1992, but the bus on which they were being transported was intercepted in Nikšić, Montenegro, by Pero Elez, a Bosnian-Serb soldier, who sent the group back to the KP Dom. (*Krnojelac* Trial Judgment, paragraph 482)

11. …[M]edical care was inadequate and medicine in very short supply. A basic medical service was provided but those in need of urgent medical attention were left unattended or given insufficient treatment. (*Krnojelac* Trial Judgment, paragraph 44)

12. As in much of Bosnia and Herzegovina, Foča Municipality was affected at the beginning of the 1990s by the rise of opposing nationalist sentiments which accompanied the disintegration of the Socialist Federal Republic of Yugoslavia ("SFRY"). (*Krnojelac* Trial Judgment, paragraph 14)

13. Tensions between the two major ethnic groups in Foča were fuelled by the Serb Democratic Party ("SDS") on behalf of the Serbs and the Party for Democratic Action ("SDA") on behalf of the Muslims. (*Krnojelac* Trial Judgment, paragraph 14)

14. Both the SDA and the SDS organized rallies or "promotional gatherings" in Foča, similar to those being organized throughout Bosnia. (*Krnojelac* Trial Judgment, paragraph 15)

15. Administrative bodies in Foča, previously jointly controlled by Muslims and Serbs, ceased to function as had been envisaged by March 1992. (*Krnojelac* Trial Judgment, paragraph 17)

16. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foča, and both groups established Crisis Staffs along ethnic lines. (*Krnojelac* Trial Judgment, paragraph 17)

17. On 8 April 1992, an armed conflict between the Serb and Muslim forces broke out in Foča. (*Kunarac* Trial Judgment, paragraph 567)

18. [On 8 April 1992] [r]oadblocks were set up throughout the town. (*Krnojelac* Trial Judgment, paragraph 20)

The Panel, having held a hearing on the motions on 14 September 2007, at which the defense counsels and the parties were given the opportunity to argue their positions, considered the motions and the arguments presented by the counsel and the parties, and rendered the decision to accept the proposed facts on the following grounds:

Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH (hereinafter: the Law on Transfer) provides that at the request of a party or *proprio motu* the Panel, after hearing the parties, may decide to accept as proven those relevant facts that are established by a final and legally binding decision in any proceedings before the ICTY.

The formal requirement set forth in Article 4, requiring that the parties be granted a hearing, has been met.

Article 4 of the Law on Transfer leaves to the discretion of the Panel the decision as to whether to accept the facts proposed. Neither the LoTC nor the CPC of BiH provide for the criteria upon which the Panel might exercise its discretion. This Panel, in its decision dated October 3, 2006, in the case of *Miloš Stupar et al.* (Number: X-KR-05/24), its decision dated 26 June 2007, in the case of *Tanasković* (Number: X-KR/06/165), and its decision dated 3 July 2007, in the case of *Lelek* (Number: X-KR/06/202), set out the criteria it considered appropriate to apply in the exercise of its discretion under Article 4. Those criteria took into account the rights of the accused under the law of BiH, incorporating as it does the fundamental rights protected by the ECHR. At the same time the Panel was mindful of the ICTY jurisprudence developed in interpreting Rule 94 of the ICTY Rules of Procedure and Evidence ("RoPE"). The Panel emphasized that Rule 94 of the ICTY RoPE and Article 4 of the LoTC are not identical and that this Panel is not in any way bound by the decisions of the ICTY. However, it is self-evident that some of the issues confronting the Tribunal and this Panel are similar when considering Established Facts, and that therefore the considerations will likewise be similar. Upon review of these criteria in light of the arguments in this case, the Panel continues to be of the opinion that the criteria fairly protect the interests of the moving parties, the rights of the accused, the purpose of the LoTC, and the integrity of the trial process.

Therefore, in deciding as it did, the Panel took into account the following criteria:

1. A fact must truly be the "fact" that is:
   a) sufficiently distinct, concrete and identifiable;
   b) not a conclusion, opinion or oral testimony;
   c) not a characterization of legal nature.
2. A fact must contain essential findings of the ICTY and must not be significantly changed.
3. A fact must not attest, directly or indirectly, to the criminal responsibility of the accused.

4. Nevertheless, a fact that has gained such a level of acceptance as true that it is common knowledge and not subject to reasonable contradiction can be accepted as an adjudicated fact even if it relates to an element of criminal responsibility.
5. A fact must be "established by a legally binding decision" of the ICTY, which means that the fact was either affirmed or established on appeal or not contested on appeal, and that no further opportunity to appeal is possible.
6. A fact must be established in the proceedings before the ICTY in which the accused against whom the fact has been established and the accused before the Court of BiH have the same interests with reference to contesting a certain fact. Accordingly, the facts stated in the documents which are a subject of a plea agreement or voluntary admission in the proceedings before the ICTY shall not be accepted, given that the interests of the accused in such cases are different, often contrary to the interests of those accused who utilized their right to a trial.

7. A fact must be established in the proceedings before the ICTY, in which the accused against whom the fact has been established had legal representation and the right and opportunity to defend himself. It is therefore clear that the acceptance of the fact deriving from the proceedings in which the accused has not tested it by his evidentiary instruments is unacceptable for this Panel. Even more so because the accuracy of that fact is questionable, since the accused did not have the opportunity (or had insufficient opportunity) to respond to it and try to contest it.

All of the facts the Panel accepted as proven met the requirements of the criteria. In particular, all of these facts are relevant to the case against the Accused on the basis that the crimes established in *Krnojelac* and *Kunarac* cases were committed at the same time and in the same geographical area as those with which the Accused are charged.

Though facts must generally meet all the criteria the Panel has enunciated to be accepted as proven, the Panel recognizes a limited exception to this rule where the defense affirmatively agrees to the acceptance of facts that attest directly or indirectly to the criminal responsibility of the accused.[1] The Panel will not typically accept facts that attest to the criminal responsibility of the accused in order to safeguard the right of the accused to a fair trial and the presumption of innocence. However, where the defense, in this case, both Accused, affirmatively agree that such facts may be accepted as proven, the Panel interprets that agreement as a waiver of their right to have those facts proven against them. Therefore, the Panel has accepted those facts that have been proposed by the Prosecutor and both Accused, either personally or through counsel, even if they fail to satisfy criterion three. Although the Panel is ultimately responsible for ensuring that the Accused receive a fair trial, the Panel also recognizes the right of the Accused to conduct their defense in the manner the Accused choose. Facts accepted as proven under this limited exception are not treated as stipulations or facts of common knowledge, but as established facts. That is, facts accepted as proven under this limited exception will be considered along with all of the evidence produced in the trial from all sources.

[1] The Panel has not considered and need not reach a conclusion regarding the issue of whether facts that do not meet any other criterion may be accepted notwithstanding that fact if the parties agree that such facts should be accepted.

The legislative purposes for providing the Panel with the discretion to accept 'as proven' established facts include judicial economy, the promotion of the accused's right to a speedy trial, and consideration for witnesses in order to minimize the number of tribunals before which they must repeat testimony that is often traumatizing. The LoTC's purpose of facilitating a speedy trial can be promoted in accordance with the right of the accused to a trial without delay as prescribed by Article 13 of the CPC of BiH and guaranteed by Article 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). The purposes of judicial economy and consideration for witnesses, however, can put at risk the accused's right to a fair trial and the presumption of innocence. Therefore the Panel may only promote those purposes in a way that respects those rights. The criteria are designed to do this. Otherwise, these facts proposed by the Prosecutor could require that the evidentiary proceedings *de facto* end to the detriment of the accused even before the imminent presentation of all of the evidence in the case. The Panel had in mind Article 6 of the ECHR and Articles 3, 13 and 15 of the CPC of BiH when exercising its discretion under Article 4 of the LoTC in this case.

Presumably, the facts proposed by the Defense would not engender the same risks to the rights of the Accused. However, there are two Accused here, and the facts proposed by one Accused may not be in the interests of the other. The criteria the Panel has outlined are thus similarly applicable to facts proposed by the Defense. Furthermore, although the Panel has largely anchored its established facts analysis in the right of the defense to a fair trial and presumption of innocence, the Panel recognizes that other important interests must be respected as well, and that such interests are co-extensive with the rights of the Accused. In particular, the Panel recalls the principle of the free evaluation of evidence as expressed in Article 15 of the CPC of BiH and the Panel's fundamental obligation under Article 239(2) of the CPC of BiH to "ensure that the subject matter is fully examined [and] that the truth is found…." Accordingly, the Panel applies the same criteria to facts proposed by the Defense as to facts proposed by the Prosecutor when exercising its discretion under Article 4 of the Law on Transfer in this case.[2]

The acceptance of facts proposed by the Prosecutor "as proven", under the criteria the Panel has outlined, does not relieve the Prosecutor of her burden of proof nor does it detract from the presumption of innocence under Article 3 of the CPC of BiH. The acceptance "as proven" of facts established in the final judgments of the ICTY means only that the Prosecutor has met the burden of production of evidence on that particular fact and does not have to prove it further in her case in chief. Admission of each fact does not affect in any way the right of the Accused to challenge any of the accepted facts in their defense, as they would do with any other factual proposition on which the Prosecutor had produced evidence. Nor does it preclude the Prosecutor from presenting additional evidence in order to rebut the defense challenge. Likewise, Article 15 of the CPC of BiH is respected because the Panel is not bound to base its verdict on any fact admitted as proven.

As to the facts proposed by the parties but not accepted, the Panel concluded that these facts do not satisfy the foregoing criteria and therefore cannot be accepted as such in this particular case before the Court of BiH.

[2] The Trial Chambers of the ICTY have similarly analyzed facts proposed by the Defense by the same criteria applied to facts proposed by the Prosecutor. *See Prosecutor v. Hadzihasanovic, et al.*, IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubara on 20 January 2005, 14 April 2005; *Prosecutor v. Hadzihasanovic, et al.*, IT-01-47-T, Final Decision on Judicial Notice of Adjudicated Facts, 20 April 2004.

As to the facts in the remaining part of all three motions, the Panel notes that these facts do not satisfy the foregoing criteria and they therefore cannot be accepted in this particular case before the Court of BiH.

Also, the Panel visited the KP Dom Foča on 2 November 2007, specifically the following rooms: Room 11, Room 12, infirmary, Rooms 13 and 14, the mess hall, the former office of Savo Todović, the former office of the warden Milorad Krnojelac, the former office of Mitar Rašević, Metalno and Velečevo.

All examined witnesses of the prosecution, except for the witness Amor Mašović, are victims of the committed crime during the time period relevant to the Indictment, and testified about the events in KP Dom Foča at the relevant time. All prosecution witnesses, except for Ekrem Zeković and Amor Mašović, are identified by pseudonyms and testified under certain protection measures. These witnesses were granted protection of their personal details and identities in the proceedings before the ICTY, which is a decision the Court was anyhow obliged to respect, therefore, all the witnesses testified before the Court of BiH in that capacity. The Accused and their Defense Counsel were fully informed about their identity.

In its closing argument, the Prosecutor's Office of BiH submitted that it was proven beyond any reasonable doubt that the accused Mitar Rašević and Savo Todović committed the criminal offense with which they were charged. The Prosecutor's Office moved the Panel to find the Accused guilty and to punish them in accordance with the law.

The defense for the Accused moved the Panel to render a verdict fully acquitting the accused of the charges. The Accused did not dispute that the crimes occurred in the KP Dom, that people were taken for "exchanges" which actually never took place, that many were deprived of their lives, and many have been missing to date. However, although the accused Rašević was superior to the guards, he did not have *de facto* or *de iure* authority to punish the guards. The defense for the second-accused Todović stated that the civilian structures had no management or command authorities over the things happening in the KP Dom. The management of the KP Dom was only in charge of the regular prisoners. The evidence of the Prosecutor's Office also indicates that the arrests and imprisonments were carried out by the military and paramilitary units. KP Dom staff did not take part in these activities.

There is no evidence indicating that Todović made any lists whatsoever, particularly not those concerning the beatings and others. The accused Todović stated that he cannot be held responsible for any acts taking place outside the KP Dom and that he did not have any authority over them. The Prosecutor's Office did not prove that the accused had failed to prevent the crimes or punish the perpetrators thereof. According to the Book of Rules on Internal Organization of the KP Dom (adopted in August 1992), the accused Todović, pursuant to these rules, had no authority to punish anyone.

As for the joint criminal enterprise, the Prosecutor's Office did not prove the existence of the joint criminal enterprise or its elements. This concept of criminal responsibility is not acceptable in the proceedings before the Court of BiH. It was not included in the provisions of the CC SFRY, nor is it now included in the provisions of the CC BiH. This doctrine has been developed through the jurisprudence of the ICTY.

As regards the application of the substantive law, the defense for the Accused stated that the Court should apply the law which was in force at the time of the perpetration of the alleged

criminal offence, not the CC BiH. The retroactive application of the provisions of CC BiH is not justifiable and cannot be considered to be an exception from Article 15(2) of the International Covenant on Civil and Political Rights and Article 7(2) of the European Convention, unless these principles have already been incorporated into the national legislation, and only if the violation of these principles may be qualified as crimes against humanity. Article 4 CC BiH forbids the principle *nulla poena sine lege*.

Therefore, having weighed all pieces of evidence individually and in their entirety, the Panel rendered a decision as stated in the operative part for the following reasons:

II. CRIMINAL OFFENSES: FINDINGS

Pursuant to the Indictment, the Accused are charged with the criminal offense of crimes against humanity in violation of Article 172(1) of the Criminal Code of BiH ("CC of BiH"), which reads, in part:

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:
   a) Depriving another person of his life (murder);
   c) Enslavement;
   d) Deportation or forcible transfer of population;
   e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   f) Torture;
   h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
   i) Enforced disappearance of persons;
   k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

A. *CHAPEAU* ELEMENTS OF CRIMES AGAINST HUMANITY

In order to prove the charge of crimes against humanity, the Prosecutor was obliged to first establish the *chapeau*, or general, elements of such crimes, namely:

1) The existence of an attack directed against a civilian population, namely:
    i. a course of conduct involving the multiple perpetrations of acts referred to in Article 172(1);
    ii. against a civilian population; and
    iii. pursuant to or in furtherance of a State or organizational policy to commit such attack.
2) The attack was either widespread or systematic; and
3) A "nexus" between the acts of the Accused and the attack, namely:
    i. the acts of the Accused were committed as part of the attack;
    ii. the Accused had knowledge of the attack;
    iii. the Accused knew that his acts were part of the attack;
    iv. the Accused knew that the attack was committed pursuant to or in furtherance of a State or organizational policy to commit such attack; and
    v. the Accused knew his acts were pursuant to or in furtherance of a policy to commit such attack.

Article 172(2)(a) of the CC of BiH clarifies that an "attack directed against any civilian population means a course of conduct involving the multiple perpetrations of acts referred to in paragraph 1 of this Article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

1. The Law on *Chapeau* Elements

a. Article 172(2)(a): The "Policy" Element

Under customary international law at the relevant time, the existence of a plan or policy to attack a civilian population or commit the acts that constitute such an attack need not be proven as an element of the charge of crimes against humanity.[3] However, Article 172(2)(a) does incorporate such a "policy" element.

The "policy" element can be expressed in terms of four sub-elements. Pursuant to Article 172(2) (a), it must be shown that:
1) there was a State or organizational;
2) policy;
3) to commit such attack; and
4) the attack was in fact undertaken pursuant to or in furtherance of that policy.

[3] *Prosecutor v. Blaskic*, IT-95-14-A, Judgment, 29 July 2004, para. 120 ("a plan or policy is not a legal element of a Crime against Humanity" under either the ICTY Statute or customary international law); *Prosecutor v. Kunarac, et al.*, IT-96-23 and IT-96-23/1-A, Judgment, 12 June 2002, para. 98 ("Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.").

In interpreting this "policy" element, the Panel notes that Article 172 of the CC of BiH is identical to Article 7 of the Rome Statute.[4] Accordingly, the Panel considers the Rome Statute, its drafting history and the accompanying Elements of Crimes to be persuasive authority in guiding its interpretation of this provision. While "State" is a specific term with a clearly defined meaning under international law, "organization" is a much more broad and amorphous concept. Although it is not necessary for the organization to be adjudged criminal under international or national law for the purposes of this sub-element, this requirement should be interpreted liberally to cover a wide variety of organizations, and the relevant consideration should focus on the organization's capacity as a group to conceive and adopt the policy to attack a civilian population in a widespread or systematic manner, rather than on the organization's formal characteristics and taxonomy.

Relative to the second sub-element, the existence of a "policy", the Panel emphasizes that "policy" should be understood as distinct from "plan". Policies, in organizational terms, particularly at the State level, may broadly define goals that are then to be implemented through individual decision-making on lower levels. "'Policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population."[5] The policy need not contemplate the crimes, as enumerated in paragraph 1, that were in fact committed, only a policy to commit an attack generally.[6] The fourth sub-element requires a causal link between the State or organizational policy and the attack that was committed in fact. This element largely involves factual considerations on a case-by-case basis and with regard to the totality of the circumstances, including the characteristics of the relevant policy and the crimes committed during the course of the attack. Whether an attack is widespread or systematic, on the one hand, and whether an attack is pursuant to or in furtherance of a State or organizational policy, on the other, are distinct inquiries, and the satisfaction of one element cannot be simply inferred from satisfaction of the other. The following factual factors are considered with regard to establishing the existence of a policy to commit an attack: concerted action by members of an organization or State; distinct but similar acts by members of an organization or State; preparatory acts prior to the commencement of the attack; prepared acts or steps undertaken during or at the conclusion of the attack; the existence of political, economic or other strategic objectives of a State or organization furthered by the attack; and in the case of omissions, knowledge of an attack or attacks and willful failure to act. Whereas each attack must be considered as widespread or systematic individually, a pattern of attacks against civilian populations, whether or not individually widespread or systematic, would, in some circumstances, be evidence of a policy to commit such attacks.

b. Widespread or Systematic Attack

An attack is widespread if it is large-scale in nature and targets a number of persons, and systematic if it is organized in nature and constitutes "non-accidental repetition of similar criminal conduct on a regular basis."[7] The following factors, *inter alia*, are relevant to determining whether an attack was widespread or systematic: "The consequences of the

[4] Rome Statute of the International Criminal Court ("Rome Statute"), adopted at Rome on 17 July 1998, PCNICC/1999/INF/3.
[5] Elements of Crimes to Rome Statute ("Elements of Crimes"), Art. 7, Introduction, (3).
[6] D. Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AJIL 43, fn. 46 (1999).
[7] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para. 94.

attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes."[8]

c. Directed against a Civilian Population

An attack is "directed against a civilian population" if the civilian population is the primary object of the attack.[9] It is not necessary that the entire civilian population be the object of the attack, but it is sufficient if the evidence shows that the attack was directed against enough individuals or in such a way as to demonstrate that the attack was not against a limited and random number of individuals or consisted of limited and isolated acts.[10] The population need not be wholly civilian in nature, but only predominately civilian, and thus may include non-civilians among it without altering the conclusion that the population is civilian in nature. Article 3(1)(a) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention") defines civilians as "persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause."[11] Factors to be considered in determining whether the attack was directed against a civilian population include: "the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war."[12]

It is irrelevant whether the opposing side in the conflict also committed an attack against the attacker's own civilian population.[13]

d. Nexus between the Acts of the Accused and the Attack

Article 172 requires that the accused commit the criminal offenses "as part of a widespread or systematic attack directed against any civilian population [and] with knowledge of such an attack." The requisite nexus then has an objective element and a subjective element.

As to the objective element, to be part of the attack, the acts of the accused must be sufficiently linked or related to that attack. The offense committed by the accused need only be part of the attack. Acts that were geographically or temporally removed from the midst or height of the attack can still be considered part of that attack if they were nonetheless linked to the attack, such as in the manner in which the acts were committed or the identity of the victims, or where the acts continued from the height of the attack.[14] Finally, the acts of the accused do not need to themselves be widespread or systematic to be part of the attack, as that requirement only applies to the attack itself.[15]

[8] *Kunarac* Appeal Judgment, para. 95.
[9] *Id*., para. 91.
[10] *Kordic* Appeal Judgment, para. 95.
[11] *See Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Judgment, January 17, 2005, para. 544.
[12] *Blaskic* Appeal Judgment, para. 106.
[13] *Kunarac* Appeal Judgment, paras. 87, 88; *Nikola Kovačević*, X-KR-05/40 (Ct. of BiH), First Instance Verdict, 3 November 2006, pgs. 22-23.
[14] *See Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 September 2004, para. 132; *Prosecutor v. Kunarac, et al.*, IT-96-23 and IT-96-23/1-T, Judgment, 22 February 2001, paras. 581-592.
[15] *See Kordic* Appeal Judgment, para. 94.

As to the subjective element, Article 172, by its terms, requires that the accused act "as part of [the] attack…, with knowledge of [the] attack." Some Trial Panels at the Court of BiH have concluded that the subjective nexus is in two parts. In *Jadranko Palija*, Panel 4 listed the *chapeau* elements of crimes against humanity as including, "That the acts of the Accused were part of the attack and that he was aware that his acts were part of the attack."[16] In *Dragan Damjanović*, this Panel found "the accused's knowing participation in [the] attack".[17] However, the Appeals Panel in its second instance verdict in *Boban Šimšić* characterized the subjective element as only "that the Accused knew of the attack", although the Panel did conclude that the Accused wanted his actions to be part of the attack.[18]

The Panel concludes that it is required under customary international law and Article 172 that the accused both know of the attack against the civilian population and that his acts form part of that attack.[19]

It is not necessary that the Prosecution prove by direct evidence that the accused had knowledge of the relevant context and nexus, as such proof may be established constructively through circumstantial evidence, including: the accused's position within a civilian or military hierarchy; his membership in a group or organization involved in the commission of crimes; the scale of the acts of violence; his presence at the scenes of crimes; and the extent to which the crimes were reported in the media.

The elements of the requisite nexus are, therefore:

1) the commission of an act which is objectively part of the attack; and
2) the knowledge on the part of the accused that:
    a. there is an attack on the civilian population;
    b. his act is part of such attack
    c. the attack is pursuant to or in furtherance of a State or organizational policy to commit such attack; and
    d. his act is pursuant to or in furtherance of a policy to commit such attack.

2. Factual Findings and Conclusion

Based upon the law and the evidence adduced, the Panel concludes that from April 1992 to October 1994 there was a widespread and systematic attack against the non-Serb civilian population in the area of the Municipality of Foča, involving the multiple perpetration of acts enumerated in Article 172(1), pursuant to and in furtherance of the policy, and in fact plan, of the SDS-Foča and Foča Serb Crisis Staff to commit such attack, and conducted by the military and police of the Republika Srpska and paramilitary formations. The Panel further concludes that the Accused's acts were part of that attack, and that the Accused had knowledge of the attack, that their acts were part of the attack and that their acts were pursuant to or in furtherance of a policy to commit such an attack.

Beginning on 8 April 1992, Serb forces, including local soldiers, soldiers from Montenegro and Yugoslavia and the White Eagles paramilitary formation, launched an attack against the

[16] *Jadranko Palija*, X-KR-06/290 (Ct. of BiH), First Instance Verdict, 28 November 2007, pgs. 25, 26.
[17] *Dragan Damjanović*, X-KR-05/51 (Ct. of BiH), First Instance Verdict, 15 December 2006, pg. 17.
[18] *Boban Šimšić*, X-KRŽ-05/04 (Ct. of BiH), Second Instance Verdict, 7 August 2007, pgs. 15, 19.
[19] *See Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 134. *See also*, *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment, 15 May 2003, para. 332 (concurring); *Prosecutor v. Bagilshema*, ICTR-95-1A-T, Judgment, 7 June 2001, para. 94.

non-Serb civilian population of Foča town. Serb forces directed artillery and small-arms fire at predominately Muslim residential neighborhoods in Foča such as Donje Polje, as well as mixed neighborhoods such as Čohodor Mahala. Despite some resistance, Serb forces then proceeded to take over Foča town area by area, and succeeded in capturing the entire town sometime between 15 and 18 April 1992. These facts were established by Established Facts P11, P12, P13, P16, P18, P31, P32 and P51, and witnesses FWS 65, FWS 86, FWS 111, FWS 138, FWS 142 and others testified generally regarding these events.

In the following weeks, this attack against the non-Serb civilian population continued in villages throughout Foča Municipality, including Brod, Jeleč and Mješaja/Trošanj. Following the same general pattern as the attack against Foča town, local Serb forces, together with Serb army and paramilitary forces from outside Bosnia, attacked these and other villages with artillery and small-arms fire, burned houses and captured members of the non-Serb civilian population. Serb paramilitary forces also captured non-Serb civilians who had fled to the military facilities in Pilipovići to seek shelter. At Pilipovići and other locations, a number of non-Serb civilians were physically mistreated by the attacking forces, while a smaller number were killed in the attack or executed afterwards. These facts were established through the testimonies of FWS 104, FWS 141, FWS 119, FWS 58, FWS 182, and A, as well as Established Facts P19, P21, P22, P23 and P24.

This armed and violent take-over of Foča Municipality was followed by systematic efforts to control, detain and expel the non-Serb population that had not fled the attack. Serb forces quickly became a noticeable presence in and around Foča. Non-Serbs were warned to stay in their houses and apartments and restricted from moving around town or meeting with one another. Their phone lines were also cut. Non-Serbs were fired from their jobs, and when Serb civilians were ordered to return to work around the end of April, beginning of May, non-Serbs were prevented from returning as well. These facts were established by the testimonies of FWS 83 and FWS 139 and Established Facts P25, P26, P27, P28, P29 and TC-9.

Non-Serbs, particularly non-Serb men, throughout the Foča area were then systematically arrested and detained. The evidence shows that many non-Serb civilians were initially held in houses in Foča town and in the former Territorial Defense warehouses in Livade near Foča. Witness D described being taken by Serb soldiers to a neighbor's house along with others from his street, where he was told by a local Serb resident that he would be held for a time. FWS 210 described being detained at "Šandal's house", in Čohodor Mahala, from where he was transferred to the KP Dom Foča ("KP Dom") along with 80 to 100 other men.

Similarly, beginning on 12 April and continuing until 17 April 1992, more than one hundred non-Serb civilians, both men and women, were detained in the former Territorial Defense warehouses in Livade. These events were described by witnesses E, FWS 02, FWS 111, FWS 115, FWS 138, FWS 182 and FWS 250 and confirmed by Established Facts P38 and P39. FWS 02 testified that on or around 12 April, everyone from the apartment building where he and his family had sought shelter was taken to Livade, where they were separated by ethnicity and gender. FWS 111, who was brought to Livade from his place of work on 11 April, also described how men, women and children from the Aladža neighborhood were brought to Livade on 12 April. Military personnel, including reserve forces of Serb Foča residents, secured the warehouses. The conditions in the warehouses were extremely poor, and the witnesses described how some of those held there had been beaten, some during their arrests and some during their detention. On the evening of 17 April, all the non-Serb civilian men in the warehouses were transported by truck to the KP Dom.

Other non-Serb civilians were arrested in Foča by members of the military police and soldiers and transported directly to the KP Dom. A number of those arrested were beaten, in many cases severely, during the course of these arrests. The arrests were themselves conducted in a systematic and organized fashion. Witness Ekrem Zeković described how members of the military police arrived at his house with a list of seven or eight names and asked him to accompany them to the KP Dom to give a statement. Similarly, FWS 65 explained that he was stopped by a soldier in the street, who asked his name and then, after consulting a list, arrested him and took him to the KP Dom. FWS 139 testified that the military police gathered the Muslim men from his street, five or six in total, and took them all to the KP Dom. FWS 113 described how paramilitaries moved through the Aladža neighborhood, expelling residents, and how his neighbors, friends and family members were arrested one by one and taken to the KP Dom, until he was himself arrested on 23 April. FWS 03, FWS 85, FWS 86, and B also stated that they were arrested by military police and transported to the KP Dom. These testimonies were corroborated by Established Facts P34, P36, and P37.

Those non-Serb civilians who remained in Foča and were not detained at the KP Dom were expelled from the area in the following months. As FWS 15 explained, after being released from the KP Dom, he was required to report daily to the police station in Foča, until he was expelled on 4 July. On that day, he, along with hundreds of other civilian residents, was taken by bus to Novi Pazar, Serbia. On 13 August, those non-Serb civilians remaining in Foča, predominately women and children, were taken to Rožaje, Montenegro. These facts were established by FWS 15 and Established Facts P41 and P42.

From April 1992 to October 1994, non-Serb civilians detained at the KP Dom were subjected to various forms of systematic mistreatment, as will be detailed further in the discussion of the specific acts alleged. Conditions at the KP Dom were extremely poor. The non-Serb civilians imprisoned in the KP Dom were not provided with sufficient food and medical care, were not provided with heating during the 1992-1993 winter and were locked in their rooms at nearly all times.[20] Detainees were also subjected to physical abuse and mistreatment, while many detainees were taken out of KP Dom purportedly for exchange or to perform tasks, but were never seen alive again afterwards. Finally, detainees were expelled from the Foča area and transferred to detention facilities or locations in other parts of Bosnia or to places outside the country.

It is evident that this attack was committed pursuant to and in furtherance of the policy and plan of the SDS and Serb Crisis Staff in Foča, among other organizations within the meaning of Article 172(2)(a), to commit an attack against the non-Serb population of Foča. In the period leading up to the commencement of the attack, Serbs in Foča set up a separate political structure, the Serbian Municipal Assembly of Foča, and established a Serb Crisis Staff lead by the President of the SDS in Foča. On 7 April 1992, the SDS leadership pressured the Foča police force to divide upon ethnic lines. That same day, Serb forces were mobilized and proceeded to take over important institutions and facilities in Foča, including the Foča radio station, the warehouse of the regional medical center and the Territorial Defense military warehouse. These facts were established by Established Facts P1, P3, P4 and P9.

[20] Those non-Serb civilians detained at the KP Dom will be hereafter referred to as "detainees", as distinguished from those Serb civilians who were lawfully detained at the KP Dom, who will be referred to as "convicts".

These preparatory acts were followed by the widespread and systematic attack outlined above. The Panel notes in particular the systematic and organized manner in which this attack proceeded, from the initial use of armed force, to the establishment of control over the non-Serb civilian population, to the systematic arrest and detention of a large portion of that population, to the final disposition of the non-Serb population, either through expulsion or detention followed sometime later by expulsion, and that this systematic pattern of events proceeded methodically throughout Foča municipality following the initial stages of the attack on Foča town. The political and strategic aim of this attack is evident, and was clearly expressed shortly after the conclusion of the main stage of the attack when Foča was renamed Srbinje, or "town of the Serbs", as established by Established Fact P46.

It is untenable to suppose that these events were random, isolated acts. To the contrary, it is clear beyond a reasonable doubt that these events were the result of significant planning, organization and coordination with the aim of committing what happened in fact, an attack against the non-Serb civilian population involving the multiple perpetrations of crimes.

Through its cross-examination of witnesses and the Established Facts, the Defense established facts related to the rise in ethnic tensions between Serbs and Bosniaks, the breakdown of government authority in Foča in the period preceding April 1992, the establishment of both Serb and Bosniak Crisis Staffs in Foča, the imposition of roadblocks by Bosniak forces at the beginning of the conflict, and fighting between Serb and Bosniak armed groups in Foča. The Panel reiterates that customary international law *absolutely prohibits* the use of armed force against civilians and that the *tu quoque* principle offers no defense. The Panel further emphatically notes that criminal proceedings for crimes against humanity are manifestly not a forum in which to apportion responsibility for the outbreak of hostilities. The origins of an attack against a civilian population, and the existence *vel non* of a corresponding attack against the attacker's civilian population, are therefore wholly irrelevant. Moreover, examining the facts presented by the Defense in the most relevant and favorable light, the Panel concludes that insufficient evidence was introduced to establish that there were sufficient armed combatants among the non-Serb civilian population of Foča to alter the character of that population, and that the evidence introduced does not alter the conclusion that the attack described above was directed against the civilian population, notwithstanding any military operations between armed forces on the opposing sides.

The Panel further concludes that the requisite nexus between the Accused's acts and the attack was established beyond a reasonable doubt. The KP Dom played an integral role in the attack against the non-Serb civilian population, as it was the primary permanent detention facility for non-Serb civilian men from throughout Foča municipality who were unlawfully arrested during the course of the attack. Similarly, the violence, mistreatment and abuse at the KP Dom were a microcosm of the attack against the civilian population of Foča, a faithful reproduction within the confines of its walls of that broader pattern of criminal activity. The Accused's acts, and the acts of others for which the Accused are responsible, were thus related and connected to the attack.

Given the magnitude of the attack and the integral role of the KP Dom in that attack, as well as their specific positions, the Accused knew of the wider context of their acts and the role of their acts in the attack. While there is no suggestion that the Accused knew in advance of the policy and plan of the SDS and Serb Crisis Staff to commit the attack, the existence of such a plan would have been obvious even in the initial stages of the attack, and the Accused would have undoubtedly become aware of the plan's existence at the time of or shortly after

assuming their responsibilities at the KP Dom. Even if the Accused were not specifically informed of that plan at least in part, which is highly unlikely, it would have been obvious to them that the detention and mistreatment of so many hundreds of civilians by military and civilian police was pursuant to the policy of the Crisis Staff. The Accused also had to have known that their acts and the acts of others at the KP Dom were pursuant to and in furtherance of that policy.

Accordingly, based upon the foregoing, the Panel concludes that the *chapeau* elements of crimes against humanity pursuant to Article 172 of the CC of BiH were proven beyond reasonable doubt.

The Panel conformed the operative part of the Verdict to the Panel's factual findings and legal conclusions, as detailed herein and in the following section on the criminal liability of the Accused. In conforming the operative part of the Verdict to the Panel's factual findings and legal conclusions, the Panel deleted charges not proven beyond doubt where it acquitted the Accused of the charges.

Therefore, the Panel found that not all prison guards were mentioned by the witnesses, and also that the explicit reference to the names of the guards does not specifically affect the establishment of the criminal liability of the Accused, so the Panel therefore decided to delete such references. More detailed reference to the names of individual guards was included in the reasoning to the individual Counts of the Indictment.

The Panel also deleted the references to the modes of perpetration and contribution of the Accused to the joint criminal enterprise (planning, ordering, instigating and aiding and abetting the planning and preparation of the persecution, as well as the participation in setting up the system of punishment), as well as the charges related to the special authorities of Todović (selection of prisoners who were to be deprived of their lives, punished, physically mistreated, interrogated or exchanged), all of which were stated in the introductory part of the Indictment in relation to which their responsibility has not been established. The specific mode of responsibility of the Accused is separately elaborated through the analysis of the form of responsibility in a separate section of the Verdict.

B. COUNT 1: TORTURE AND OTHER INHUMANE ACTS

The facts from individual counts of the Indictment which have been found to be established beyond reasonable doubt are mainly based on the witnesses' testimonies. A general comment on the testimonies would be that almost all witnesses are the survivors of the committed criminal offense. All of them described the events in the KP Dom with a higher or lesser degree of precision. The Panel finds that their testimonies are credible and without significant inconsistencies that would prevent the Panel from drawing a quality inference.

1. Elements of the Crimes

a. Torture

As defined by Article 172(2)(f) of the CC of BiH, torture, as criminalized in Article 172(1)(f), "means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under control of the accused; except that torture shall not include pain or suffering arising only from, or being inherent in or incidental to, lawful sanctions." Accordingly, the specifically-enumerated elements of the crime of torture under Article 172(2)(f) are:

1) the intentional infliction;
2) of severe pain or suffering, whether physical or mental; and
3) upon a person in custody or under control of the accused.[21]

The Panel notes that these elements differ from the elements of torture existing in customary international law, as defined in the jurisprudence of the ICTY and ICTR, at the time the crimes alleged in this proceeding were committed. Specifically, customary international law requires as an additional element that the incriminating act:

> [M]ust aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.[22]

This additional element identified by the ICTY, the requirement of a "prohibited purpose", is not contained within the definition of torture in Article 172(2)(f). Recognizing that neither jurisprudential precedent nor conventional law provided a sufficiently precise definition of the offense of torture as a violation of international humanitarian law, the Trial Chambers of the ICTY and ICTR, in applying Articles 2, 3 and 5 of the ICTY Statute and Articles 3 and 4 of the ICTR Statute, looked to international human rights conventions to determine the legal elements of torture under customary international law. In particular, the Trial Chambers concluded that Article 1 of the Torture Convention largely reflected customary international law.[23] The Trial Chamber in *Celebici* noted that the definition in Article 1 of the Torture

[21] The Panel reads the reference in this element to the "accused" as including the accused's co-perpetrators or other persons for whose actions the accused is found to be criminally liable.
[22] *Kunarac* Appeal Judgment, para. 142.
[23] 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), 1465 U.N.T.S. 85, entry into force 26 June 1987. *See also* 1975 United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Declaration"), adopted by General Assembly resolution 3452

Convention contained the definition of torture in the Torture Declaration and was the source of the definition in the Inter-American Torture Convention, and thus reflected a consensus representing customary international law.[24] The Trial Chamber in *Furundzija* further justified its conclusion by noting that the Torture Declaration had been adopted by the UN General Assembly by consensus, that the Torture Convention contained all the necessary legal elements implicit in the general conventional prohibitions on torture and that the definition in the Torture Convention had been applied by the United Nations Special Rapporteur and adopted by the European Court of Human Rights ("European Court") and the United Nations Human Rights Committee.[25] Reviewing the conclusion of the Trial Chamber, the Appeals Chamber in *Furundzija* concurred and held that the "definition given in Article 1 [of the Torture Convention] reflects customary international law."[26] The Trial Chamber in *Kunarac*, having reviewed the conventional definitions discussed above as well as the definition of torture under the European Convention on Human Rights ("ECHR"), concurred that the Torture Convention should be largely "accepted as representing the status of customary international law on the subject."[27]

Having reviewed the relevant instruments and jurisprudence, the Panel likewise concludes that the Torture Convention should be regarded as reflecting customary international law as to the offense of torture as a crime against humanity at the relevant time. With specific regard to the "prohibited purposes" element, the Panel also considers the ICRC Commentary on Art. 147 of the Fourth Geneva Convention persuasive authority as to the centrality of this element to the offense of torture. The ICRC commentary focuses on the purposes, rather than the severity, behind the act of torture and emphasizes that what "is important is not so much the pain itself as the purpose behind its infliction". As to the specific "prohibited purposes" required for the offense of torture, the Panel concludes that the purposes enumerated in the Torture Convention also represent customary international law and are sufficient for the purposes of these proceedings.[28] The Panel also notes that the prohibited purpose need not be the sole or predominate purpose, but need only be part of the motivation beyond the conduct.[29]

Accordingly, in applying Article 172(1)(f) of the CC of BiH to the facts established in this proceeding, the Panel concludes that, in addition to the specifically enumerated elements set out in 172(1)(f) of the CC of BiH which have been proven beyond doubt, the evidence further supports that the acts or omissions were committed for a prohibited purpose.[30]

(XXX) of 9 December 1975; 1987 Inter-American Convention to Prevent and Punish Torture ("Inter-American Torture Convention").

[24] *Prosecutor v. Delalić* ("*Celebici*"), IT-96-21-T, Judgment, 16 November 1998, para. 459.

[25] *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, 10 December 1998, para. 160.

[26] *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgment, 21 July 2000, para. 111.

[27] *Kunarac* Trial Judgment, para. 483. *See also Kunarac* Appeal Judgment, para. 146 ("The definition of the crime of torture, as set out in the Torture Convention, may be considered to reflect customary international law.")

[28] *See Prosecutor v. Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 185.

[29] *See Brdjanin* Trial Judgment, para. 487.

[30] *See also Goran and Zoran Damjanovic*, X-KR-5/107 (Ct. of BiH), First Instance Verdict, 18 June 2007, pgs. 15, 16 (citing and adopting the elements of the crime of torture as identified in the *Kunarac* Trial Judgment to define torture as a violation of the laws and customs of war pursuant to Article 173(1)(c) of the CC of BiH); *Gojko Janković*, X-KR-05/161, First Instance Verdict, 16 February 2007, pg. 53, 59 (concluding, without legal explanation, that "prohibited purposes" are required under Article 172(1)(f) in the context of determining whether cumulative convictions are permissible for rape and torture as crimes against humanity under Article 172).

The element of suffering in Article 172(2)(f) of the CC of BiH, requires that the pain or suffering be "severe", a standard which is necessarily imprecise and contextual. In particular, the definition of torture as causing "severe" pain or suffering must be contrasted with the lesser crimes of inhuman treatment, cruel treatment and other inhumane acts, which require "serious" pain or suffering. While the precise threshold between "serious" and "severe" pain or suffering cannot be fixed, it is nonetheless clear that the label of torture is reserved for a more limited, more odious subset of inhumane acts. The severity of the pain or suffering should be considered both objectively and subjectively in light of all the circumstances of the act. The Trial Chamber in *Krnojelac* identified the following, though not exhaustive, objective considerations: "the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the manner and method used[,] the position of inferiority of the victim" and "to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal."[31] Similarly, the Trial Chamber in *Kvocka* recognized that the subjective, individualized circumstances of the victim should be taken into account in assessing the severity of the pain or suffering, including: "the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health."[32] Permanent injury is not required for an act to cause sufficient pain or suffering to rise to the level of torture.[33] The Human Rights Committee also concluded that psychological torture included threats to remove bodily limbs.[34]

Article 3 of the ECHR provides that "No one shall be subjected to torture or to inhuman treatment or degrading treatment or punishment." The European Court has concluded that "the special stigma of 'torture' [only attaches] to deliberate inhuman treatment causing very serious and cruel suffering."[35] The Court has concluded that a variety of different forms of mistreatment rise to the level of torture, including: suspension from arms tied behind the victim's back ("Palestinian hanging"), *Aksoy*; being repeatedly punched, kicked, and hit with objects; being invited to perform oral sex on a male police officer before being urinated upon; being threatened with a blowlamp and then with a syringe;[36] application of "falaka" ("falanga") and fracture of the sternum;[37] electric shocks, hot and cold water treatment, blows to the head and psychological pressure.[38]

[31] *Krnojelac* Trial Judgment, para. 182 (citing a number of European Court decisions, in particular *Soering v. United Kingdom*, Judgment, 7 July 1989, Series A No. 161, paras. 106, 111, on the effect of time on the severity of the treatment).
[32] *Prosecutor v. Kvocka, et al.*, IT-98-30/1-T, Judgment, 2 November 2001, para. 143.
[33] *Brdjanin* Trial Judgment, para. 484.
[34] "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Report of the Special Rapporteur ("Special Rapporteur Torture Report"), E/CN.4/1986/15, 19 February 1986, para. 35 (citing Official Records of the General Assembly, Thirty-Eighth Session, Supplement No. 40, A.38/40, annex XII, para. 8.3).
[35] *Aksoy v. Turkey* (App. 21987/93), Judgment of 18 December 1996, para. 63. *See also Moldovan and others v. Romania, Judgment No. 2* (Apps. 41138/98 and 64320/01), Judgment of 12 July 2005, para. 100 ("According to the Court's case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.").
[36] *Selmouni v. France* (App. 25803/94), Judgment of 28 July 1999.
[37] *Salman v. Turkey* (App. 21986/93), Judgment of 27 June 2000.
[38] *Akkoç v. Turkey* (Apps. 22947/93 and 22948/93), Judgment of 10 October 2000.

b. Other Inhumane Acts (Physical Mistreatment)

Article 172(1)(k) of the CC of BiH defines "Other inhumane acts" as a crime against humanity as: "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health."

Accordingly, the specific elements of the crime of other inhumane acts as a crime against humanity are:

1) the acts must be of a similar character to those acts specifically enumerated in Article 172(1);
2) the acts must cause great suffering, or serious injury to body or to physical or mental health; and
3) the acts must have been performed with the intention of causing great suffering or serious injury.

The crime of other inhumane acts is a residual provision covering acts not specifically enumerated as crimes against humanity but of a similar gravity and causing sufficient injury or harm so as to be properly considered as crimes against humanity. As the offense was included among the offenses defined as crimes against humanity in the core documents defining crimes against humanity, including the Charter of the International Military Tribunal of 1945 ("IMT Charter"), 8 August 1945, the Charter of the International Military Tribunal for the Far East of 1946 ("Tokyo Charter"), 19 January 1946, Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity ("Control Council Law 10"), 20 Dec 1945, and the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal ("Nuremberg Principles"), in Report of the International Law Commission to the General Assembly ("1950 ILC Report"), U.N. Doc. A/1316, pgs. 374-378 (1950), there is no violation of the *nullum crimen* principle.[39] The Panel concludes that "other inhumane acts" was an offense as a crime against humanity under customary international law at the relevant time.

While a residual provision covering acts not specifically enumerated in Article 172(1), the crime of other inhumane acts is not intended to criminalize any morally reprehensible act or act of mistreatment committed during a widespread or systematic attack. Crimes against humanity are "very grave crimes which shock the collective conscience."[40] Accordingly, to constitute the offense of "other inhumane acts", the act must objectively be of a kind that is of similar gravity to the acts enumerated in Article 172(1), and the act must in fact cause serious physical or mental injury, or great suffering.[41] The seriousness of the injury, that is, the consequence in fact, should "be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s)."[42] It is not required that the injury or suffering be long-lasting so long as it is real

[39] *See Prosecutor v. Stakic*, IT-97-24-A, Judgment, 22 March 2006, para. 315.
[40] *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 27.
[41] *See Prosecutor v. Kupreskic, et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 566 (suggesting that the *ejusdem generis* principle could be applied to determine whether an act is of similar gravity to the enumerated acts).
[42] *Blagojevic* Trial Judgment, para. 627.

and serious, but the long-term effect of the act will be relevant to the analysis of its seriousness.[43]

Beatings and other acts of violence have been determined to be acts of sufficient gravity to constitute the crime of "other inhumane acts" under customary international law at the relevant time.[44] Confinement in inhumane conditions has similarly been determined to be an act of sufficient gravity under customary international law.[45]

2. Factual Findings and Conclusions

a. Count 1b: June 1992 to May 1993

The Accused are charged under Count 1b of the Indictment with participating in maintaining a system of punishment and mistreatment of detainees during the period from June 1992 to May 1993 with respect to a number of specific events. Based upon the evidence before it, the Panel concludes that the events as stated in the operative part of the verdict occurred and constituted the crimes of torture and other inhumane acts pursuant to Article 172(1)(k) and (f) of the CC of BiH. Further, the Panel concludes that those remaining events alleged in the Indictment but not stated in the operative part of the Verdict were either improperly pled or were not proven beyond doubt.

(i) Dž.B.

The Prosecutor established beyond doubt that "detainee Dž.B. was beaten and locked in a solitary confinement cell for about one month in inhumane conditions." These acts constitute the crime of other inhumane acts pursuant to Article 172(1)(k) of the CC of BiH.

Witnesses FWS 138, FWS 142 and C testified regarding this event; they identified this victim as having the initials Dž.B., and the operative part of the Verdict has been adapted accordingly. FWS 138 stated that on or around 15 or 16 May 1992, Dž.B. was taken out of his room, beaten up and taken to a segregation cell. Similarly, witness C stated that Dž.B. was taken several times for interrogation, that he and others could see that Dž.B. was beaten up and that Dž.B. was also taken to segregation. Finally, FWS 142 stated that on the day he arrived at the KP Dom, 13 May, Dž.B. was first taken to the administration building, where he was beaten, and then put in segregation, where he remained for about a month.

These witnesses' statements are consistent and credible and establish beyond doubt that Dž.B. was beaten and locked in a segregation cell for a period of about one month. The testimonies of these three witnesses agree that Dž.B. was taken out of his room, beaten and then put in a solitary confinement cell. While C did not specify the time frame, witnesses FWS 138 and FWS 142 were clear that they were referring to events that occurred in May 1992. FWS 142 further elaborated that Dž.B. was confined in the segregation cell for one month. Although FWS 142 was the only witness to state the specific duration of Dž.B.'s confinement, that testimony is sufficient to establish that fact. FWS 142's testimony is consistent with the testimony of FWS 138 and C in other respects, and there are no reasons to

[43] *See, e.g., Krnojelac* Trial Judgment, para. 144; *Kunarac* Trial Judgment, para. 501.
[44] *See, e.g., Krnojelac* Trial Judgment, para. 176; *Kvocka* Trial Judgment, para. 208, 209; *Prosecutor v. Tadic*, IT-94-1-T, Judgment, 7 May 1997, para. 730.
[45] *See* Count 3, Section D.1.b and fn. 56, *infra*.

doubt this additional detail. Finally, the Defense did not raise any doubts regarding the general content of FWS 142's testimony regarding this event or this specific detail.

Furthermore, this specific event as described by these witnesses can be linked to a broader pattern established through the testimonies of other witnesses, including, among others, Ekrem Zeković, FWS 03, FWS 86, FWS 111, FWS 113, FWS 162, FWS 250 and C. As those testimonies reveal, detainees who had been beaten were often taken to the segregation cells afterwards. FWS 162, who was himself taken to segregation in such circumstances, specifically noted that it was the practice to take detainees who had been beaten to the segregation cells for a few days. While some of these detainees were injured prior to their arrival at the KP Dom, others were beaten during the interrogations that took place in the administration building over the course of the first few weeks, as witnesses C and FWS 142 indicated was the case with Dž.B. Ekrem Zeković described how after his interrogation, he was taken to segregation, where he found a number of other detainees who were severely injured. FWS 182 and FWS 03 testified that the same occurred to them. This pattern of treatment further demonstrates the veracity of the testimonies of FWS 138, FWS 142 and C with regards to Dž.B., as their description of Dž.B.'s treatment corresponds to that pattern.

The conditions in which Dž.B. was held in segregation were inhumane. Witnesses FWS 58, FWS 119, FWS 250, A, D and Ekrem Zeković described how, during that time, the segregation cells were overcrowded. FWS 119, who was taken to a segregation cell upon his arrival at the KP Dom in April 1992, testified that there were 12 detainees in his 4 square meter cell and that they were all forced to sit right next to each other because there was so little space. FWS 119 also testified that there were no windows in the segregation cell, only walls and some nets. Witness A testified that, in July 1992, he was held, with between 2 and 6 other detainees, for 30 days in a small segregation cell that had a Turkish toilet, a small separation wall and only two metal beds. Similarly, FWS 58 testified that in April 1992 he was held in a 6-7 square meter segregation cell with 4 other detainees, while FWS 250 testified that he was held in a segregation cell with 6 or 7 detainees. More importantly, like others taken to segregation, Dž.B. was injured and in physical pain due to the beatings. FWS 162 testified that medical treatment was not provided to injured detainees held in segregation. Similarly, FWS 113 described how a doctor among the detainees had to provide medical care to two detainees who were taken away and then brought back to the room with severe injuries that had not been treated; FWS 250 testified to the same. In light of the totality of the circumstances, then, namely the beating, the lack of medical assistance, the length of his confinement and the overcrowding in the solitary confinement cells, the Panel concludes that the conditions in which Dž.B. was held in solitary confinement caused great physical and mental suffering. These acts are also of a similar character as other acts enumerated in Article 172(1).

That these acts were intentional and done with the intent to cause great suffering can also be inferred from the circumstances. Dž.B. could have been returned to his room where the detainees were regularly housed, and where, although the accommodation was poor, he would have had water, light, medical care and where he could have been cared for at least by other detainees who were not injured. Instead, the decision was made to confine him in a cell which was designed for and used as punishment when the KP Dom was a lawful prison before the conflict. It is especially clear that such treatment would cause great suffering in Dž.B.'s case, particularly as the lack of medical assistance would prolong the pain suffered during the beating and the overcrowding would exacerbate the physical distress. That the beating and detention in a segregation cell of Dž.B. was merely one instance in a larger

pattern, as discussed above, supports the conclusion that the acts were done intentionally and with the intention to inflict such suffering.

FWS 138 specifically asked Dž.B. who had beat him, but Dž.B. refused to answer. The testimony of the witnesses cited above, particularly Ekrem Zeković and FWS 03, establish that the KP Dom guards were responsible for taking the detainees to the solitary confinement cells following the interrogations and beatings. The Accused Rašević testified that the KP Dom guards were responsible for bringing prisoners to the interrogators in the administration building and then returning the detainees. Rašević testified convincingly that the interrogators ordered the KP Dom guards to put detainees whom they had interrogated into the segregation cells.

(ii) FWS 71

The Prosecutor established beyond doubt that "two guards called out detainee FWS 71, took him out of his cell and into the solitary confinement cell and beat him for about 20 minutes until he fainted." These acts constitute the crime of other inhumane acts pursuant to Article 172(1)(k) of the CC of BiH.

FWS 71 appeared as a witness and testified regarding this event. He stated that on 11 July 1992, he was taken out of his room by two guards, whom he specifically named. These two guards beat him on the stairs, then took him to the guard duty room and beat him there as well. He testified that he was beaten for about twenty minutes, and that as a result of this physical abuse he lost consciousness.

That the witness passed out as a result of the beatings is sufficient to establish that the physical abuse was of such severity as to cause great suffering or serious bodily injury. That the beatings continued in two different locations and that the guards persisted until he passed out is sufficient to establish that the assault was undertaken with the intent to cause such suffering or injury.

The Defense attacked the credibility of this witness with regard to both this event and his testimony generally. As to this event, the Defense noted in cross-examination that in a prior statement, FWS 71 referred to only one guard beating him on this occasion. In response, the witness stated that both guards he mentioned in his testimony beat him on this occasion. The Defense also noted that the witness was unable to give a reason as to why he was beaten on this occasion, though he mentioned reasons for beatings on other occasions. As to the credibility of the witness more generally, the Defense identified a number of inconsistencies between this witness's testimony and the testimonies of other witnesses, as well as a number of gaps in the witness's testimony.

Having reviewed the points raised by the Defense, the Panel concludes that they do not call into question the reliability of the witness's testimony regarding this event. The witness's prior statements provide a largely identical description of this event. The only inconsistency with respect to the event charged is as to the number of guards who participated. The Panel is satisfied that this inconsistency does not cast doubt on the witness's testimony as to this event, nor does the witness's lack of knowledge as to why he was beaten. The Panel is further satisfied that the witness accurately described the event in his oral testimony. Finally, the Panel concludes that any other gaps or inconsistencies in the witness's testimony

regarding other matters do not call into question the witness's credibility or cause the Panel to entertain any doubt about the witness's testimony as to this event.

(iii) Nurko Nišić

The Prosecutor established beyond doubt that "the military seriously tortured detainee Nurko Nišić, officer from the municipality administration and SDA member, and returned him to the cell covered in blood and bruised." These acts constitute the crime of torture pursuant to Article 172(1)(f) of the CC of BiH.

Witnesses FWS 71, FWS 72, FWS 76, FWS 85, FWS 86, FWS 111, FWS 119, FWS 138, FWS 172, and D all testified to these facts. These witnesses described how Nišić was taken out of his room on several occasions for interrogation, and that it was evident from his injuries, which some of the witnesses observed after interrogation, that he was severely beaten during those interrogations. FWS 76, who was in the same room with Nišić, specifically described the terrible physical state he was in when he was returned by the KP Dom guards and that his body was covered with bruises. The severity of his injuries were confirmed by other witnesses, such as FWS 111, who stated that he observed that many detainees suffered serious injuries from beatings, but that Nišić was the most severely injured of the detainees who were beaten during interrogations. These witnesses also established that Nišić was an officer in the municipality administration.

That these beatings were intended to cause Nišić severe physical pain is evident from the physical injuries described by the witnesses and the fact that Nišić was subjected to such harsh physical abuse on multiple occasions. According to the procedure in place, Nišić was taken to and returned from interrogations by KP Dom guards. Nišić was in the custody and control of KP Dom authorities and guards at the KP Dom facility. As the witnesses testified, each time he was taken out, it was in order to interrogate him for additional information. Each time he returned from interrogation he showed signs of physical assault. The beatings were committed during the course of a pattern of interrogations and were committed with the prohibited purpose of obtaining information or a confession from him.

FWS 76 and FWS 111 further testified that Nišić stated after having been returned to the room that he was beaten by Dragomir Zelenović. Both witnesses stated that Zelenović was not a KP Dom guard, and FWS 76 elaborated that Zelenović was a member of the military police. FWS 162 also testified that Dragomir Zelenović was in charge of the military police. The role of the military in the beating of Nišić was further confirmed by FWS 86, FWS 119 and D.

(iv) S.M.

The Prosecutor established beyond doubt that "the military policemen tortured and beat detainee S.M., having mistaken him for another detainee selected for interrogation; they threatened to take out his eye; they stopped at the moment [the Accused] Mitar Rašević appeared saying they had discovered a mistake and ordered the guards to return the seriously injured and bloody S.M. to the cell." These acts constitute the crime of torture pursuant to Article 172(1)(f) of the CC of BiH.

Witnesses D, Ekrem Zeković, FWS 76, FWS 83, FWS 86, FWS 111, FWS 119, FWS 138, FWS 142 and FWS 210 testified about these events, as did the Accused Mitar Rašević.

These testimonies establish that S.M. was taken from his room for interrogation and was later returned covered in blood, bruised and with a cut or injury below his eye. The witnesses testified that S.M. described to other detainees that he was beaten during his interrogation, and how those interrogating him had pressed a knife below his eye and threatened to cut it out. The Accused Rašević then intervened, saying that the interrogators were mistaken as to S.M.'s identity, and he was returned to his cell. The witnesses furthered described how another detainee with the same last name, F.M., was later taken away.

The physical abuse S.M. suffered, as evidenced by his visible injuries when returned to his room, together with the intense fear that would have been induced by the threat that his eye would be cut out, caused S.M. severe physical and mental pain and suffering. The context of these acts, particularly that they occurred during the course of an interrogation, demonstrates that they were intended to cause severe physical and mental pain and suffering. As a detainee at the KP Dom, S.M. was in the custody and control of KP Dom authorities and guards, and specifically in the control of his interrogators. Finally, the physical abuse and threats were committed with the prohibited purpose of obtaining information from S.M.

Witnesses D, Ekrem Zeković, FWS 76, FWS 86 and the Accused Rašević testified that S.M. was interrogated, beaten and threatened by members of the military police. FWS 76 and the Accused Rašević specifically named Dragan Zelenović as the primary perpetrator, along with other persons. FWS 76 and Ekrem Zeković testified that the Accused Todović or both the Accused together intervened during the interrogation of S.M. However, the Accused Rašević testified that he alone intervened, which was confirmed by FWS 83, FWS 138 and FWS 210. The testimony of these three witnesses and Rašević corroborate each other, and it is logical that Rašević, as the person who intervened, would remember that fact most clearly. Todović did not contradict Rašević that it was in fact Rašević and not Todović who was present. The Panel concludes that Ekrem Zeković and FWS 76, both credible witnesses, are nonetheless mistaken in this detail, and that Rašević alone was present and intervened.

FWS 76 also testified that the Accused told those interrogating S.M. to return him and call out another man. FWS 76 was the only witness to state that either Accused directed the guards or the interrogators to call out another detainee. In addition, the Accused Rašević testified that he only told those interrogating S.M. that S.M. was not the person they thought he was and that he did not tell them another name. The Accused's testimony in this regard is consistent and credible. Further, although F.M. was later taken out of his room, there is no evidence to suggest that this could have only happened if the Accused Rašević told the military interrogators about F.M. Accordingly, the testimony of FWS 76 is insufficient to establish that the Accused Rašević told the military police to take out F.M. after returning S.M. to his room. Although this testimony is inconsistent, it is a reasonable mistake given the circumstances, and moreover, this issue is not part of the allegation as pled.

b. Other Charges in Count 1b

With regard to the remaining part of the charges from this sub-count, the Panel concludes that, based on the presented evidence, it was impossible to establish the charges in Count 1b concerning the injured parties E.G., FWS 54, A.M., F.M., S., Zulfo Veiz, Salem Bićo, D.R., D.N., Juso Džamalija, Đ.H., Kemo Đelilovic, Ramo Dženduši ć, F.E., G.A., Nail Hodžić, I.K., K.I., Halim Konjo, Mustafa Kuloglija, M.F., M.E., R.H., Husko Rikalo, Š.H., Munib Veiz, FWS 214, FWS 113, FWS 71, FWS 76, I.I., and D.C.

With regard to E.G., FWS 54, A.M., F.M., S., D.R., D.N., Husko Rikalo, Zulfo Veiz, Ramo Dženduši ć, F.E., G.A., I.K., R.H, K.I. and M.F., the Prosecutor did not present any evidence on these charges.

With regard to Juso Džamalija, the Prosecutor did not establish beyond doubt that this victim was beaten at the KP Dom as opposed to having been beaten prior to his arrival at the KP Dom. FWS 250 suggested that this victim was beaten prior to his arrival at the KP Dom, and other witnesses who testified that this victim was beaten, namely FWS 58 and FWS 71, did not testify at all about where and when this victim was beaten.

With regard to Š.H., the Prosecutor failed to prove the crime alleged in the Indictment. Specifically, no evidence was introduced to establish that this victim was physically mistreated after June 1992 during the evening interrogations on the ground floor, as stated in the Indictment. The only evidence introduced was that this victim was physically mistreated in April 1992 soon after he arrived at the KP Dom. There is no evidence that this incident as described in the indictment occurred, or that this detainee suffered the treatment alleged in the indictment either at the alleged time, or at the alleged place, or in the alleged manner.

With regard to Salem Bićo, Kemo Đelilovic, Nail Hodžić, Halim Konjo, Mustafa Kuloglija, Munib Veiz, FWS 214 and FWS 113, FWS 71, I.I. and D.C.,, the Prosecutor did not prove all elements of the crime alleged. Although the witnesses testified that these persons were taken from their rooms, "beaten" and then returned to their rooms, they did not describe the details of the physical assault or the severity of any injuries these victims may have suffered. Therefore, this is insufficient to prove the essential elements of the offense of other inhumane acts, that is: that the physical mistreatment was of a character similar to those acts specifically enumerated in Article 172(a)(1); and that the acts caused great suffering, or serious injury to body or to physical or mental health.[46]

With regard to FWS 76, Đ.H. and M.E., the Indictment fails, pursuant to Article 284(a) of the CPC of BiH, to sufficiently plead the charge. Specifically, the Indictment merely states that these persons were "physically mistreated" but does not allege the nature of the act itself, the severity of the act, the seriousness of the injury, or the extent of the suffering of these detainees, which are essential elements of the crime of inhumane acts as a crime against humanity.

Considering the foregoing, the Panel harmonized the operative part of the Verdict with the established facts of the case pertaining to the description provided under Count 1b of the Indictment.

c. Count 1c: July 1993

The Prosecutor established beyond doubt that: "In early July 1993, after detainee FWS 216 had escaped and was then recaptured and returned to the KP Dom, one of the guards beat him; the detainee was confined in an isolation cell for 28 days during which Savo Todović and other guards mistreated him and beat him with a chain and bare hands all over his body; on the said day, Savo Todović informed all the detainees that, as a collective punishment for the escape of FWS 216, their food rations would be reduced and that work and medical

[46] *See, e.g., Krnojelac* Trial Judgment, para. 176 ("It is important to emphasize that the mere description of the assaults as 'beatings' does not by *itself* establish that the assaults constituted … 'inhumane acts'.").

treatment would be forbidden." These acts, as detailed below, constitute the offense of torture in violation of Article 172(1)(f) of the CC of BiH.

The testimonies of numerous witnesses, including the Accused, established that FWS 216 attempted to escape from the KP Dom in early July 1993. He was recaptured the next morning after his escape and returned to the KP Dom. The following facts were directly established through the credible and consistent testimony of Ekrem Zeković, that is, FWS 216, who requested that the Panel withdraw the protective measures previously ordered.

This witness clearly described that, upon his return to the KP Dom, he was immediately at the entrance to the compound severely beaten by a KP Dom guard, Milenko Burilo. This guard, who had been sitting on a bench outside the entrance, apparently waiting for Zeković's return, threw Zeković to the ground and started jumping on him. The Warden of the KP Dom, Milorad Krnojelac, and another guard attempted to restrain Burilo and protect Zeković. They then took Zeković inside the compound towards the solitary confinement cells. However, in the corridor, Burilo again grabbed Zeković and threw him against the wall. At that point, Zeković lost consciousness and later awoke inside a solitary confinement cell. While Zeković was confined in the solitary cell, KP Dom guards entered and kicked and beat him. Zeković testified that he did not recognize these guards, but that he later heard another guard whom he knew, although not by name, threaten to cut him into pieces with a knife.

Throughout that same day, other KP Dom personnel came into the solitary confinement cell to talk to Zeković, lecturing him that he should not have tried to escape and warning him that he would be interrogated and that another detainee had already told the guards everything about his escape. That night, Zeković was removed from the solitary cell and taken to the reception room for interrogation by the Accused Todović, Boro Ivanović, who, according to FWS 210 and Ekrem Zeković, was not a KP Dom employee but represented the military command in some fashion, and another person. Zeković testified that the Accused Todović threw him against a chair in the corner of the room and began beating him with some chains, before being stopped by Boro Ivanović. Zeković stated that he was only hit a couple of times on this occasion and that these were not severe blows, but that he was simultaneously suffering from the serious injury from the prior beating by the KP Dom guards. The Accused Todović and the others then began telling Zeković that they knew everything about his escape, that the military command had been informed that he had been killed while attempting to escape and that his survival depended on the information that he told them and his answers to their questions. They then told him that he had the night to think about what he would do and returned him to the solitary confinement cell, where he was chained to a ring in the middle of the cell.

Zeković testified that he was interrogated the next morning, in particular regarding any Serbs in the KP Dom or in Foča who were helping the detainees. Zeković was then taken to the compound, where all the detainees had been gathered, along with Krnojelac and Rašević. The Accused Todović talked to the detainees about Zeković's escape, and then, as the reliable testimonies of Zeković and numerous other witnesses established, informed the detainees that their food rations would be cut, that they would not receive medical care, that they would lose yard privileges and that they would not work. Zeković was returned to the solitary confinement cell, where he was kept for 28 days. On at least two occasions, he was taken out of the cell at night by three KP Dom guards and beaten with batons in the corridor. Zeković was again interrogated two days after his capture by the Accused Todović, but was not

mistreated during that interrogation. While confined in the solitary cell, Zeković only received half of the normal food rations.

The Panel concludes, on the basis of these facts, that Ekrem Zeković suffered severe physical and mental pain as a result of these events. As noted, the Panel should assess the severity of the injury in the whole context of a pattern of related acts, as is the case here. Accordingly, while the Panel, for example, does not conclude that the physical abuse by the Accused Todović alone caused severe physical injury, the Panel does conclude that the beating by Todović, together with the beatings by the KP Dom guards over the course of several days did cause such injury. The Panel notes in particular that the victim lost consciousness during the initial beating by the guard Milenko Burilo, and that the victim was beaten with batons on a number of occasions over the course of a few days by other guards. The Panel also concludes that the threat that the victim would be killed if he did not provide the interrogators with answers and information caused the victim severe mental pain.

The Panel further concludes that these acts were committed with the prohibited purposes of obtaining information from Ekrem Zeković and punishing him for his attempted escape. This context, the repetition of the acts and their severity, demonstrate as well that the acts were committed with the intent to cause severe physical and mental pain. Finally, the Panel concludes that the victim was generally in the custody and control of KP authorities and staff and specifically in the control of the perpetrators of the beatings and the interrogators.

The Accused questioned the severity of the blows with a chain by the Accused Todović, and further suggested that there was no need to interrogate the victim as the KP Dom authorities had obtained all information about the escape attempt from another detainee. As noted, the Panel considered the beating by the Accused Todović in the context of a course of related beatings. In addition, the Panel concludes that the purely hypothetical suggestion that it was not logical to interrogate the victim does not raise doubts concerning the veracity of the victim's testimony, or the establishment of the element of prohibited purpose.

d. Other Charges in Count 1c

With regard to the remaining allegations in this sub-Count of the Indictment, the Panel concludes that, based on the presented evidence, it was not possible to establish that, as alleged in Count 1c of the Indictment, "[Todović] ordered that detainees FWS 73, FWS 110, FWS 144, FWS 210, for a period of 10 days, as well as approximately 10 other detainees, all work companions of FWS 216, be taken to the administration building where about 10 guards beat them; while Savo Todović and other guards beat and kicked detainee FWS 73 in his lower abdominal region and they kicked FWS 110 until he lost consciousness; after that the aforesaid detainees were locked in solitary confinement for various time periods up to 15 days."

Only three witnesses who testified regarding this incident were direct participants, namely FWS 82, FWS 210 and A, and there were substantial inconsistencies between their testimonies. What the witnesses agreed upon was that, following the discovery that Ekrem Zeković had escaped, all the detainees who worked with him in the metal workshop, approximately ten in total, were taken to the reception room of the administration building. There, the KP Dom staff, including Milorad Krnojelac, both Accused and some KP Dom guards, and Todović in particular, questioned the detainees about the escape, cursing at them, threatening them, cajoling them and even attempting to bribe FWS 210 to tell them where

Zeković had gone. The witnesses consistently testified that Todović threatened to shoot them if they did not tell him where Zeković had gone. The detainees were then taken to the metal workshop, where they were again questioned, and then finally taken to the segregation cells.

The Panel notes that three allegations are charged in this part of the Indictment. First, most generally, that approximately 14 detainees were taken to the administration building on the orders of Todović, where they were then beaten by about 10 guards. Second, that Todović and other guards beat and kicked FWS 73 in his lower abdominal region. Third, that Todović and other guards kicked FWS 110 until he lost consciousness.

With regard to the first and more general allegation, that 14 detainees were taken to the administration building where they were beaten by about 10 KP Dom guards, there were serious inconsistencies between the witnesses' testimonies. In particular, FWS 82 testified that he was not physically abused by Todović when he was taken out of the segregation cell and questioned, did not describe any of the other nine detainees with him in the segregation cell as having been abused and did not testify that he heard the sounds of abuse while in the segregation cell. In particular, the Panel notes that FWS 82 testified that other detainees, when questioned, said that he, FWS 82, knew best about Zeković's escape, but that he was nonetheless not physically mistreated by Todović when he was questioned. Witness A provided significantly different testimony, testifying that he heard the sounds of cries and shouts when he was in the segregation cell, and further that, after he was taken out of the cell, he saw Todović slapping another detainee and pointing a gun at his head and was himself punched and slapped repeatedly by two KP Dom guards while other guards looked on. FWS 210 testified that another detainee with him in the segregation cell was moaning in pain and complaining that he had been beaten, and that he himself had been punched and kicked once when brought to the reception room. However, FWS 210 also testified that the guard who punched and kicked him was quickly stopped by another guard, and, more importantly, that he himself was not beaten or mistreated afterwards even though he testified that he was taken out of the segregation cell and questioned every few hours throughout the first night. FWS 210 did testify generally that he heard the sounds of beatings when he was in the metal workshop, but he did not testify that he heard the sounds of beatings while he was in the segregation cell.

These inconsistencies can be accounted for by differences in recollections and ability to observe, as well as by the types of questions asked in direct examination at trial. However, the testimony, though revealing of the reaction of the Accused, and especially Todović, to the escape by a detainee, does not, taken individually or collectively, establish the allegations as stated in the Indictment.

With regard to the latter two more specific allegations, FWS 119 was the only witness who testified concerning the mistreatment of FWS 73 and FWS 110. FWS 119 was not among the detainees who were questioned and taken to solitary confinement, but learned about what had happened from other detainees who were present. Neither FWS 82 nor FWS 210 even mentioned these detainees. While A testified that FWS 73 was brought to the solitary confinement cells, after the detainees who worked in the metal workshop, along with others who socialized with Zeković, he did not testify that FWS 73 was physically mistreated or abused. FWS 119 testified that he had been told by both FWS 73 and FWS 110 that they had been "beaten" by the Accused, but did not describe the extent and severity of their injuries. Accordingly, even if the Panel were to conclude that FWS 73 and FWS 110 were physically mistreated, it was not established beyond doubt that this mistreatment caused sufficient injury

to rise to the level of a criminal offense; moreover, there is no evidence for the specific factual allegations, namely that Todović kicked and beat FWS 73 in his lower abdomen or that he, along with the guards, kicked FWS 110 until he lost consciousness, as alleged in the Indictment.

The Panel recognizes that witness A testified that he was kicked repeatedly by Todović, which FWS 210 confirmed in part. However, this incident was clearly not alleged in the Indictment, particularly as A testified that Todović, not the guards, kicked him and as it appears from the testimony of A that this occurred before A was taken to the administration building.

Finally, while the Panel is satisfied that the detainees were kept in the segregation cells for a period of up to 15 days, the Prosecutor did not introduce any evidence to establish the elements of a criminal offense. In contrast to the witness testimony regarding conditions in the segregation cells during the months of April, May and June 1992 – discussed previously in connection with Count 1b – there was no evidence that the conditions in the segregation cells at the time of Ekrem Zeković's escape in July 1993 were any worse than the conditions in the regular detainee housing units. FWS 210 specifically testified that, while he was in the segregation cell, Todović asked him if he needed anything and gave him a blanket when requested.

C. COUNT 2: MURDER

1. Elements of the Crime

Article 172(1)(a) of the CC of BiH criminalizes the act of "depriving another person of his life (murder)". The elements of this offense have previously been noted in the *Dragan Damjanović* First Instance Verdict, pgs. 53, 54, as:

1) the deprivation of life; and
2) the direct intention to deprive of life, as the perpetrator was aware of his act and wanted the act to be perpetrated.

The Panel concludes that the legal definition of the offense under Article 172(a)(1) corresponds to the legal definition of the offense under customary international law at the relevant time.[47]

The death of the victim need not be proved by evidence that the victim's body was recovered. As the Trial Chamber stated in *Tadic*, "Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death."[48] The death of the victim can be inferred, rather, in the absence of a recovered body, from the totality of the circumstances established through the evidence presented, so that the victim's death from the acts charged is the only reasonable inference.[49] Factors that can support such an inference include: proof of incidents of mistreatment directed against the victim; patterns of mistreatment and disappearances of other individuals in similar circumstances; a general climate of lawlessness where the alleged acts were committed; the length of time which has elapsed since the victim disappeared; and the fact that there has been no contact between the victim and persons the victim would be expected to contact, such as the victim's family.[50] As to the causal link between the act of the perpetrator and the death of the victim, the Panel concludes that the perpetrator's act must be a substantial cause of the victim's death.[51]

2. Factual Findings and Conclusions

The Prosecutor has proven beyond doubt that, as stated in Count 2 of the operative part of the Verdict, 18 named persons and an unknown number of other persons were killed at the KP Dom. These acts constitute the crime of deprivation of life (murder) pursuant to Article 172(1)(a) of the CC of BiH.

In analyzing the allegations presented in Count 2 of the Indictment, the Panel relied on the testimonies of a large number of witnesses, primarily FWS 03, FWS 65, FWS 71, FWS 76, FWS 83, FWS 85, FWS 86, FWS 111, FWS 113, FWS 119, FWS 142, FWS 162, FWS 172, FWS 182, FWS 210, B, E and Ekrem Zeković. The general description and pattern of events

[47] *See, e.g.*, *Brdjanin* Trial Judgment, para. 381.
[48] *Tadic* Trial Judgment, para. 240. *See also Prosecutor v. Hassan Ngeze,* ICTR-97-27, Oral Decision, 21 June 2001.
[49] *Krnojelac* Trial Judgment, para. 326.
[50] *Id.*, para. 327.
[51] *See, e.g., Celebici* Trial Judgment, para. 424 ("[T]he conduct of the accused must be a substantial cause of the death of the victim.").

as described below was drawn from the consistent and credible testimonies of these witnesses.

As established by the testimonies of witnesses, beginning approximately in the second half of June 1992, a large number of detainees were taken from their rooms by KP Dom guards in a series of related and connected events. Witnesses E, FWS 113, FWS 119 and FWS 142 specifically referenced some of the incidents as having occurred on or around Vidovdan (St. Vitus' Day), which falls on 28 June in the Gregorian calendar. While the Panel cannot conclude that all the incidents described occurred on specific dates, the Panel is satisfied that that the events described occurred in the weeks before and after those dates, that is, from mid-June through early July 1992.

As described by FWS 03, FWS 65, FWS 71, FWS 113, FWS 119, FWS 162, FWS 210 and E, during that time, detainees were taken out of their rooms either individually or in small groups by KP Dom guards at some point during the evening. The testimonies of FWS 03, FWS 65, FWS 71, FWS 83, FWS 113 and E established that the KP Dom guards selected these detainees specifically and by name, and at least where multiple individuals were removed from their rooms, the KP Dom guards had lists from which they read the names of the detainees to be taken. From the rooms, the KP Dom guards escorted the detainees to the metal gate leading from the inner compound of the KP Dom to the administration building of the KP Dom. As FWS 142 testified, on at least some occasions, the detainees were lined up in front of this gate, prior to being taken into the administration building, and some of the detainees were hit or slapped while there. In all instances, detainees were taken into the administration building either individually or in small groups, and once inside the administration building were taken to a certain room.

Coming from this room, other detainees, in their rooms in the housing units, could hear the sounds of beatings, blows, screams, moans and cries for help, as well as voices asking questions or shouting at certain detainees by name. FWS 65, FWS 119 and FWS 182 stated that they could hear the dull sound of blows being struck against bodies. More importantly, FWS 03, FWS 65, FWS 83, FWS 86, FWS 111, FWS 113, FWS 142, FWS 162, FWS 172, FWS 210 and E testified that they could infer that detainees were being severely beaten from their cries and moans of pain, begging that the beatings stop, which they could clearly hear. In particular, witnesses stated that they could recognize the pleading, moans and screams of Kemal Tulek (FWS 119), Kemal Dželilović (FWS 83), Halim Konjo (FWS 03, FWS 172 and FWS 210) and Munib Veiz (FWS 83).

Numerous witnesses also specifically testified that they heard voices calling out the name of Nurko Nišić, taunting him and asking him questions. FWS 142 testified that he heard a voice ask Nurko whether he knew what had happened to a man named Banović, nicknamed Bota, and that he then heard Nurko scream loudly. Ekrem Zeković similarly testified that he heard a person ask Nurko what had happened to Bota. FWS 142 and Ekrem Zeković explained that they later learned Banović was injured in a mine explosion. FWS 03 stated that he heard voices yelling at Nurko, telling him to die, while FWS 83 stated that he heard persons ridiculing Nurko. Finally, FWS 71 testified that he heard persons asking Nurko where his gun was and where his flag was.

This consistent, detailed and credible aural evidence was confirmed by the visual evidence of four witnesses, FWS 71, FWS 83, FWS 210 and Ekrem Zeković. FWS 71 and FWS 210, who were able from Room 11, where they were both held at the time, to partially see into the

room in which these beatings took place, testified that they saw detainees being beaten with batons, sticks, and similar implements; Ekrem Zeković and FWS 83 confirmed that persons in Room 11 could see into the room where these beatings took place. FWS 71, FWS 83 and Ekrem Zeković also testified to the events that followed the beatings. FWS 83, who was not able to see into the room where the beatings occurred from his vantage point in Room 11, but could see into area adjacent to that room, testified that he saw a KP Dom guard returning to the room carrying blankets, while FWS 71 testified that he saw the detainees being wrapped up in these blankets inside the room following the beatings. Ekrem Zeković, who similarly could not see into the interrogation room but could see the area adjacent to the room, testified that he saw a person carrying bodies wrapped in blankets from the room.

Following these beatings, the detainees identified by the witnesses as having been taken away in connection with these events were not brought back to their rooms, and were indeed never seen again, at the KP Dom or elsewhere. Ekrem Zeković, FWS 65, FWS 76, FWS 83, FWS 86, FWS 111, FWS 182 and E testified that they heard the sounds of gunshots shortly after the sounds of beatings had ceased, and from this they inferred that the detainees had been shot and killed. Ekrem Zeković, FWS 65, FWS 76, FWS 83, FWS 86 and FWS 182 also testified that shortly after they heard the gunshots, they heard the distinctive sound of a Zastava automobile belonging to the KP Dom, which they could identify because of its broken exhaust system, driving away from the KP Dom compound towards the Drina River bridge. Ekrem Zeković, who worked in the metal and mechanical workshop, testified that on a day after one of the evenings when gunshots were heard, he saw blood traces in this car, and FWS 65 testified that Šefko Kubat, who also worked in the metal and mechanical workshop, similarly told him that he saw blood trails in that vehicle.

The witnesses testified that this general course of events was repeated on a number of occasions during June and July. Witnesses also distinguished these events from the beatings that preceded them and the putative and real exchanges that followed. For example, both FWS 113 and FWS 172 testified that exchanges did not begin until later. Similarly, the witnesses were clear that, in contrast to prior beatings and interrogations, after these events the victims were not returned to their rooms; the witnesses also did not testify that the victims were seen in the segregation cells. They were not in fact seen at the KP Dom again.

The 18 named victims identified in Count 2 of the operative part of the Verdict were specifically linked to these events by a number of witnesses. The identity of 15 victims was confirmed by the consistent testimony of multiple witnesses. With regard to Alija Altoka and Enko Čedić, FWS 71 was the only witness to identify these victims. However, the Panel concludes that FWS 71's testimony as to the detainees taken away during this time was highly credible. FWS 71 testified that he compiled notes about the events at the KP Dom following his release while they were still fresh in his memory, and was able to specifically identify the names of many, if not most, of the victims of these events. Further, except as to these two victims, his identification of other victims was confirmed by numerous other witnesses.

Similarly, the Panel established that Adil Krajčin was a victim of these events on the basis of the credible testimony of witness E. E was in the same room with this victim, and testified that when this victim was taken from his room during this time period, never to return, he was specifically told by the KP Dom guard that he would not need his coat; this can be contrasted with the pattern for exchanges, in which detainees were told to pack and bring all their belongings because they were going to be exchanged. E further testified that Krajčin's

life was threatened after his interrogation because Krajčin had confessed that he was a member of the SDA. While other witnesses provided different, though less specific, testimony concerning the circumstances in which Krajcin was taken out of the KP Dom, E's testimony as to Krajčin's fate was by far the most consistent and reliable.

The Panel recalls that it previously concluded in Count 1b that Nurko Nišić was subjected to severe beatings amounting to torture on previous occasions. The torture described above was distinct from the events forming the basis of this offense. The witnesses specifically distinguished between those beatings after which Nurko Nišić was returned to his room with visible injuries, and this incident, after which he was not returned to any room and was in fact never again seen at the KP Dom or elsewhere.

The fatal beatings and shootings were predominately perpetrated by members of the military police, but at least one KP Dom guard also participated. FWS 82, FWS 162, FWS 182 and Ekrem Zeković testified that they either heard the name of or recognized the voice of members of the military police, whom they were able to identify by name or description, during these beatings. In addition, other witnesses, such as FWS 76, FWS 86, FWS 111 and FWS 210, testified generally that members of the military police were the primary perpetrators of previous beatings at the KP Dom. The participation of at least one KP Dom guard is established through the testimonies of FWS 71, FWS 83, FWS 210 and Ekrem Zeković; these witnesses consistently and specifically identified this guard by name as Milenko Burilo. These witnesses testified that they saw and recognized the voice of Milenko Burilo, and that he was participating in these events. FWS 71 testified that he saw this KP Dom guard beating and taunting one of the victims, Nurko Nišić; Ekrem Zeković also testified that he heard this guard shouting at Nišić. Similarly, FWS 210 testified that he saw this same KP Dom guard grabbing another victim, Mustafa Kuloglija, although he did not see this guard beat any victim. Finally, both FWS 83 and Ekrem Zeković testified that they saw this guard carrying the blankets in which the victims were later wrapped.

The facts are sufficient to establish these 18 named victims' deaths beyond doubt, and that those deaths were the result of the acts described. These victims were removed from their rooms and severely beaten during an organized and systematic series of events. They were never again seen at the KP Dom, and indeed are still missing.[52] Gunshots were heard following at least some of these beatings, and bodies wrapped in blankets were seen being taken from the room in which the beatings occurred.

The facts established by the evidence are sufficient to prove the necessary intent beyond doubt. The large number of victims, the systematic and organized manner in which the victims were called out of their rooms and beaten, the severity of the beatings, the shooting of at least some victims, the disposal of bodies and the repetition of these events together demonstrate the intent to kill. In addition, some witnesses, such as FWS 76, FWS 86 and E, testified that some of the victims, specifically Adil Krajčin, Nurko Nišić and Zulfo Veiz, had stated prior to these events that their lives had been threatened and related their fears that they would be killed.

The Accused disputed the testimony of those witnesses who testified that they were able to see into the room where the beatings occurred. FWS 71 and FWS 210 admitted that the

[52] FWS 210 testified that he saw Halim Konjo's body in the morgue at the Foča hospital while working there. This is the only victim whose death is directly established in this manner. FWS 139 testified that the warden of the KP Dom, Milorad Krnojelac, told detainee R.J. that Halim Konjo died as a result of the beatings described.

window of the room was partially blocked, but both witnesses further testified that the top ½ or ⅓ of the window was not blocked. FWS 83 was also in Room 11, and although he could not see into the room where the beatings occurred from his vantage point in Room 11, he confirmed that the window was not fully covered and testified that some in the right position could see through the gap. Ekrem Zeković also confirmed that detainees in Room 11 could see into the room. Although FWS 71 and FWS 83 testified that the window was blocked by a board, while FWS 210 testified that the window was painted white, the Panel concludes that this is only a minor discrepancy and does not call into question these witnesses' otherwise wholly consistent testimonies. The witnesses' testimonies on this issue were consistent and credible, as were the reports of what they saw through the unobstructed portion of the window. The Panel also confirmed by visiting the KP Dom that the window of the room in the administration building where the murders and tortures took place was visible from Room 11 in the detainee housing block; the Panel further noted that the distance between Room 11 and the administration building was relatively short. This observation corroborates those witnesses' testimony on this point and supports their credibility on the other matters about which they testified.

The Accused also noted that Ekrem Zeković did not mention in a prior statement that he heard the voice of the KP Dom guard during the beatings. The Panel finds credible his explanation that he did not recall and was not asked about all details on every occasion he gave a statement about the KP Dom. Moreover, his testimony at trial on that issue, which was subject to cross-examination, was clear, certain and corroborated by other testimony.

The Accused also disputed that the witnesses were able to hear the sounds of beatings and gunshots, suggesting that noise from the road in front of the KP Dom and the gunfire in the area generally would have prevented other detainees from hearing what occurred in the administration building. The Panel visited the KP Dom and was able to observe the proximity of the windows in the housing units where the witnesses were located to the administration building generally and the window of the interrogation room they described. The Panel concludes that the buildings are quite close to one another, and there are no intervening obstructions or vehicular traffic between them, so that the prisoners in the Room 11 could hear what was going on in the interrogation rooms.

D. COUNT 3: IMPRISONMENT AND OTHER INHUMANE ACTS

1. Elements of the Crimes

a. Imprisonment

Article 172(1)(e) of the CC of BiH criminalizes "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" as a crime against humanity. Accordingly, the elements of the crime of imprisonment in violation of Article 172(1)(e) of the CC of BiH are:

1) imprisonment or other severe deprivation of physical liberty; and
2) in violation of fundamental rules of international law.

The *mens rea* necessary for this crime is the intent to deprive the victim arbitrarily of physical liberty or in the reasonable knowledge that the act is likely to cause arbitrary deprivation of physical liberty.[53] The ICRC has noted that, as to the first element, internment is the most severe form of deprivation of physical liberty.[54] The fundamental rules of international law to which the second element refers are the international legal norms established in customary and conventional humanitarian and human rights law, including: Articles 42 and 43 of the Fourth Geneva Convention, Article 9 of the Universal Declaration of Human Rights ("UDHR") and Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"). Those norms are violated when a person, regardless of the existence of a state of conflict, is arbitrarily deprived of his or her liberty. Arbitrary deprivation depends on a case by case analysis, but includes imprisonment without a basis established by law.

The Panel concludes that the legal definition of the offense of imprisonment under Article 172(1)(e) corresponds to the legal definition of the offense under customary international law at the relevant time.

The Trial Chamber in *Krnojelac* concluded that "a deprivation of an individual's liberty is arbitrary, and therefore unlawful, if no legal basis can be called upon to justify the initial deprivation of liberty."[55] Evidence that persons deprived of their liberty were not informed of the reasons for their detention or that the justification for detention was not considered in court or administrative proceedings can, in context, circumstantially demonstrate that the detention was not, in fact, instituted on legal grounds.

b. Other Inhumane Acts

As previously stated, the elements of the crime of other inhumane acts as a crime against humanity pursuant to Article 172(1)(k) of the CC of BiH are:

1) the acts must be of a similar gravity to those acts specifically enumerated in Article 172(a)(1);

[53] *See Krnojelac* Trial Judgment, para. 115.
[54] ICRC Commentary to Fourth Geneva Convention, Art. 41.
[55] *Krnojelac* Trial Judgment, para. 114.

2) the acts must cause great suffering, or serious injury to body or to physical or mental health; and
3) the acts must have been performed with the intention of cause great suffering or serious injury.

The legal issues previously discussed with regard to the crime of other inhumane acts are equally applicable to the Panel's analysis of the allegations and facts under this Count.

Inhumane living conditions can cause sufficient suffering or injury and be of sufficient gravity so as to constitute the crime against humanity of other inhumane acts. The ICTY concluded in both *Krnojelac* and *Kvocka* that inhumane living conditions can constitute the crime of other inhumane acts as a crime against humanity.[56] As with other acts charged under Article 172(1)(k) of the CC of BiH, the key inquiry is whether the acts were of similar gravity to the crimes specifically enumerated in that Article and whether the acts caused serious injury or great suffering.

2. Factual Findings and Conclusions

The Prosecutor established beyond doubt the facts as stated in the preambular paragraph that 700 non-Serb detainees were unlawfully imprisoned at the KP Dom and in Count 3 alleging that the detainees were imprisoned in inhumane conditions. These acts, as described below, constitute the crime of imprisonment in violation of Article 172(1)(e) of the CC of BiH and the crime of other inhumane acts in violation of Article 172(1)(k) of the CC of BiH.

a. Imprisonment

The evidence establishes beyond doubt that the non-Serb detainees at the KP Dom were imprisoned arbitrarily and without legal justification. The evidence establishes, in fact, that the detainees were imprisoned simply on the basis of their ethnicity, without individualized suspicion and without regard to law.

It is unquestionable that the non-Serb detainees at the KP Dom were imprisoned and deprived of their physical liberty. As all the prosecution witnesses testified, the non-Serb detainees were unable to leave the KP Dom of their own volition. The KP Dom compound, including the housing units where detainees were kept locked in their rooms, is surrounded by a high wall. In addition, as evidenced through witness testimony and Exhibit P-10, a minefield was laid around the KP Dom in the summer of 1992. As FWS 138 testified, armed KP Dom guards stationed in the guard towers and at the KP Dom gate provided external security for the prison complex. Internally, security was provided by KP Dom guards stationed within the compound and in the administration building. As the Accused both confirmed, detainees

[56] *Krnojelac* Trial Judgment, para. 133; *Kvocka* Trial Judgment, paras. 190-192. *See also*, *Limaj* Trial Judgment, paras. 288, 289 (concluding that inhumane living conditions caused serious mental and physical suffering and constituted the offense of cruel treatment under Article 3 of the ICTY Statute); *Simic* Trial Judgment, para. 97 (concluding that inhumane living conditions – including harassment, humiliation, the creation of an atmosphere of fear through torture and other forms of physical and psychological abuse, an insufficient supply of food and water, lack of space, unhygienic detention conditions, and an insufficient access to medical care – were of similar gravity to other crimes against humanity and therefore constituted the *actus reus* of persecution); *Celebici* Trial Judgment, para. 1119 (concluding that inhumane living conditions – including an atmosphere of terror and deprivation of adequate food, water, sleeping and toilet facilities and medical care – constituted the offenses of cruel treatment and willfully causing great suffering or serious injury to body or health under Article 2 of the ICTY Statute).

were only allowed to leave the KP Dom upon an order signed by civil or military authorities in Foča.

The testimony of all prosecution witnesses was that the detainees at the KP Dom were non-Serb civilians. Based upon the testimonies and personal details of all prosecution witnesses, it is evident that the detainees were of all ages and health status, including the elderly, the physically ill, the mentally ill and the disabled. FWS 119 suffered from … and had to use crutches, while FWS 65, FWS 71 and FWS 111 testified that sick, mentally-disabled and mentally-ill persons were also detained at the KP Dom. The detainees were from all backgrounds and professions, from laborers and factory workers, to doctors, to farmers, to company managers. As discussed previously with respect to the widespread and systematic attack, they were arrested individually and *en masse*, some with family and neighbors, some with strangers, some alone. They were arrested at their homes or places of work, from places where they had sought shelter from the fighting, and some, including FWS 08 and FWS 71, were even arrested outside the country where they had fled and brought back to Foča to be imprisoned at the KP Dom. The sole common characteristic that can be identified is that all were non-Serbs, predominately of Bosniak ethnicity. The witness testimony was corroborated by Established Facts P36 and P71.

All of the prosecution witnesses who were detainees at the KP Dom testified that none of those apprehended were shown warrants or told the reasons for their arrest and imprisonment. At most, some detainees were told that they would have to give a statement and would then be allowed to return home. In no cases were they told that they were to be imprisoned. During their imprisonment, they were interrogated by members of the civilian police and asked about any weapons they may have had and whether they were members of the SDA or any other party, as established by FWS 03, FWS 86, FWS 115, FWS 250, C and E. Some detainees signed written statements, while others were not asked to. Having been detained and imprisoned at the KP Dom, none of the detainees were provided with a legal explanation of the reasons for their detention. Detainees such as FWS 08 and FWS 210 who wrote letters or asked about their detention, the reasons for it and any charges against them received no response. No detainees were given access to court proceedings to challenge their detention. Indeed, none of the detainees were ever charged and tried, much less convicted of any charges. These violations of the procedural rights guaranteed under international law were gross – all rights were denied – and extensive – all detainees were similarly denied their procedural rights.

On the basis of these facts, established through the testimonies of all witnesses who had been detained in the KP Dom, the Panel concludes that it has been proven beyond reasonable doubt that the non-Serb detainees at the KP Dom were initially, and continued to be, imprisoned arbitrarily, that is, without legal justification of any kind.

As to the number of non-Serb civilians unlawfully imprisoned at the KP Dom, Amor Mašović testified that, according to the records of the Federation Commission on Missing Persons, approximately 1100 civilians were imprisoned at the KP Dom at some point between April 1992 and October 1994. Numerous detainees, such as FWS 65, FWS 71, FWS 76, FWS 139 and others, also testified that the detainees themselves attempted to keep count of the number of detainees and that approximately 600 civilians were imprisoned at the KP Dom at various times, particularly in the summer of 1992. They noted that this was not an exact number because the number fluctuated as detainees left while other civilians arrived at the KP Dom. This information was corroborated by Established Facts P60 and P64.

Accordingly, the Panel is satisfied is that at least 700 non-Serb civilians were unlawfully imprisoned at the KP Dom during the relevant period.

Addressing in part the arbitrariness of the deprivation of liberty, the Accused testified that they were informed by the military command that the detainees were Prisoners of War and were being detained on that basis. Defense witness Milutin Tijanić similarly testified that he was told by the President of the Executive Board when he assumed his position at the KP Dom in 1993 that the detainees at the KP Dom were Prisoners of War. The Accused argued, therefore, that they were not aware detainees were illegally and arbitrarily deprived of their liberty. The Panel does not agree.

The Panel notes first that the detainees were not prisoners of war, but were in fact civilians, as established above. The mere assertion that someone is a prisoner of war does not establish that fact, which is rather a legal determination. More importantly, the authorities and staff of the KP Dom could not have reasonably, honestly and in good faith believed that the detainees were Prisoners of War. Those at the KP Dom both knew the circumstances of the attack against the non-Serb civilian population of Foča and the circumstances in which the detainees were initially arrested and imprisoned. The personal characteristics and circumstances of the detainees discussed above were equally obvious to those at the KP Dom. Finally, those at the KP Dom were the neighbors, friends and acquaintances of the detainees and would have known that those detainees they were acquainted with personally were civilians, not Prisoners of War. Ultimately, when questioned during their testimony, both Accused admitted that they in fact knew at the relevant time that the non-Serb detainees were not prisoners of war and had not been deprived of their liberty and imprisoned pursuant to any legal process. The staff at the KP Dom must have been aware, as well, that the detainees were civilians who had initially been deprived of their liberty arbitrarily and solely on the basis of their ethnicity, and that the continued maintenance of that initial deprivation of liberty was also arbitrary and illegal.

The Accused argued that the detainees were arrested and transported to the KP Dom by military police, and that they were not responsible for those acts. The Panel notes in this regard that its conclusions are with respect to the continued imprisonment and deprivation of liberty of the non-Serb detainees at the KP Dom, not the initial apprehension, which was not charged in the Indictment.

Accordingly, the Panel concludes that the detainees were intentionally deprived of their liberty arbitrarily and without legal justification, and that the maintenance of this intentional and arbitrary deprivation of liberty at the KP Dom constituted the crime of imprisonment as a crime against humanity.

b. Other Inhumane Acts (Living Conditions)

As described by a number of witnesses, including FWS 65, FWS 119, FWS 76, FWS 142, D and Ekrem Zeković, the detainees were kept in overcrowded rooms, with up to 50, 60 or even 70 detainees kept in one room. Although each room contained a number of separate dormitories or smaller rooms, and detainees were largely provided with a number of beds, the living and sleeping space was insufficient for these large numbers of detainees. Similarly, a number of witnesses, including A, FWS 250 and Ekrem Zeković testified that, particularly during the summer of 1992, the solitary confinement cells, designed for one prisoner as the name implies, were overcrowded, with up to six or seven detainees kept in one cell.

This overcrowding was exacerbated by the specific living conditions in which the detainees were held. Until the summer of 1993, detainees were kept locked in their overcrowded rooms throughout the day and were denied yard privileges. The detainees were unable to even simply move around outside their rooms except when taken to eat their meals in the prison canteen, and only those detainees who went to labor were permitted to leave their rooms for any significant period of time. Other detainees, like witness A, were kept in the solitary confinement cells, more properly called "segregation cells", for extensive periods of time, 30 days in the case of A, and were prevented from leaving at all, as their meals were brought to them in their cells. A number of witnesses described a Slovenian reporter who was held in segregation during his entire detention until December 1992; FWS 182 testified that a certain Tulek was held in segregation for 102 days. These facts were established by a large number of witnesses, including Ekrem Zeković, FWS 138, FWS 142, FWS 172 and E.

Detainees were also denied the means to maintain their personal hygiene, at least until the summer of 1993. Detainees were not provided with soap, toothbrushes and toothpaste, and were not able to take baths or showers or otherwise provided with hot water to clean themselves. The only clothes detainees had were the clothes they were wearing upon their arrest and some uniforms formerly used by prisoners at the KP Dom. They were unable to wash these few pieces of clothing or their bedding. The Accused Rašević did apparently provide some detainees with soap to clean themselves and their clothes, but other witnesses testified that they did not receive hygiene products until 1993. Similarly, some detainees were able to devise methods to heat water for washing, but these efforts were punished by the KP Dom guards, and not all detainees were able to heat water for themselves. These facts were established through the testimonies of a number of witnesses, including FWS 65, FWS 113, FWS 115 and FWS 119.

Living conditions in the KP Dom were particularly harsh during the winter of 1992-1993. The witnesses were consistent in their descriptions of the conditions that winter. They testified that the detainees were not provided with even the most basic protection against the cold weather. There was no heating in the rooms where the detainees were kept, and there was no glass or other barrier in the broken windows. The detainees were not provided with winter clothing, but had only those clothes they were wearing when arrested and the few uniforms previously used by convicts that they found. The detainees largely relied on those blankets they found in their rooms to stay warm. This testimony was never contradicted and is entirely credible. These brutal conditions were made much worse by the actions of the KP Dom guards. Detainees attempted to use thread that they found and make winter clothing for themselves, such as gloves or vests, out of the extra blankets that became available as detainees were taken out of the KP Dom. However, as FWS 08, FWS 65, FWS 71 and FWS 119 testified, when the guards discovered these activities, they punished the detainees by taking the clothing they had made and all extra blankets except for two or three blankets each, and put some detainees in segregation as punishment. As a result of these terrible winter conditions, detainees suffered from frostbite and their extremities became swollen and red. FWS 08, FWS 65, FWS 119, FWS 139, A and Ekrem Zeković, among others, testified to the harsh living conditions during that winter.

It was established that the boiler room and the heating system in the rooms were broken as a result of the attacks on the facility in the spring of 1992. FWS 250 specifically testified that he was directed to fix the heating system, and the boiler room was operational by the fall of 1992 and provided hot water to the kitchens. The radiator system that heated the detainees'

rooms remained broken, and he was not ordered to repair it. FWS 250 also testified that coal was used to heat the boiler, and was procured from some source, although the Accused Rašević stated that the coal mine associated with KP Dom was not reopened until 1993. Although the KP Dom staff was admittedly dealing with shortages of fuel and building materials, the facts confirm that available steps to protect the detainees from the harsh winter conditions were not taken. Broken windows were not fixed or covered. FWS 65 testified that there were wood stoves in the administration building and that detainees would chop wood for the administration building and the kitchen. The Accused Rašević stated that it was not possible to simply cut wood in the forests; however heating was provided in the administration building through wood stoves, but not in the detainees' rooms. Ekrem Zeković also testified that in the fall and winter of 1992, the laborers in the metal workshop built furnaces for the soldiers on the front lines. The Accused Todović testified that the broken windows in the rooms were repaired with new glass or cardboard, but the Panel does not find this assertion credible in light of the testimony of FWS 139 that at least some of the broken windows were not repaired in any fashion. This is corroborated by the testimony of the witnesses detailed above that the conditions at the KP Dom that winter were particularly harsh, and thus the Panel concludes that FWS 139's testimony in this regard is consistent and credible. Most indicative that the conditions were intended to be inhumane was the fact that the KP Dom guards, as previously described, punished the detainees for their own attempts to warm themselves by seizing extra blankets and the winter clothing detainees had sewn for themselves. Any suggestion that the guards properly punished the detainees for destroying prison property and breaking prison rules is absurd in those circumstances.

The most severe and pervasive physical deprivation inflicted upon the detainees, which proved the most debilitating and physically damaging, particularly in terms of the number of detainees who suffered, was the intentional deprivation of adequate food. As nearly all detainees testified, the daily ration of food was limited to a small amount of bread, tea and a weak broth or some rice, which was grossly inadequate in both quantity and quality. Nearly every witness described how they rapidly lost significant amounts of weight, up to 40 kilos, during their detention. As FWS 65, FWS 104, FWS 172 and FWS 250 testified, loaves of bread were cut into 10 to 15 slices, and each detainee was only given one of these small slices. Similarly, detainees were not given meat or vegetables and therefore did not receive the protein, vitamins and nutrients necessary to sustain their health. In contrast, the prison staff and Serb convicts were given larger portions of more nutritious food. FWS 250, who worked for a time in the kitchen at the KP Dom, testified that the Serbs received better quality of food as compared with the detainees, and that the Serb convicts were given as much bread as they wanted. This was confirmed by FWS 162 and FWS 182, who described how bread would be leftover and discarded after the Serb convicts had eaten, as well as by FWS 65, FWS 71, FWS 76, FWS 82 and FWS 119, who all testified that the Serb convicts received better quality food than the non-Serb detainees.

The Defense offered a number of exculpatory arguments regarding the inadequate food given to detainees. The Accused Todović testified that there was a general famine in Foča in 1992 and early 1993, and that it was not until the summer of 1993 when the Red Cross began bringing food into Foča that sufficient foodstuffs were available for residents and detainees. The Accused Rašević similarly provided documentary evidence, Exhibit O-I-53, that there was a food shortage and that rations were therefore reduced. The Accused also testified that the army provided the food and that they simply did not provide enough. Relatedly, the Accused Todović testified that the KP Dom farm, which had provided the prison with food and money for food before the war, was seized by the army; the role of the farm and its

seizure was confirmed by some prosecution witnesses. Accused Todović also stated that all the food that was available was distributed equally to the detainees and convicts, and that the detainees did not suffer the degree of weight loss that they described, at least after July 1992.

However, even if there was a general shortage of food in Foča until 1993 and less food was available because the KP Dom farm was seized by the army, this would not alter the Panel's conclusion that the non-Serb detainees were intentionally given significantly less and poorer quality food than the Serb convicts and the prison staff. In that regard, the Panel does not find credible the Accused Todović's testimony that food was distributed equally, and that the detainees did not suffer significant weight loss after July 1992. FWS 65, FWS 71, FWS 76, FWS 82, FWS 119, FWS 162, FWS 182 and FWS 250 credibly and consistently testified that there was a significant disparity in the food provided to Serbs and non-Serbs. The evidence is also overwhelming that the detainees lost significant amounts of weight over an extended period of time, while no weight loss was observed among the Serb convicts. That this deprivation was deliberate is also confirmed by the testimony that the staff and Serb convicts received enough food that they could actually discard their leftovers. Todović himself indirectly corroborated the fact that the Serb staff and convicts discarded bread. In his testimony, in an effort to contradict the witnesses who said they saw bread leftover and discarded, he asserted that this was impossible because he took the leftover bread from the kitchens to trade to farmers for feed in return for eggs. Accordingly, the Panel concludes that although food may not have been plentiful, the detainees were intentionally denied an adequate share of the available food, with the result that the detainees were subjected to the severe suffering of starvation and the accompanying serious mental and physical consequences of malnutrition.

As established by Established Fact P91 and the testimonies of witnesses, including FWS 85, FWS 86, FWS 111 and FWS 182, medical care at the KP Dom was inadequate. Detainees suffered from a range of maladies, injuries and conditions, both pre-existing and new, and they received either no or largely inadequate medical care. As FWS 65, FWS 182, B, C and the Accused Rašević testified, the permanent medical staff at the KP Dom consisted of a single medical technician, although a doctor from the local hospital did regularly visit the KP Dom. However, as FWS 65 and FWS 182 further testified, even when the doctor was present, not all detainees were able to be seen. In addition, very few medicines were available, and the medicine that was available was often past its expiration date or provided in less than its full dosage, as established through the testimony of FWS 85, FWS 86 and the Accused Todović. FWS 111 testified that a guard prevented him from receiving medical treatment. However, other witnesses, such as FWS 65 and FWS 115, testified that what medicine that was available was distributed to detainees, while FWS 86 noted that the medical staff wanted to help but did not have sufficient medicines to do so. FWS 111 also testified that a doctor was made available to the detainees after he complained to the KP Dom management, although this doctor later fled Foča and the KP Dom, as was confirmed by the testimony of Todović. Both the Accused testified without contradiction that medical care in Foča during the operative time was insufficient, both inside and outside KP Dom, due to severe shortages of medical personnel and supplies. Accordingly, while the Panel concludes that the medical care detainees received was insufficient, and added to their misery, there is not sufficient evidence to conclude that the KP Dom administration and staff generally intended to deprive the detainees of necessary medical care. Nevertheless, the inadequate medical care, in combination with the other conditions at KP Dom, were factors relevant to the death of some detainees, although these conditions cannot be said to have caused the death of these detainees.

One night, at some point during the spring or summer of 1992, Esed Hadžić's …. Other detainees in his room told the guards that he needed medical care, but this was not provided. He did not receive medical care until the next morning, when he was subsequently taken to the local hospital. He apparently received some medical care at the hospital, but nonetheless he died. These facts were established through the testimonies of a number of witnesses, including E, Ekrem Zeković, FWS 03, FWS 71, FWS 76, FWS 104, FWS 138, FWS 162 and FWS 182.

Other deaths from illnesses also occurred among the detainees while imprisoned at KP Dom. The witnesses testified regarding the deaths of detainees Šefko Kubat, Omer Kunovac and Juso Džamalija. According to the witnesses, including Ekrem Zeković, FWS 115, FWS 139, FWS 182 and FWS 250, Šefko Kubat also suffered from … and was in need of medical attention, as he was suffering from severe pain. It is not clear to what extent he initially received medical care, but the evidence establishes that he was given care, and after some time, transferred to the local hospital for surgery. The Accused Mitar Rašević testified that, at the hospital, it was determined that Šefko Kubat had …. The hospital was apparently unable to provide treatment, and he was returned to the KP Dom, where he died. Omer Kunovac was deaf and mute. He was beaten, although it is not clear whether before or during his detention, as a result of which he suffered serious injuries. FWS 139 testified that Kunovac could not tell the other detainees about his pain, and that the only treatment he received was from another detainee who was a doctor. After a few days, he died. The Panel does not find that the deaths of Šefko Kubat and Omer Kunovac were the result of denial of medical care. While Šefko Kubat may not have received immediate medical care, he was given some care and transferred to the local hospital for surgery. Indeed, Ekrem Zeković and FWS 138 specifically testified that Šefko Kubat's death was not the result of lack of medical care. As to Omer Kunovac, the Prosecutor did not establish beyond doubt that the guards or others at the KP Dom knew or were informed that he required medical care and that such medical care was denied.

The Panel concludes that medical care in Foča at this time was substandard and that the inadequate medical care combined with the harsh conditions at KP Dom were detrimental and sometimes fatal to the detainees. However, there is no evidence that the medical care that was available in Foča was intentionally withheld by anyone connected with KP Dom in order to cause suffering. In fact the weight of the evidence establishes that efforts were made by the KP Dom authorities, and the Accused Rašević in particular, to provide the detainees with access to the care that was available in Foča at the time. Therefore although the Indictment accurately describes the factual situation, the evidence does not establish the existence of the third element, intent, of the crime of other inhumane acts necessary to make that factual situation a crime against humanity.

The testimonies of witnesses, including FWS 58, FWS 71, FWS 111 and FWS 250, established that Juso Džamalija committed suicide in a solitary confinement cell while detained at the KP Dom. FWS 250 was in the solitary confinement cells at the same time, and testified that Juso Džamalija was brought into solitary confinement injured and covered in blood. Sometime that night he committed suicide by hanging himself. There is conflicting evidence as to the reasons for his suicide: FWS 111 linked Juso Džamalija's suicide to the suffering of his family members in an attack on his hamlet, while FWS 58 linked his suicide to beatings and interrogation at the KP Dom. The evidence thus does not establish beyond doubt that the suicide was caused by the conditions at KP Dom.

Other detainees were also frequently and arbitrarily beaten and placed in segregation cells. As FWS 65 and FWS 119 testified, detainees who tried to mitigate the harsh winter conditions by sewing winter clothes were punished and put in segregation by the KP Dom guards. Detainees were also confined in segregation cells by the KP Dom guards for similar arbitrary reasons, including: taking an armchair out of the guards' office for a detainee who could not sleep; taking food from the kitchen; picking up cigarette butts from the prison yard; attempting to request medical assistance from staff at the local hospital; hiding a small radio; having extra blankets; attempting to heat water; attempting to contact other detainees; giving other detainees extra portions of bread; asking for tea from the kitchen directly rather than asking the guards for permission first; and other reasons. A number of detainees testified that they were simply physically mistreated as punishment, while others who were taken to the segregation cells for such punishment testified that the KP Dom guards slapped, hit or beat them on the way to the cells or in the cells. These facts were established by Ekrem Zeković, FWS 65, FWS 71, FWS 76, FWS 138, FWS 139, FWS 162, FWS 210, FWS 250 and B.

Psychological suffering also characterized the living conditions at the KP Dom. As witnesses FWS 02, FWS 58, FWS 65, FWS 76, FWS 111, FWS 113, FWS 115, FWS 172 and FWS 182 testified, the detainees lived in a state of apprehension and anxiety, generated by the arbitrary punishments described above as well as the exposure to the suffering, death and disappearances of other detainees, and the uncertainty about who might be the next victim. In addition they were kept in isolation, prohibited from communicating with other detainees from other rooms, deprived of all visitors, and forbidden mail or communications from the outside.

The evidence establishes that the Accused Todović threatened the detainees with serious bodily harm if they violated prison rules, attempted to escape or refused to work. As nearly all witnesses who were detainees at the KP Dom testified, Todović specifically and generally threatened the detainees upon learning that Ekrem Zeković had escaped. As FWS 82, FWS 210 and A testified, Todović severely threatened all detainees who worked with Zeković in the metal workshop, going so far as to point guns at them; these witnesses were unanimous in stating that they believed this threat and were very afraid that they would be killed. Similarly, after Zeković was caught and returned to the KP Dom, Todović assembled all the non-Serb detainees in the KP Dom compound. Todović told the detainees that, because the Serbs were humane, Zeković would not be harmed for trying to escape, but warned all the detainees not to escape and punished them for Zeković's escape by halving food rations. FWS 76, FWS 138 and FWS 139 testified that Todović was clearly threatening the detainees; FWS 76 further specifically testified that Todović told the detainees that if they attempted to escape they would be killed. As to the forced labor, FWS 71 testified that Todović threatened him when he refused to go labor in the mines, saying that he could never refuse again, that anything could happen to him; that Todović threatened detainees if they refused to work was confirmed by FWS 65 and FWS 138. Finally, FWS 182 testified that when Todović caught him smuggling tobacco with Serbs at the KP Dom, Todović took him to a segregation cell and threatened his life if he did not tell Todović what was happening. Similarly, FWS 210 testified that when he was caught trying to pass a message, Todović threatened him and told him that they were blood enemies, and then sent him to segregation as punishment. These testimonies are detailed, consistent and credible in describing that Todović used threats to ensure that the non-Serb detainees complied with the prison rules and obeyed his orders and directives.

Viewed together, the Panel concludes that the living conditions at the KP Dom, as detailed, caused great suffering and serious mental and physical injury. Witnesses FWS 85, FWS 86, FWS 111, FWS 139 and FWS 162, among others, testified to their dramatic weight loss while detained at the KP Dom and the great suffering and serious injury this caused them. Witness C testified that he developed … as a result of the malnutrition he suffered while at the KP Dom. FWS 71 and FWS 82 testified to the serious, long-term mental injuries, including symptoms of …, they suffered as a result of these conditions and for which they still receive treatment. The Panel further concludes that these conditions were of similar gravity to those acts specifically enumerated in Article 172(1) of the CC of BiH, particularly viewed as a whole and in context.

Except for the finding that the inadequate medical care, though detrimental to the health of the detainees, was not intentional, the living conditions existing at KP Dom for the non-Serb detainees were intentionally created and intended to cause that great suffering and serious mental and physical injury that in fact resulted. The evidence establishes that the conditions described above were harsh and almost unbearable. This is particularly evident from the disparity between the living conditions for non-Serb detainees and Serb convicts and prison staff. Accordingly, the Panel concludes that the living conditions were intentional and were intended to cause great suffering and serious injury, specifically to non-Serbs.

E. COUNT 4: ENSLAVEMENT AND OTHER INHUMANE ACTS

1. Elements of the Crimes

a. Enslavement

Article 172(2)(c) of the CC of BiH defines "enslavement", as a crime against humanity pursuant to Article 172(1)(c), as "the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children." Accordingly, the elements of the crime of enslavement pursuant to Article 172(1)(c) of the CC of BiH are:

1) the exercise of any or all of the powers attaching to the right of ownership over a person; and
2) the intentional exercise of such powers.

Count 4 of the Indictment described the events discussed herein as a system of "forced labor". While forced labor, standing alone, is, in some circumstances, a war crime, and has otherwise been treated as constituting the crimes of cruel treatment, inhumane treatment, persecution and other inhumane acts in the jurisprudence of the ICTY, forced labor may also, in combination with other circumstances, amount to enslavement as a crime against humanity.[57] Accordingly, for the reasons discussed below, the Panel concludes that the forced labor of non-Serb detainees at the KP Dom constituted enslavement as a crime against humanity.

It is clear that "enslavement" was a crime against humanity under customary international law at the relevant time. The IMT Charter, in Article 6, included "enslavement" among the acts constituting crimes against humanity, as did Control Council Law No 10, Art. 6(1)(c), the Tokyo Charter, Art. 5(c), and the Nuremberg Principles, Principle VI(c). The legal definition of slavery under customary international law is provided in the 1926 Slavery Convention and the 1956 United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ("Supplementary Slavery Convention").

Accordingly, the Panel concludes that the legal definition of the offense of enslavement pursuant to Article 172(2)(c) corresponds to the legal definition of the offense under customary international law at the relevant time.[58]

[57] *See, e.g.*, *Blaskic* Appeal Judgment, para. 597 (cruel treatment); *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, Judgment, 31 March 2003, paras. 262 *et seq* (crime of unlawful labor under Article 3 of the ICTY Statute for violating the provisions of Articles 49, 50, 51 and 52 of the Third Geneva Convention, as well as inhumane treatment, cruel treatment and other inhumane acts); *Prosecutor v. Krnojelac*, IT-95-25-A, Judgment, 17 September 2003, para. 199 (persecution); *Prosecutor v. Simic, et al.*, IT-95-9-T, Judgment, 17 October 2003, paras. 835-837 (persecution); *Prosecutor v. Krajisnik*, IT-00-39 & 40-T, Judgment, 27 September 2006, para. 818 (persecution).

[58] *See Kunarac* Trial Judgment, para. 539 ("[T]he Trial Chamber finds that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person."); *Krnojelac* Trial Judgment, para. 350 (same).

It must be emphasized at the outset that the offense of enslavement as a crime against humanity is not limited to the lay understanding of "slavery" as ownership and disposal of persons as property, i.e. "chattel slavery". As chattel slavery, particularly *de jure*, has receded only to be replaced by other slavery-like practices, the concept of slavery in international law has evolved to address these contemporary forms of slavery as slavery.[59] This was confirmed by the Appeals Chamber in *Kunarac*, which stated:

> The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.[60]

The Trial Chamber's conclusion in *Kunarac* was also grounded in customary international law, which it concluded "may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labor found in other areas of international law."[61]

The contemporary forms of slavery under customary international law at the time the crimes were committed include "forced labor" as it is pled in the Indictment. For example, the defendants in the AFRC Case were convicted of enslavement as a crime against humanity under customary international law for forcibly abducting civilians and using them as forced labor. The Trial Chamber of the Special Court for Sierra Leone established that, on a number of occasions, armed soldiers forcibly seized civilians and took them to other locations, particularly the soldiers' villages and camps, where the civilians were used as forced labor, doing work ranging from transporting materials and collecting food to building huts and domestic activities.[62] The abducted civilians were often threatened with death if they attempted to escape or refused orders, and in fact some civilians who attempted to escape were killed. In addition, the civilians were subjected to mistreatment, including beatings, both as punishment and as simple abuse. The Trial Chamber concluded that these acts constituted enslavement as a crime against humanity. In none of these instances did the facts suggest that the civilians were treated as chattel in the classical sense of being bought, sold, bartered or trafficked.

The Panel recognizes the more limited interpretation of slavery as prohibited under Article 4 of the ECHR expressed by the European Court recently in *Siliadin v France*.[63] While the Panel recognizes the distinction between slavery and other similar practices as human rights violations under the ECHR, the Panel reiterates that, under customary international law, particularly when applied to humanitarian law as distinct from human rights law, the offense of enslavement does not distinguish between classic and contemporary forms of slavery.

Turning then to the factors to be considered to determine whether any or all of the powers attaching to the right of ownership were exercised, the Trial Chamber in *Kunarac*, having reviewed the relevant international conventions, instruments and the limited prior

[59] *See generally* M. Cherif Bassiouni, "Enslavement as an International Crime", 23 N.Y.U. J. Int'l L. & Pol. 445 (1991).
[60] *Kunarac* Appeal Judgment, para. 117.
[61] *Kunarac* Trial Judgment, para. 541. *See also*, *Radovan Stanković*, X-KR-05/70 (Ct. of BiH), First Instance Verdict, 14 November 2006, pg. 18.
[62] *See generally*, *Prosecutor v. Brima, et al.* ("AFRC Case"), SCSL-04-16-T, Judgment, 20 June 2007, paras. 1310-1394.
[63] App. No. 73316/01, 26 July 2005.

jurisprudence on the offense of enslavement and forced labor as a human rights violation identified a number of indicia of enslavement that guided its analysis:

> [E]lements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[64]

The Panel also notes an important consideration recognized in the jurisprudence of the US Military Tribunal at Nuremberg. Responding to many defendants' apparent lack of shame for the bare fact of using foreign civilians from conquered territories as slave labor in the Nazi war industries, the Tribunal highlighted the essence of the offense:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labor - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[65]

Although evidence of forced labor does not *per se* establish enslavement, as the Trial Chamber noted in *Krnojelac*, "the exaction of forced or compulsory labor or service is an indication of enslavement and a factor to be taken into consideration in determining whether enslavement was committed."[66]

b. Other Inhumane Acts

As previously stated, the elements of the crime of other inhumane acts as a crime against humanity pursuant to Article 172(1)(k) of the CC of BiH are:

1) the acts must be of a similar gravity to those acts specifically enumerated in Article 172(a)(1);
2) the acts must cause great suffering, or serious injury to body or to physical or mental health; and
3) the acts must have been performed with the intention of causing great suffering or serious injury.

[64] *Kunarac* Trial Judgment, para. 542.
[65] *US v Pohl and Others,* Judgment of 3 November 1947, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 ("Green Series"), Vol. V (1950), pg. 970.
[66] *Krnojelac* Trial Judgment, para. 359.

The legal issues previously discussed with regard to the crime of other inhumane acts are equally applicable to the Panel's analysis of the allegations and facts under this Count.

The use of persons as human shields has been determined to constitute the crime of inhumane treatment and cruel treatment in violation of the laws and customs of war.[67] Accordingly, the Panel concludes that the use of persons as human shields also constitutes an act of sufficient gravity as other acts enumerated in Article 172(1) to constitute the crime against humanity of other inhumane acts under customary international law.[68]

It is not necessary that the person used as a human shield suffer physical injury to establish the commission of the crime.[69] As the Appeals Chamber noted in *Blaskic*, "[T]he prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself." Rather, the mental injury resulting from the exposure to the risk of physical injury can suffice to establish the commission of the offense.[70]

2. Factual Findings and Conclusions

a. Enslavement (Forced Labor)

Beginning in May 1992 and lasting until the departure of the remaining detainees in October 1994, non-Serb civilian detainees were forced to labor at locations both within and outside the KP Dom. A number of detainees began working at various locations almost as soon as they arrived at the KP Dom. FWS 210 testified that within two or three days after the Užice Corps left the KP Dom, he was assigned to work, first at the mill in Ustikolina and then at the metal workshop on the premises of the KP Dom. Similarly FWS 250 testified that he worked in the kitchen at the KP Dom during April, May and June 1992, while Ekrem Zeković testified that he began working at the metal workshop immediately after he arrived in May 1992. As those witnesses who labored further testified, many worked until the day they were exchanged. Ekrem Zeković and FWS 139, who were among the last group of detainees at the KP Dom, specifically testified that they were working at the coal mine the morning of the day of their exchange; C, who was exchanged earlier, similarly testified that he worked until his exchange.

While detainees were initially assigned to labor on a relatively *ad hoc* basis, a formal work platoon was soon after created, as established through the testimonies of FWS 02, FWS 82, FWS 83, FWS 113, FWS 182, FWS 210, A, C, D and Ekrem Zeković. As FWS 82, FWS 83 and D testified, the Accused Todović was responsible for establishing the work platoon sometime in July or August 1992; this was confirmed by Ekrem Zeković, who testified that he was told by the Serb civilian who oversaw the metal workshop that Todović was in charge of work assignments. FWS 83 further testified that Todović designated him the leader of the work platoon, which FWS 82 corroborated. These detainees were moved together into a single room. Witness A testified that approximately 65-70 detainees were assigned to the

[67] *See, e.g.*, *Blaskic* Appeal Judgment, paras. 653, 654 ("The use of prisoners of war or civilian detainees as human shields is therefore prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment…."); *Naletilic* Trial Judgment, paras. 289, 303. *See also*, *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, 25 June 1999, para. 229 (concluding that use of persons as human shields constitutes the offense of outrage upon personal dignity).
[68] *See generally*, *Damjanovic* Verdict.
[69] *Blaskic* Appeal Judgment, para. 654.
[70] *Prosecutor v. Blaskic*, IT-95-14-T, Judgment, 3 March 2000, para. 716.

work platoon. While some detainees in the work platoon, such as Ekrem Zeković and FWS 210, volunteered or consented to work, others, such as FWS 02, A and D stated that they were simply assigned to work; FWS 02 and A testified that they were assigned to work by a KP Dom guard, while D testified that he was assigned by Todović. In addition, FWS 85 testified that he asked Todović to be assigned to the furniture factory and that Todović then assigned him to work there.

The detainees assigned to the work platoon were generally skilled craftsmen, farmers and others who had skills for performing the type of work they were assigned. For example, D testified that, when he was assigned to the work platoon, Todović told him he was a good farmer and a good mower. Similarly, FWS 02, who worked in the furniture factory, testified that he was a highly-skilled metal worker, as was FWS 210, who did metal work at a variety of locations, including the metal workshop, the Foča hospital and Milorad Krnojelac's house. As they were skilled laborers, the members of the work platoon worked at the economic units of the KP Dom, namely the metal and mechanical workshop, the furniture factory and the Brioni farm. The members of the work platoon also performed skilled labor at the KP Dom, such as repairing the roof of the KP Dom, and at other locations in Foča, including the hospital and Milorad Krnojelac's house.

Other detainees, including FWS 65, FWS 115, FWS 182 and B, performed odd jobs around the KP Dom compound, such as cleaning or sweeping. These detainees were not assigned to the work platoon but simply performed work around the compound. FWS 115 and FWS 182 specifically testified that they asked the Accused Todović if they could work and that Todović granted their requests and assigned them to perform odd jobs.

In contrast to the members of the work platoon, who were generally skilled laborers and began working at the economic units of the KP Dom in the summer of 1992, another group of detainees only began working in 1993 when the Miljevina coal mine was reopened. The circumstances with regard to labor at the mine differed in two important respects from the work performed by the work platoon. First, the detainees who worked at the mine were simply assigned to work there based upon lists. As FWS 142 testified, a KP Dom guard arrived at his room one day before lunch and roll called the names of 20 detainees, including himself, who were to go work at the Miljevina mine the next morning. Similarly, FWS 139 testified that the KP Dom guards collected detainees to labor at the mine based upon lists. While FWS 139 testified that some detainees volunteered to work at the mines in order to get more food, none of the witnesses who worked at the mines testified that they volunteered, and the evidence establishes that most detainees who worked at the mines were simply assigned to work there.

The evidence further establishes that the Accused Todović was responsible for assigning detainees to work at the mines. Exhibits P-155, P-156, P-159 and P-160 are lists of detainees assigned to work at the Miljevina mine, and each is signed by Todović. This evidence was corroborated by the testimony of FWS 71 and FWS 139, who stated that the KP Dom guards told the detainees that Todović was responsible for assigning them to work at the mine. In addition, Ekrem Zeković and FWS 76 testified that Todović personally told them that they were assigned to work at the mine. FWS 71 and FWS 76 further testified that Todović threatened them when they refused or said they were too ill to work at the mine.

Second, the work conditions in the Miljevina mine were much harsher than the work conditions in the metal workshop, furniture factory and Brioni farm. While the detainees

who worked at those locations testified that the labor was not hard or demanding, particularly as they were skilled at the tasks they were performing, the witnesses who worked at the mine were unanimous that the conditions in the mines were harsh. FWS 139 testified that working in the mine was hard, particularly as he did not have experience as a miner and was exhausted from malnutrition. Similarly, FWS 142 testified that the work in the mine was very hard, as he was exhausted and did not have enough strength to load the coal as he was assigned to do; FWS 142 further testified that as a result of working in the mine, he has some problems with his spine. Ekrem Zeković, who testified that he agreed to work in the metal workshop, specifically testified that he did not agree to work in the mine and that the work in the mine was physically exhausting. Finally, the work at the mine was so harsh that detainees injured themselves in order to escape working there; specifically, FWS 76 testified that he cut his leg with a razor so that he wouldn't have to go to the mine to work again.

As established by the testimonies FWS 76, FWS 83, FWS 138, FWS 139, FWS 250 and D, whenever detainees were sent outside the KP Dom to labor, they were escorted and guarded by KP Dom guards. As the Accused Rašević testified, he organized the work of the KP Dom guards, which would have included assigning them to escort and guard detainees taken outside the KP Dom to labor. Further, FWS 250 testified that Rašević on some occasions drove the detainees to the Brioni farm to work and returned them to the KP Dom in the afternoon.

The Panel finds these testimonies and the documentary evidence to be consistent and credible. Indeed, the Accused did not dispute that detainees were assigned to work in these facilities. However, the Accused did contest that the detainees were forced or otherwise coerced to work, and suggested in addition that the work assignments were in accordance with applicable prison rules and penal regulations.

The majority of witnesses testified that they did not volunteer or consent to work. Witness A testified that he was simply told that he was to work in the metal workshop, that no one asked whether he wanted to work there, and he further testified that detainees could not refuse to work when assigned. Similarly, witness C testified that he did not work in the furniture factory voluntarily, that a guard simply told him that he was to work in the furniture factory and handed him over to the person in charge of the factory. The Panel recognizes that some witnesses did testify that they worked voluntarily, or at least did not object. Ekrem Zeković testified that shortly after he arrived at the KP Dom, he was asked by one of the people already working in the metal workshop if he would like to work as well, and he accepted immediately. Similarly, FWS 210 testified that, depending on the circumstances, he performed labor voluntarily. The Panel notes that these testimonies do not show that other detainees volunteered or consented to work, but only that these individuals did. There was contrary evidence from witnesses, including FWS 65 and FWS 71, that they and others were forced to work and threatened with punishment if they did not by the Accused Todović and the KP Dom guards.

More importantly, the Panel concludes that the labor and living conditions at the KP Dom were such that it was impossible for detainees to freely consent to labor, and that the labor performed by the detainees was therefore inherently forced labor. The inhumane living conditions in which non-Serb detainees were held at the KP Dom were previously described in Count 3, and the Panel reiterates its conclusion that those conditions constituted the crime against humanity of other inhumane acts pursuant to Article 172(1)(k) of the CC of BiH.

Detainees were kept locked in crowded rooms at all times, in poor hygienic conditions, and were given manifestly inadequate food rations.

Detainees who were part of the labor detail or otherwise worked, by contrast, were held in significantly better conditions. In particular, detainees who worked were given an extra meal and were allowed to leave their rooms to work. FWS 138 specifically testified that he wanted to work because of this extra meal, as he thought that was the only way to ensure his survival. Similarly, FWS 85 stated that he was in serious fear for his health, as his weight had dropped 40 kilograms in three months, and that he asked to be allowed to work for that reason, in order to receive the additional meal given to detainees who worked. FWS 02 confirmed these testimonies, suggesting that he volunteered to work in the metal workshop because of the extra meal, as did many other witnesses. Witness B stated that those who volunteered to work did so in part so that they could leave their rooms: that they could hardly wait to be able to get out of the rooms in which they were confined. FWS 182 confirmed this and testified that he was glad to work because it allowed him to leave the room and move around the compound.

Recognizing, then, that detainees who worked were not subjected to the same degree to the inhumane conditions that other non-Serb detainees were subjected to, the Panel concludes that detainees could not freely volunteer for or consent to labor. The Elements of Crime of the Rome Statute explains: "The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."[71] The choice to escape or ameliorate such conditions is not a free choice, but the essence of coercion and the negation of free will. That so many detainees wanted to work for this very reason only serves to emphasize the absence of true choice given the circumstances.

For this reason, it is disingenuous to frame labor as a privilege for detainees. The improved living conditions those detainees who worked enjoyed were not a privilege, but merely included some aspects of humane treatment that all detainees should have enjoyed as a matter of course. Denial of those humane conditions in the first instance does not somehow transform them into a reward to be chosen and granted.

The Accused suggested that the detainees were lawfully forced to work pursuant to penal regulations and national law, noting that the Serb convicts at the KP Dom were lawfully forced to labor. This defense must be emphatically rejected. The detainees at the KP Dom were unlawfully and arbitrarily imprisoned, and therefore no penal regulation or law applying to either lawful convicts or lawful prisoners of war could justify forcing the detainees to labor. Nor, as previously discussed, could the staff at the KP Dom reasonably and in good faith believe that the non-Serb detainees were either lawful convicts or lawful prisoners of war.

The Panel further concludes that the use of detainees as forced labor constituted enslavement. The manner in which detainees were forced to labor and the conditions in which they labored establish that the staff and administration of the KP Dom exercised the powers attaching to the right of ownership over those detainees forced to labor. The detainees were not merely forced to labor, but exploited for their labor, and treated accordingly. Their freedom,

[71] Elements of Crimes, Art. 7(1)(d), fn. 12.

autonomy and independence were severely restricted by reason of their detention. The detainees were not free to return to their homes and communities after filling their work obligation, but remained imprisoned at all times. That imprisonment, troubling itself alone, was further marked by brutally inhumane living conditions. In fact, it was these inhumane living conditions which provided the means through which to compel the detainees to labor.

Detainees, then, were imprisoned at all times, in inhumane conditions and forced to labor. These factors alone, in the circumstances, establish enslavement. However, the Panel further highlights that the forced labor of the detainees was intensely exploitative. The detainees were not paid or otherwise remunerated for their labor. The KP Dom and others, on the other hand, derived significant benefit from the detainees' labor. The furniture assembled by the detainees was sold to provide funds for the KP Dom's operations. Detainees working in the metal and mechanical workshop repaired the facilities of the KP Dom, constructed furnaces for Serb soldiers and did various work in and around Foča for other institutions. The same is true of the detainees who had to work in the Miljevina mines, the Brioni farm and at other locations, including the house of Milorad Krnojelac, the warden of the KP Dom. In all these circumstances, the detainees performed labor that exclusively benefited others. The detainees only derived tangential, if any, benefits, and those benefits in any case should have been provided to them without their labor. The detainees were certainly not paid for their work.

In addition, these were not mere isolated or temporary labor assignments. Rather, the detainees had daily "working hours" and were forced to labor over extensive periods of time. As Ekrem Zeković, FWS 85 and FWS 210 testified, the detainees generally worked eight or nine hours a day, five days a week, beginning their work day at approximately seven o'clock in the morning and returning to the KP Dom at three or four in the afternoon. This schedule was followed repeatedly, day after day, for months and years. Ekrem Zeković, FWS 83 and FWS 210, in fact, labored almost from the moment they arrived until they were exchanged in October 1994, a period of more than two years of constant labor; for Ekrem Zeković and FWS 210, this constant labor was broken only when they were held in solitary confinement and not allowed to work for fear that they would escape. Other detainees, such as those who worked at the Miljevina mine, worked for shorter periods of time, but still were forced to labor for periods from many months, such as FWS 142, to over a year, as with FWS 139, who worked at the mine from September 1993 until October 1994.

Accordingly, the Panel concludes, in light of all the circumstances and facts, that the staff and administration of the KP Dom exercised the powers attaching to the right of ownership over those detainees forced to labor in the furniture factory, the metal and mechanical workshop, the Miljevina mine, the house of Milorad Krnojelac and at other locations in and around Foča and thereby enslaved those detainees.

(i) Count 4a

The Prosecutor established beyond doubt the facts as stated in Count 4a of the operative part of the Verdict with regard to the forced labor of detainees. These acts constituted the crime of enslavement pursuant to Article 172(1)(c) of the CC of BiH.

Among the facilities at the KP Dom were a furniture factory, located within the compound, and a metal and mechanical workshop, located immediately outside the compound. Prior to the war, these facilities were part of the KP Dom economic unit, and the goods produced were sold commercially to provide revenues for the KP Dom. The staff for these facilities

was composed of convicts, who were assigned to labor pursuant to applicable penal regulations, and a certain number of civilian workers and managers, who were compensated for their work.

The testimonies of witnesses and documentary evidence establish that non-Serb detainees were similarly assigned to labor in these facilities during their detention, beginning in May 1992. Witnesses C, D, FWS 76, FWS 85 and FWS 138 testified that they worked in the furniture factory, while witnesses A, FWS 02, FWS 76, FWS 82, FWS 210 and Ekrem Zeković testified that they worked in the metal and mechanical workshop. These testimonies are confirmed generally by Exhibit P-157, which is a list of detainees assigned to work in the metal workshop. Among the persons listed are witnesses A and FWS 210, as well as other detainees, such as FWS 144, FWS 78, R.T. and D.M. These detainees received no compensation for their work. These testimonies and exhibits are consistent and credible, and the Accused did not dispute that detainees were assigned to work at these locations.

(ii) Count 4b

The Prosecutor established beyond doubt the facts as stated in Count 4b of the operative part of the Verdict with regard to the forced labor of detainees. These acts constituted the crimes of enslavement pursuant to Article 172(1)(c).

In addition to the metal workshop and furniture factory as described in Count 4a), detainees were assigned to labor at locations outside the KP Dom, including the Brioni farm, the Miljevina mine, the house of Milorad Krnojelac and other locations in and around Foča. Witnesses B, FWS 71, FWS 83 and FWS 250 testified that they worked at the Brioni farm. These testimonies are confirmed by Exhibit P-158, which is a list of three detainees assigned to work at the Brioni farm, including K.S. and S.M. Witnesses Ekrem Zeković, FWS 83 and FWS 210 testified that they performed labor at the house of Milorad Krnojelac. Witnesses FWS 71, FWS 76, FWS 139 and FWS 142 testified that they performed labor at the Miljevina mine. As to the Miljevina mine, these testimonies are confirmed generally by Exhibits P-155, P-156, P-159 and P-160, which are lists of detainees assigned to work at the Miljevina mine. Among the detainees listed are FWS 142, R.T., Z.A., J.A. and H.A., as well as many others. FWS 210 testified that he was assigned to unload flour at the Ustikolina mill, while FWS 82 and FWS 83 testified that they were assigned to clear a school building in Foča. These testimonies and exhibits are consistent and credible, and the Accused did not dispute that detainees were assigned to work at these locations.

b. Other Inhumane Acts (Minesweeping)

(i) Count 4b

The Prosecutor proved beyond doubt the allegation regarding FWS 141 stated in Count 4b. These acts constituted the crime of "other inhumane acts" pursuant to Article 172(1)(k) of the CC of BiH.

Over a period of approximately three months, FWS 141 was forced to drive a FAP truck in front of army convoys in order to detect and detonate mines in the roads. FWS 141 testified as to the general pattern of these events, and the essential elements of his testimony were confirmed and elaborated by witnesses A, FWS 86 and FWS 182. He was taken from his room by a KP Dom guard to the gate of the KP Dom, where he was then handed over to

members of the army, who were outside the KP Dom compound with a truck. Accompanied by an armed escort, he would then drive the truck in front of army convoys, such as troop convoys moving to the front-line, from Foča to Ustikolina, Kalinovik and other locations. While driving on asphalt roads, which were not at risk of being mined, the armed escort would be in the truck with FWS 141 while he drove. However, when the convoy was to drive over macadam roads, which could be mined, the escort would leave the truck, and FWS 141's left leg would be chained to the clutch, preventing him from leaving the vehicle or escaping. He would then drive in front of the convoys, so that his vehicle would detonate any mines in the road first. FWS 141 was not himself physically injured as a result of these activities, but he testified that two other persons who were also used as minesweepers were killed by mines. He testified that he did not go out every day, but on the days that he did work in this way he worked between five and ten hours.

FWS 141 was never asked whether he wanted to perform this task, nor did he volunteer. He was in great fear for his life and consulted another detainee who was a doctor, and was given advice about how to induce high blood pressure. He managed to do so and was able to obtain a medical order stating he was not fit to drive. This was then presented to the KP Dom guard who was taking him for the minesweeping detail and the guard, after checking with someone, either a KP Dom superior or the military personnel, told FWS 141 that he did not have to go.

The Panel concludes that FWS 141's testimony as to these events, as confirmed by witnesses A, FWS 86 and FWS 182, is detailed, consistent and credible, and that the evidence establishes beyond doubt that FWS 141 was forced to act as a minesweeper. The Accused did not dispute the substance of FWS 141's testimony on this issue, except as to their responsibility for his treatment. Being forced to act as a minesweeper caused FWS 141 great suffering and serious mental injury. FWS 141 specifically testified that he feared for his life, which prompted him to take measures to try to induce high blood pressure in order to avoid this work assignment. Those who participated in forcing FWS 141 to act as a minesweeper were aware of the great suffering and serious mental injury this would cause him and intended that in the event of the detonation of a landmine, serious injury befall him, a non-Serb detainee, in order to avoid injury to Serb military personnel.

(ii) Count 4c

The Prosecutor established beyond doubt that: "Detainees FWS 109 and K.G. were used on several occasions as drivers for the detection of land mines by driving ahead of Serb convoys." These acts constituted the crime of "other inhumane acts" pursuant to Article 172(1)(k) of the CC of BiH.

Victims FWS 109 and K.G. did not testify. However, other witnesses, who were present at KP Dom when these two were forced to act as minesweepers and who spoke to them about what they were doing, confirmed that they were detainees at KP Dom and that they were taken out in a manner similar to FWS 141, to drive a truck in front of convoys and act as minesweepers. Based on their observations, and conversations with K.G., FWS 86 and FWS 182 both verified that KG, like FWS 141, was similarly forced to act as a minesweeper for Serb military convoys. Both also stated that they had spoken to FWS 141 and confirmed his testimony, and showed they were in fact familiar with the experience he underwent. FWS 182 likewise testified that FWS 109 and K.G. were called out in a similar fashion to FWS 141. This was confirmed generally by Amor Mašović, who was told by FWS 109 that he had

been forced to drive a vehicle in front of a convoy so that he would be the person blown up should any mines be detonated.

Except for Amor Mašović, these witnesses were all present in KP Dom when these events occurred, knew the victims and had the opportunity to observe what occurred. In addition, all of these witnesses had the opportunity to speak directly with one or both of these victims. The testimony is further corroborated by the testimony of FWS 141, who testified directly as to what driving as a minesweeper entailed and the severe psychological suffering and anxiety that was caused by being chained to the clutch of a vehicle and ordered to precede a convoy for the sole purpose of detonating land mines, which would have resulted in almost certain death for the driver. The Panel concludes that the task of "minesweeping" that FWS 109 and K.G. were forced to perform was intended to and did cause great suffering and serious mental injury. Like FWS 141, FWS 109 and K.G. were victims of inhumane acts of gravity similar to other crimes against humanity listed in Article 172 of the CC of BiH.

F. COUNT 5: DEPORTATION, FORCIBLE TRANSFER AND ENFORCED DISAPPEARANCE

1. Elements of the Crimes

a. Deportation and Forcible Transfer

Article 172(2)(d) of the CC of BiH defines "deportation or forcible transfer" as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without the grounds permitted under international law." Accordingly, the elements of the crime of deportation or forcible transfer pursuant to Article 172(1)(d) of the CC of BiH are:

1) the forced displacement of the persons concerned by expulsion or other coercive acts;
2) from the area in which they are lawfully present; and
3) without the grounds permitted under international law.

The Panel notes that Article 172(1) of the CC of BiH does not substantively distinguish between deportation and forcible transfer, as both are criminalized in the same provision. As the elements of the crime make clear, it is sufficient that the persons concerned be expelled from the area in which they are lawfully present. Both deportation, the forcible displacement of persons across internationally-recognized borders, and forcible transfer, the forcible displacement of persons within state borders, are crimes against humanity under customary international law. The ICRC Commentary on Article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"), is in accord, noting that this provision on "civilian displacement" covers both "displacements of the civilian population as individuals or in groups within the territory of a Contracting Party" and "compelling civilians to leave their own country".

Forcible transfer is treated as the crime of other inhumane acts in the jurisprudence of the ICTY. The Appeals and Trial Chambers of the ICTY have concluded that "displacements within a state or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law."[72] Nonetheless, as Article 5 of the ICTY Statute does not include forcible transfer as a separate offense over which the ICTY Chambers have jurisdiction, the Chambers have applied the law of other inhumane acts to instances of forcible transfer, thereby requiring that they distinguish factually and legally between forcible transfer and deportation, which is recognized as a separate crime against humanity in the ICTY Statute. Because the CC of BiH recognizes forcible transfer and deportation together as a distinct crime, which encompasses displacement both within and outside a national border, the relevant inquiry under the first element is only whether the victim has been displaced by expulsion or coercive acts, and the location to which they are displaced is not critical.

The force used to effect the displacement, required in the first element, should be interpreted broadly to include physical violence, threat of force or coercion, such as that caused by fear

[72] *Krnojelac* Appeal Judgment, para. 222.

of violence, duress, detention, psychological oppression or abuse of power or by taking advantage of a coercive environment. The essential question is whether the concerned persons had real choice. "[A] civilian is involuntarily displaced if he is 'not faced with a genuine choice as to whether to leave or to remain in the area. …[A]n apparent consent induced by force or threat of force should not be considered real consent.'"[73]

As to the third element of the offense, generally, displacement of persons is absolutely prohibited under international law except in specific, limited circumstances, namely that persons may be "evacuated" from the area in which they are lawfully present when "the security of the civilians involved or imperative military reasons so demand."[74] Art. 49(2) of the Fourth Geneva Convention further provides, "Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."

The ICTY Chambers have identified the *mens rea* element of this crime as the "intent to remove the victims, which implies the intention that they should not return."[75] As noted, international law requires that evacuees be returned as soon as the circumstances permitting their evacuation have ceased. Accordingly, the Panel agrees that, under customary international law at the relevant time, the *mens rea* of the crimes of deportation and forcible transfer is the intent to remove the victims and that they not return.

b. Enforced Disappearance

Article 172(2)(h) of the CC of BiH defines "enforced disappearance" as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with an aim of removing them from the protection of the law for a prolonged period of time." Accordingly, the elements of the crime of enforced disappearance pursuant to Article 172(1)(i) of the CC of BiH are:

1) the arrest, detention or abduction of persons;
2) by or with the authorization, support or acquiescence of a State or a political organization;
3) followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons; and
4) with the aim of removing those persons from the protection of the law for a prolonged period of time.

Although the offense of enforced disappearance as a crime against humanity is enumerated in Article 7 of the Rome Statute, which Article 172 of the CC of BiH mirrors, enforced disappearance is unique among the offenses considered in this Verdict in that it is a relatively "new" crime, both in itself and as a crime against humanity. The core underlying offenses of crimes against humanity were first recognized in the IMT Charter, the Nuremberg Principles, Control Council Law 10 and the Tokyo Charter and have been consistently reiterated in later documents such as the ILC Draft Codes. Their status as crimes against humanity under customary international law is thus inseparable from the recognition of crimes against humanity as a category of offenses under customary international law. Enforced

[73] *Simic* Trial Judgment, para. 125 (citing *Krnojelac* Trial Judgment, para. 475, fn. 1435).
[74] Additional Protocol II, Art. 17(1); Fourth Geneva Convention, Art. 49(2).
[75] *Blagojevic* Trial Judgment, para. 601.

disappearance, on the other hand, was neither specifically recognized by that designation nor defined.

However, the first recognizable instance of enforced disappearance was the 1941 "Nacht und Nebel Erlass" (Night and Fog Decree), in which persons from occupied territories were seized and secretly deported to Germany, where they were then held in secret in concentration camps. As the IMT Judgment noted, "After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came or their relatives; even in cases where they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person."[76] These persons "were entirely cut of from the world and were allowed neither to receive nor to send letters. They disappeared without trace and no announcement of their fate was ever made by the German authorities."[77] Field Marshal Wilhelm Keitel was convicted of war crimes against the civilian population for his participation in these acts; however, the acts were not described as enforced disappearance as such.

Enforced disappearance as a specific human rights and criminal concept developed in response to the practices of Latin American governments during the "Dirty Wars" of the 1960s, 70s and 80s. In 1988, the Inter-American Court commented in *Velasquez Rodriguez* that "[i]nternational practice and doctrine have often categorized disappearances as a crime against humanity," but it admitted that "there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology".[78] The first and most forthright international declaration on the status of enforced disappearance under international criminal law was by the OAS General Assembly, which declared in 1983 that enforced disappearance "is an affront to the conscience of the hemisphere and constitutes a crime against humanity."[79] Similarly, the Parliamentary Assembly of the Council of Europe declared in 1984 that it considered "that the recognition of enforced disappearance as a crime against humanity is essential if it is to be prevented and its authors punished."[80] The resolution further called "on the governments of the member states of the Council of Europe to support the preparation and adoption by the United Nations of a declaration setting forth the following principles [that] [e]nforced disappearance is a crime against humanity."[81] Finally, in 1992 the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance ("Enforced Disappearance Declaration"), which stated in the third preambular paragraph that "enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity."[82]

Today, the primary international sources addressing enforced disappearance as a crime against humanity are the Rome Statute, the 2006 Convention for the Protection of All Persons from Enforced Disappearance ("Enforced Disappearance Convention") and the 1994 Inter-American Convention on Forced Disappearance of Persons ("IA Forced Disappearance

[76] International Military Tribunal, Judgment of 1 October 1946 ("IMT Judgment"), Trial of the Major War Criminals before the International Military Tribunal ("Blue Series"), Vol. I (1947), pgs. 232-33.
[77] *Id.*, IMT Indictment, pg. 44.
[78] *Velasquez Rodriguez v. Honduras*, Petition No. 7920/1981, Judgment, 29 July 1988, para. 153.
[79] OAS Doc. AG/Res. 666 (XIII-0/83), 18 November 1983, para. 4. *See also*, OAS Doc. AG/RES. 742 (XIV-O/84), 17 November 1984.
[80] PACE Res. 828, 26 September 1984, para. 12.
[81] *Id.*, para. 13.
[82] GA Res. 47/133, UN Doc. A/RES/47/133, 18 December 1992.

Convention"). As noted, enforced disappearance is specifically enumerated as a crime against humanity under Article 7 of the Rome Statute, which entered into force on 1 July 2002 and to which there are currently 105 State parties. Similarly, the Preamble to the IA Forced Disappearance Convention, which entered into force on 28 March 1996, reaffirms that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity." Article 2 of the IA Forced Disappearance Convention defines the legal elements of the offense of enforced disappearance, while Article 4 obliges State parties to include enforced disappearance as a criminal offense under domestic law and exercise jurisdiction over cases committed in their jurisdiction, when the perpetrator is a citizen or when the perpetrator is in its territory. Although that convention was concluded in 1994, it confirms that the crime of enforced disappearance as defined already existed in international law and that it was the departure point for the treaty that follows the Preamble.

2. Factual Findings and Conclusions

The Prosecutor established beyond doubt the facts as stated in Count 5 of the operative part of the Verdict. These acts constitute the crimes of deportation or forcible transfer pursuant to Article 172(1)(d) of the CC of BiH and enforced disappearance pursuant to Article 172(1)(i) of the CC of BiH.

a. Deportation and Forcible Transfer

As established by the facts supporting the Panel's findings of a widespread or systematic attack and Count 3 of this Verdict, the detainees illegally imprisoned in KP Dom were lawfully present in Foča and had a lawful right to remain in and be free to stay in Foča.at the time of their illegal apprehension, at the time they were initially imprisoned at KP Dom, and throughout their illegal detention at KP Dom. The evidence, as reasoned below, further establishes that from August 1992 to October 1994, these same non-Serb detainees were taken from the KP Dom to other detention facilities outside the Foča area to be exchanged. Prior to the actual exchange, detainees from the KP Dom were held for varying amounts of time, from mere days to many months, in other detention facilities, including facilities in Kalinovik, Rudo and the KP Dom Kula in Sarajevo. From these transitional facilities, detainees from the KP Dom were then exchanged in Sarajevo for Serbs held by Bosniak forces, often under the aegis of the International Committee of the Red Cross.

Nearly every witness testified about the circumstances of his own exchange. Generally, as FWS 71, FWS 82, FWS 115, FWS 142, C, D and many other witnesses consistently testified, the KP Dom guards would come to the rooms where the detainees were held and roll call them from lists, telling them to pack their belongings as they were going to be exchanged. The detainees were then escorted by the KP Dom guards to the administration building, where they were typically searched, as established by the testimonies of FWS 71, FWS 76, FWS 113 and Ekrem Zeković. FWS 113 suggested that the search was specifically to ensure that detainees did not take notes or other written information on the situation at the KP Dom with them on their exchange. The detainees were then taken by the guards out of the KP Dom compound to a waiting vehicle.

(i) July 1993 through September 1994

As established by the testimonies of witnesses and documentary evidence, and corroborated by Established Fact P124, approximately 80 non-Serb detainees were taken to other detention

facilities, including at Kalinovik, Rudo and Kula, to be exchanged during this period. Not all detainees were transported from the KP Dom to other facilities or locations in the same manner or by the same persons. Witnesses C and FWS 82, along with approximately 15 other detainees from the KP Dom were taken together in early July 1993 on a bus from the KP Dom to Rudo, where they were then detained until their transfer to Kula, from where they were exchanged in October 1994. The detainees were escorted by four armed police officers. At approximately the same time but in a different incident, D and four other detainees, as confirmed by O-I-34, were taken together by military bus, with approximately ten soldiers or military police as escorts, from the KP Dom to Rudo, from where D was then sent to Kula, and then eventually exchanged. Similarly, in August 1994, J.A., FWS 76, FWS 142 and FWS 182, as confirmed by O-I-37a and O-I-37b, were taken together by military personnel from the KP Dom to Sarajevo. FWS 111 was taken alone in July 1993 by police from Grbavica from the KP Dom Foča to the KP Dom Kula. FWS 119 was taken alone in October 1993, as confirmed by O-I-33, by the then-warden of the KP Dom, Zoran Sekulović, from the KP Dom Foča to the KP Dom Kula, where he was held until his exchange in June 1994. FWS 115 was also taken alone in January 1994, as confirmed by exhibit O-I-27, to the KP Dom Kula, where he was held until his exchange in May 1994, but this witness did not detail the identity of the persons who transported him to Kula.

As to the number of detainees taken out of the KP Dom between July 1993 and the end of September 1994 and transported to other detention facilities to be then exchanged, the Panel notes that Amor Mašović, currently co-chair of the Federation of BiH Commission on Missing Persons and formerly with the State Commission for the Exchange of Prisoners during the time relevant to the Indictment, testified that exchanges were most frequent and intense after the Summer of 1993 through 1994. This witness also testified that a total of 1100 non-Serbs were detained at the KP Dom between April 1992 and October 1994, and the Panel concludes below that the evidence establishes that there were approximately 60 detainees remaining at KP Dom by 4 or 5 October 1994. In addition, the documentary evidence – including Exhibits O-I-19, O-I-20, O-I-23, O-I-25, O-I-31, O-I-39 and O-I-41(a)(b) – identifies 14 detainees transported from the KP Dom to other locations during this period for the purposes of exchange or release, and the witness testimony discussed above identifies at least 29 detainees so transported during this period. Accordingly, on the basis of this evidence, the Panel is satisfied that at least 80 detainees were transported to other detention facilities to be exchanged between July 1993 and September 1994, as charged in the Indictment.

(ii) <u>October 1994</u>

The final exchange of approximately 60 detainees took place in early October 1994, after which no non-Serb detainees were held at the KP Dom, and none of the non-Serbs detained at the KP Dom between April 1992 and October 1994 remained in the Foča area. This exchange was part of a larger exchange of more than 200 non-Serbs held by Serb forces that was organized under the auspices of the ICRC on the "all for all" principle. Eleven witnesses were among the approximately 60 detainees taken out of the KP Dom at that time, namely FWS 65, FWS 71, FWS 83, FWS 85, FWS 138, FWS 139, FWS 210, FWS 250, A, B and Ekrem Zeković. The Accused Rašević also testified regarding this exchange. The testimonies of these witnesses establish that the remaining detainees were told in the morning that they would be exchanged, that they were taken from their rooms to the administration building and searched. The detainees were addressed by the then-warden, Zoran Sekulović, and both Accused, and then put on a bus. Two guards from the KP Dom and the Accused

Rašević also boarded the bus to escort the detainees to KP Dom Kula. When the bus arrived at KP Dom Kula, the detainees were prevented from entering the prison by five or six Serb soldiers or paramilitaries, who began cursing at the detainees, the Accused Rašević and the bus driver, complaining that non-Serbs were being exchanged while Serb soldiers were dying on the front lines. The Serb soldiers forced the detainees back on the bus, and then forced the bus driver to drive them back to Foča, threatening that the detainees would be killed. The bus was then driven to Miljevina, where the warden Sekulović arrived, apparently to negotiate with those who opposed the exchange of these detainees. Following whatever negotiations or discussions took place, after a few hours the detainees were then driven back to KP Dom Kula, where they were held prior to their exchange the next morning.

The witnesses generally testified that they left the KP Dom on 5 October 1994, except for a few witnesses who offered later dates. This minor inconsistency can be explained by the fact that the detainees were actually exchanged in Sarajevo over the next week, and so these witnesses were likely describing the date on which they were actually exchanged in Sarajevo. The witnesses estimated that between 52 and 85 detainees in total were taken on this day, and accordingly the Panel concluded that the allegation that about 60 detainees were taken to KP Dom Kula on this occasion was proven.

(iii) August 1992

As established by the testimonies of numerous witnesses, including FWS 58, FWS 86, FWS 172 and E, who were participants in this event, on or around 31 August 1992, 35 detainees were deported from the KP Dom to Rožaje, Montenegro, where they were released. This event will be discussed in more detail below, but with regard to the actual deportation, the Panel notes that the detainees were accompanied by two military members as escorts during their deportation to Montenegro.

(iv) Conclusions: Forcible Transfer and Deportation

Throughout these three periods of time, the detainees who were transferred and exchanged were all displaced from Foča to other locations. As previously established with reference to the existence of a widespread or systematic attack against the civilian population, these detainees were civilian residents of Foča and surrounding villages and were therefore unquestionably lawfully present in Foča. Finally, it is evident from the facts that these deportations and forcible transfers were not conducted pursuant to grounds permitted under international law. At the time all of these acts occurred, there were no military operations in the immediate Foča area that would have endangered the security of the detainees or require their evacuation to allow imperative military operations. In addition, there were no natural disasters or other circumstances that would permit the detainees to be evacuated for humanitarian purposes.

The Accused did not dispute that these displacements occurred, but argued that these detainees were not forcibly displaced, and disputed their responsibility for these acts.[83] The Accused pointed to the testimonies of numerous witnesses that they wished to be exchanged or were glad that they were to be exchanged. For example, FWS 210 testified during cross-examination that it was his wish to be exchanged the day after he arrived, while witnesses A and FWS 250 stated that of course they wished to be exchanged. Many, if not most, of the

[83] The Accused's responsibility for these events will be discussed further below.

witnesses similarly answered in the affirmative when asked on cross-examination whether they wished to be exchanged.

However, contrary to the Accused's suggestions, these facts do not establish that these detainees were not forcibly displaced. As with forced labor, the wish to be exchanged does not preclude the conclusion that the displacement was forced. "Force" should be interpreted in context, and the essential question is whether the persons displaced had "a genuine choice as to whether to leave or to remain in the area."[84]

There was no suggestion that the detainees were ever offered a "choice" to remain in Foča. The evidence uniformly demonstrates that decisions regarding exchanges and transfers were made for the detainees by other persons, as evidenced by Exhibits O-I-19, O-I-20, O-I-23, O-I-25, O-I-31, O-I-33, O-I-34, O-I-39 and O-I-41(a)(b). This was not the same situation as with labor at the KP Dom, where some detainees volunteered or requested to work. Certainly, some detainees requested, if not begged, to be exchanged, but there is no evidence that such a request was ever granted. While the detainees may have been pleased or happy with the decisions made that got them out of KP Dom, that in no way demonstrates that they "chose" to be displaced. To the contrary, the absence of any control whatsoever over one's fate, whether to remain or to be transferred to another location, is the antithesis of genuine choice and the essence of force understood broadly. Moreover, even if the Panel were to accept that detainees were offered an implicit choice, that they could refuse to be transferred to other locations, the Panel would still conclude that the detainees were forcibly displaced. The conditions in the KP Dom, as described in Count 3, demonstrate that detainees were subject to severe ill-treatment in the KP Dom. The detainees' "choice", then, was between being displaced to another location outside Foča or remaining in the inhumane conditions in which they were held at the KP Dom. This is the essence of a coercive environment precluding the exercise of free will.

The evidence further establishes that the detainees were deported and forcibly transferred with the intent that they not be able to return. In particular, the Panel notes that Foča was effectively ethnically cleansed and that no non-Serb civilians remained in Foča after 13 August 1992, as confirmed by Established Fact P42. The deportations and forcible transfers of non-Serb detainees from the KP Dom were part of the same campaign and committed with the same intent to permanently remove all non-Serbs from the Foča area.

Accordingly, the Panel concludes, as described in Count 5 of the Verdict, that detainees at the KP Dom were subject to forcible transfer and deportation in violation of Article 172(1)(d).

b. Enforced Disappearance

While, as described, a number of the non-Serb detainees held at the KP Dom were subsequently illegally forcibly transferred or deported from the Foča area, it is evident from the documentary evidence introduced and the testimony of witnesses that many other detainees imprisoned in the KP Dom during the time relevant to the Indictment remain unaccounted for to this day. Even after cessation of hostilities and the closure of detention facilities throughout the territory of Bosnia and Herzegovina, including the KP Dom Foča, the families and friends of these persons heard nothing of them, and they have never joined their families either here or abroad. In addition, the bodies of some persons detained at the

[84] *Simic* Trial Judgment, para. 125.

KP Dom during the relevant time have now been discovered in mass graves and other locations, but the events leading to their deaths remain unknown. The families of these persons, the Federal Commission on Missing Persons and other organizations have sought information on the fates of these persons since their disappearance, but even to the date of the main trial in this case, fourteen to sixteen years after they were last seen alive, there is no information about their fates.[85]

(i) General Allegations: June 1992 to March 1993

Although some detainees – particularly the young and elderly, such as FWS 15, A's brother and father and the elderly persons named by D – were released from the KP Dom shortly after their detention, a sustained process of "exchanges" involving much greater numbers of detainees began in earnest by August 1992.[86] FWS 113 testified that, around mid-August 1992, the detainees at the KP Dom first heard that exchanges were to begin, which they hoped meant that the camp would soon be closed; the witness specifically noted that exchanges had not been mentioned prior to this time. Similarly, FWS 58 described how, around this time, detainees began to be roll-called for exchanges, which made all the detainees hopeful that they would soon be released.

From mid-August 1992 onward, groups of detainees, most ranging from approximately 12 to 30 persons, began to be regularly taken out of the KP Dom to be, as the detainees were told, exchanged. FWS 113, who during his detention kept records of the persons taken for exchanges and the dates they were taken, although these records were taken when he left the KP Dom, testified that from mid-August until the end of 1992, there were approximately 17 or 18 "exchanges". These exchanges were apparently the most intense between the last weeks of August and mid-September. Numerous witnesses, including A, FWS 113 and FWS 172, testified that large groups of detainees, each from around 20 to 60 persons, were taken to be exchanged between the 25th and 31st of August. FWS 172 specifically testified that, on the 25th, he saw around 20 detainees standing at the gate of the KP Dom, carrying all their belongings in plastic bags; the witness also referred to another group taken out for exchange on the 27th of August. As well, FWS 119 testified that on 12 September, approximately 50 young men between 25 and 35 years old, including his brother's son, were taken to be exchanged.

These exchanges followed the same general pattern. In contrast with prior events resulting in torture and killings discussed above, detainees were taken out of their rooms for "exchanges" during the daytime, as established by the testimonies of FWS 119, FWS 172, FWS 210, B and Ekrem Zeković. As FWS 58, FWS 65, FWS 119, A and B testified, a KP Dom guard

[85] The Panel notes in this regard that, as noted below, the bodies of some of those detainees who were forcibly disappeared from the KP Dom have been discovered in mass graves, particularly within the last few years. Although it is clear from the legal elements of the offense, it is worth emphasizing that it is not necessary to establish that persons forcibly disappeared either are alive or deceased. That is, the crime of enforced disappearance is legally distinct from other crimes that may have been committed following the forcible disappearance. For that reason, it is not legally or factually inconsistent to conclude that persons were forcibly disappeared and killed, as these are separate acts and crimes.

[86] The Panel does not exclude the possibility that detainees were taken out of the KP Dom for exchanges, whether actual or ostensible, prior to August 1992. However, the witnesses uniformly described the extended process of exchanges, both actual and ostensible, as beginning in August 1992, and in particular chronologically ordered the interrogations, beatings, tortures and murders as occurring before the exchanges began. Accordingly, the Panel adopts that perspective, recognizing nonetheless that some exchanges may have occurred before August 1992.

would arrive at the detainees' rooms with a list of names. The guard read out the names and specifically informed the detainees that they were to be exchanged and should gather their belongings together. The detainees were then escorted by the KP Dom guards to the gate leading to the administration building. Detainees taken in this way for exchange were not seen at the KP Dom again afterwards, except on those few occasions on which an actual exchange failed.

Some detainees taken out of the KP Dom at this time were in fact exchanged. For example, on the morning of 31 October 1992, a guard came to the room where FWS 104 was held and read out a list of names, including FWS 104, and told them that they were to be exchanged. Along with a group of about 30 other persons, FWS 104 was then taken to Kalinovik, from where he was in fact later exchanged. Similarly, FWS 119 testified that some detainees from his room were taken out for exchange during this time and were actually exchanged. Ekrem Zeković testified as well that he knew of a small number of persons who were actually exchanged during this time. There were also attempted exchanges that failed during this time, such as the exchange FWS 182 was taken for in July 1992. These facts are consistent with Established Fact R56.

However, many detainees who were told that they were to be exchanged and taken out of the KP Dom were in fact forcibly disappeared and are currently unaccounted for.[87] Numerous witnesses testified generally that many of the persons taken for exchange during this time have not been seen or heard from since that time and remain missing. This general information can be confirmed with respect to a number of persons specifically mentioned by witnesses as having been taken for exchange at that time. Based upon the lists of missing persons who were detainees at the KP Dom compiled by the Federation Commission for Missing Persons, which were admitted into evidence as Exhibits P-51 and P-52, and the list of missing persons compiled by the ICRC, which was admitted into evidence as Exhibit P-53, the Panel was able to confirm that specific detainees who were told they were being taken for exchange are still missing to this day. For example, FWS 113 testified that a relative, Rešad Hadžimešić was taken away on 25 October, and P-52 confirms that this person was at the KP Dom and remains unaccounted for. Similarly, FWS 172 testified that Hajro Šabanović, Avdo Mehmedspahić, Šaban Durak and Miralem Ramović, among others, were detainees from his room who were taken for exchange as part of the 25 August group; P-52 also confirms that these persons were detainees at the KP Dom and remain missing. As well, witness A stated that between the 25th and 31st of August, Zaim Čedić and Nedžib Kršo, among many others, were taken for exchange, and P-52 confirms that these persons were detainees at the KP Dom and remain missing. As a final example, FWS 58 testified that Nedžib Lojo, Murat Granov, Rešad Hadžimešić, Miralem Ramović, Salko Šljivo and Mehmed Ćerimagić, among others, were told that they would be exchanged and left the KP Dom during this time; P-51 and P-52 confirm that these persons were detainees at the KP Dom and remain unaccounted for. Many other witnesses, such as Ekrem Zeković, testified that specific individuals were taken out of the KP Dom to be exchanged, and P-51 and P-52 confirm that these individuals were detained at the KP Dom and remain missing. The witnesses also provided many partial or incomplete names of detainees who were taken for exchange and are missing, and these

[87] While the Panel will, for simplicity's sake, refer to these detainees as missing or unaccounted for, it should be noted that the bodies of some of these detainees who were taken out of the KP Dom and subsequently disappeared have recently been found during the course of exhumations of mass graves.

partial names generally correspond to the names of persons who are confirmed to have been detainees at the KP Dom and remain missing.[88]

A number of witnesses, including Ekrem Zeković, FWS 111, FWS 113 and FWS 142, described one such exchange in significant detail. In early December 1992, between six and twelve detainees were called from their rooms during the evening hours and told that they would be exchanged the next day. They were then placed together in a separate room for that night and were taken out of the KP Dom early the next morning. The witnesses identified Fahrudin Malkić, Ekrem Čengić, Ibrahim Kafedžić, Nazif Lagarija, Halim Dedović, Aziz Šahinović and an unidentified Slovenian journalist as having been taken away on that occasion. P-51 confirms that the named persons were detainees at the KP Dom and that they are still missing.

(ii) 17 September 1992

Detainees who subsequently disappeared were also taken away from the KP Dom for ostensible purposes other than to be exchanged. In particular, FWS 65, FWS 76, FWS 111, FWS 113, FWS 115, FWS 119, FWS 139, FWS 142, FWS 182, FWS 250, A, B, C and D testified regarding the taking away of a group of detainees on 17 September 1992 to pick plums. On that day, the KP Dom guards came to the detainees' rooms in the morning and asked for a list of volunteers to go pick plums. The guards soon after returned and disregarded the list of volunteers, simply roll calling instead a group of detainees from a list of names. Another group of detainees was similarly roll called in the afternoon for the same purpose, for a total of approximately 35 persons. Some witnesses testified that they noted at the time that although these detainees were to be taken to pick plums, some of those roll called were injured or sick. These detainees did not take their belongings with them, as they were told that they would merely be away for a few days and then return. However, these detainees never returned to the KP Dom and were in fact never seen again. The witnesses specifically named a number of those detainees taken out on this occasion, including Mirsad Hadžimešić, Amer Karabegović, Husein Korenjić, Hajro Klinac, Samir Mujezinović, Halid Konjo, Murat Crneta, Rasim Kajgana, Džemal Balić, Murat Deleut and many others. P-51 confirms that these persons were detainees at the KP Dom and that they are still unaccounted for.

(iii) August 1992

Finally, on or around 30 August 1992, approximately 55 detainees left the KP Dom to be released in Montenegro, of whom 35 were in fact released in Rožaje, Montenegro on or around 31 August, as previously discussed. Witnesses FWS 02, FWS 58, FWS 86, FWS 119, FWS 172, FWS 182, B and E testified regarding this event; more specifically, FWS 58, FWS 172 and E were among those 35 detainees who were in fact released in Rožaje. These 55 detainees were originally roll called from lists that had been compiled of those who were over 65, younger than 18 or ill, and placed together in a separate room the night before they first left the KP Dom. The next morning the detainees boarded a bus at the entrance to the KP Dom, along with two military escorts. The bus first stopped at another location, apparently as

[88] The Panel recognizes that there are some inconsistencies between the dates on which the witnesses testified that certain missing persons were taken for exchange and the dates listed in P-51 on which those persons disappeared, as well as between witnesses. The Panel considers that these minor inconsistencies that do not detract from the conclusion that the persons described were at the KP Dom and are currently missing, particularly as the inconsistent dates fall generally within the time period relevant to the Indictment.

part of a planned procedure, then drove on towards the Montenegrin border and crossed into Montenegro. However, as the bus approached Nikšić, it was overtaken by a police vehicle, which directed the bus driver to pull over to the side of the road. Pero Elez, a … soldier, exited the police vehicle and ordered the bus to return to Foča, which it did. The detainees were then returned to the KP Dom, where they were placed by the KP Dom guards in rooms separate from the other detainees. Shortly afterwards, a KP Dom guard came to the room and roll called the names of 20 detainees from a list. FWS 58 described those called out in this way as relatively young. FWS 58 further testified that when the guard was asked where these people were going, he answered that they would be exchanged in Goražde. The witnesses specifically named many of those 20 singled out, including Ismet Čaušević, Fadil Divjan, Šefko Hodžić, Esad Mezbur, Alija Dželil and others, and stated that they were never seen again. P-51 and P-52 confirm that these persons were detainees at the KP Dom and that some remain missing. The witnesses also testified that the bodies of some of these persons were later found, which is confirmed with respect to all the above, except Šefko Hodžić, by the records of exhumation and body identification admitted into evidence, specifically Exhibits P-92, P-101, P-109 and P-110, respectively.

(iv) Conclusions: Enforced Disappearance

Witness Amor Mašović, currently co-chair of the Federation of BiH Commission on Missing Persons and formerly with the State Commission for the Exchange of Prisoners, testified that, between April 1992 and October 1994, 266 persons who were detained at the KP Dom subsequently disappeared and no information about their fate has been provided; this represents roughly one-quarter of the total number of all persons who the State Commission's records show were detained at any time during the relevant period at the KP Dom. Of these 266 persons, he further testified that the mortal remains of approximately 50% have been discovered to date, primarily in mass graves in the Foča region. The witness did not specify the time period in which all 266 detainees disappeared.

This testimony was confirmed and supplemented by P-51 and P-52. P-51, which does not purport to be a complete list, documents approximately 110 persons who were at KP Dom, disappeared between June 1992 and March 1993 and are currently missing. In addition, P-52 documents approximately 60 additional persons, excluding those documented in P-51 who were at the KP Dom and are currently missing; although P-52 documents the month of disappearance for these persons, it is unclear whether this information corresponds to last time the person's family or friends saw them or the month during which they disappeared from the KP Dom; it appears more likely that the latter is the case. Finally, P-51 documents a large number of other persons who were at the KP Dom and whose current status is unknown ("nepoznato"); that is, it is not known whether they were in fact exchanged or whether they disappeared.

In reaching its final conclusion that at least 200 persons detained at the KP Dom subsequently disappeared and remain unaccounted for, the Panel noted that P-51 documents a total of 127 persons who were confirmed to have been detained at the KP Dom, were taken in an unknown direction at the relevant time ("odveden u nepoznatom pravcu") and remain missing. Of these 127 persons, only 16 either did not disappear or cannot be confirmed to have disappeared from the KP Dom between June 1992 and March 1993. Accordingly, then, 13% of the total of 127 confirmed disappearances in P-51 are confirmed to have occurred between the dates relevant to the indictment.

Applying this 87:13 ratio to the total of 266 missing detainees provided by Amor Mašović, it can be reasonably inferred that 231 detainees disappeared from the KP Dom between June 1992 and March 1993. The events to which the witnesses testified occurred between those dates. Even if the Panel were to consider that upwards of 20% of those who disappeared from the KP Dom disappeared before June 1992 or after March 1993, which is not supported by the testimony of witnesses, that would still suggest that roughly 210 detainees disappeared between June 1992 and March 1993. Accordingly, the Panel concludes that at least 200 detainees disappeared from the KP Dom between those dates and remain unaccounted for, as charged in the Indictment. Among these 200 detainees were the detainees who are named in the operative part of the Verdict, each of whom have been confirmed as missing by one or more of the exhibits, P-51, P-52 and P-53; and some of whom were in addition identified as having been "exchanged" or otherwise taken away during the relevant times by witnesses.

The Panel concludes that the detainees who were victims of these enforced disappearances were taken by the KP Dom guards to the front gate of the prison and handed over to members of the military and military police, although the Panel does not exclude the possible participation of other persons, including paramilitaries and the civilian police. Exhibit O-I-48 is an order listing 35 detainees, described as prisoners of war, who were to be taken out of the KP Dom and released. This order is dated 18 September 1992 and signed by the commander of the Foča Tactical Group. The detainees listed in the order are identical to the detainees identified by witnesses as having been taken out of their rooms in the plum picking incident described above. Rašević testified that, on this occasion, members of the military took custody of the detainees and transported them from the KP Dom. In addition, Ekrem Zeković testified that he witnessed on several occasions groups of detainees, who subsequently disappeared, being handed over to members of the military at the gates of the KP Dom.

The acts described meet the elements of the offense of enforced disappearance as provided in Article 172(1)(i) of the CC of BiH. As noted, those elements are:

1) the arrest, detention or abduction of persons;
2) by or with the authorization, support or acquiescence of a State or a political organization;
3) followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons; and
4) with the aim of removing those persons from the protection of the law for a prolonged period of time.

The word "refusal" in element 3 is interpreted to include the failure to acknowledge the deprivation of freedom or provide information. It is clearly implicit that giving false information about the victim's whereabouts or fate constitutes refusal or failure to give information and satisfies the third element of the offense. The first element of the offense is satisfied by the secured detention, transfers, transportations and takings away of persons from initial detention or custody locations to other locations, and is part of the *actus reus* of the offense.

With these considerations in mind, the Panel concludes that the elements of the offense of enforced disappearance were established beyond doubt. At least 200 non-Serb detainees were taken out of the KP Dom under guard to another, unknown location. These acts were authorized by the Foča Tactical Group, an organ of the Republika Srpska. Both the remaining detainees at the KP Dom, at the time and after their own exchanges, and the

Federation Commission for Missing Persons thereafter sought and did not receive information from the KP Dom staff and the organs of the Republika Srpska regarding the whereabouts and fates of these detainees. The takings away were conducted repeatedly and systematically over a number of months and involved large numbers of detainees. In addition, there were clear attempts to hide and disguise the fates of the detainees taken away, evidencing the intent from the outset to remove any possibility that these detainees' whereabouts could be properly registered or traced by agencies and organizations authorized under domestic and international law. Detainees at the KP Dom were repeatedly told that these detainees were being taken to be exchanged, while Exhibit O-I-48 shows that the Foča Tactical Group was similarly engaged in laying a false trail by describing in official documents these detainees as having been taken to be released. These detainees were and continue to be deprived of the protection of the laws for a period in excess of ten years.

c. Other Charges in Count 5

The Panel further concludes that the charge in Count 5 that, "in October 1994, at least 187 detainees were transferred in the said facilities," has not been proven, nor has it been possible to establish with certainty that this many detainees were transferred from the KP Dom in October 1994.

G. PERSECUTION: COUNTS 1-5

Elements of the Crime

The criminal offense of persecution pursuant to Article 172(1)(h) of the CC of BiH is defined as "Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina." Article 172(2)(g) clarifies that "persecutions" means "the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity." Accordingly, pursuant to Article 172(1)(h) of the CC of BiH, the elements of the crime of persecution as a crime against humanity are:

1) the intentional and severe deprivation of fundamental rights;
2) contrary to international law;
3) by reason of the identity of a group or collectivity;
4) against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law; and
5) in connection with any offense listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina.

The Appeals Chamber of the ICTY has defined the elements of persecution as a crime against humanity as an act or omission which:

1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and
2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.[89]

Having reviewed the jurisprudence and relevant instruments, the Panel concludes that the definition of persecution developed by the ICTY correctly reflects customary international law at the time relevant to the Indictment. The Panel further concludes that the definition of persecution under customary international law is fully incorporated into the definition of persecution in Article 172(1)(h) and (2)(g) of the CC of BiH.

The Panel notes, however, two important points. First, the discriminatory grounds established by the ICTY, namely racial, religious and political, are the exclusive grounds recognized by customary international law at the relevant time and are thus the exclusive grounds that the Panel can consider in these proceedings. Second, and more importantly, although the "in connection with" element is not required under customary international law, as it is included in Article 172(1)(h), the Panel is bound to apply that element.

[89] *Prosecutor v. Kvocka, et al.*, IT-98-30/1-A, Judgment, 28 February 2005, para. 320.

The Panel agrees with the reasoning of other Trial Panels of the Court of BiH that the commission of multiple persecutory acts should be considered as the commission of a single criminal offense, namely persecution, even if individually those acts amount to other crimes against humanity.[90] In addressing the criminal responsibility of the Accused, the Panel will therefore consider whether each of the crimes established above was committed with discriminatory intent.

As an initial and general matter, the Panel concludes that all the crimes established above were intentional and severe deprivations of fundamental rights contrary to international law, satisfying the first and second elements of the criminal offense of persecution. In addition, as the crimes established above are crimes under Article 172(1) of the CC of BiH, the Panel concludes that the "in connection with" element is also clearly satisfied. The Panel will consider the third and fourth elements of the criminal offense of persecution in the course of its analysis of the criminal responsibility of the Accused as members of a systemic joint criminal enterprise.

[90] *See, e.g., Stankovic* Verdict, pg. 34.; *Kovacevic* Verdict, pgs. 43-44.

III. CRIMINAL LIABILITY: SYSTEMIC JOINT CRIMINAL ENTERPRISE AND COMMAND RESPONSIBILITY

Each of the Accused has been found personally criminally responsible as a principal for co-perpetrating the crime of persecution against inmates of the KP Dom, a concentration camp, between April 1992 and October 1994. Each has incurred personal criminal liability for their commission of the crime as part of a joint criminal enterprise of a particular type, hereinafter referred to as systemic JCE.[91]

In addition, under the principle of Command Responsibility, each of the Accused has been found to be personally criminally liable for the crimes against humanity perpetrated at the KP Dom during the incriminating period because each was found to have a superior-subordinate relationship with those who participated in the *actus reus* of the crimes, each had knowledge of the crimes, and each failed to take the measures necessary under the law to prevent or punish the crimes.

Although the elements of both forms of culpability have been charged and proven, the form which best characterizes the manner in which the crimes were committed is co-perpetration within systemic joint criminal enterprise.[92] Because command responsibility is relevant to sentencing, both principles will be discussed and reasoned below.

[91] As will be discussed in more detail below, this term comes from the description of what was called "Form 2 JCE" by the ICTY Appeals Chamber in *Tadic*, which identified three forms of JCE and characterized those forms as part of customary international law. *Prosecutor v. Tadic*, IT-94-1-A, Judgment, 15 July 1999, paras. 185-226.

[92] *Accord Kordic* Appeal Judgment, paras. 34-35; *Blaskic* Appeal Judgment paras 91-92. *See also Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgment, 23 May 2005, para. 81; *Prosecutor v. Fofana and Kondewa* ("CDF Case"), SCSL-04-14-T, Judgment, 2 August 2007, para. 251.

A. JOINT CRIMINAL ENTERPRISE AND COMMAND RESPONSIBILITY UNDER THE LAW OF BiH AND CUSTOMARY INTERNATIONAL LAW

1. Law of BiH: Joint Criminal Enterprise and Command Responsibility

a. Article 180(1) and (2) of the CC of BiH

Article 180 establishes the mode of criminal liability that the Panel must find in order to convict persons for crimes specifically referenced within Article 180. It has been charged together with Article 29 of Chapter Five of the CC of BiH, which provides for the manner of commission and degrees of liability for commissions of offenses.

Article 180(1) and (2) are derived from and are identical to Article 7 of the ICTY Statute. The ICTY Statute is international law, by virtue of its having been drafted pursuant to the powers of the United Nations.[93] It is a well-established principle of international law that when international law is incorporated into domestic law, "Domestic Courts must consider the parent norms of international law and their interpretation by international courts."[94] When Article 7 was copied into the law of BiH, it came with its international origins and its international judicial interpretation and definitions.

(i) Joint Criminal Enterprise: Article 180(1) and Article 7(1) of the ICTY Statute

The Criminal Code of BiH establishes those acts for which persons can be prosecuted and the manner in which commission of these acts can incur personal criminal liability. For Crimes committed in Chapter 17 of the CC of BiH ("Crimes Against Humanity And Values Protected By International Law"), the manner of commission by which criminal liability will attach is contained in Article 180. Article 180 (1) sets out the ways in which one will incur personal culpability for particular crimes set out in Chapter 17, including crimes against humanity (Article 172), with which the Accused are charged. Article 180(1) reads in relevant part:

> A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in… 172 (Crimes against Humanity)… of this Code, shall be personally responsible for the criminal offence. The official position of any accused person, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of criminal responsibility nor mitigate punishment.

Article 180(1) is derived from and is identical to Article 7(1) of the ICTY Statute. Article 180(1) became part of the CC of BiH after Article 7(1) had been enacted and interpreted by the ICTY to include, specifically, joint criminal enterprise as a mode of co-perpetration by which personal criminal liability would attach.[95]

[93] *See* Report of the Secretary-General, UN Doc. S/25704, 3 May 1993.
[94] Gerhard Werle, *Principles of International Criminal Law*, (The Hague: Asser Press, 2005), p. 80. *See also* Richard K. Gardiner, *International Law* (Essex: Pearson, 2003), p. 156; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), p. 206.
[95] *See infra*, discussion of *Tadic* Appeal Judgment.

The Commentaries to the CC of BiH, Article 180(1) recognize that this Article incorporates international law into domestic law. The Commentaries state:

> The provisions of paragraph 1 [of Art. 180] are worded exactly the same way as Art. 7 paragraph 1 of the ICTY Statute…. It is obvious that the legislator followed the basic rules of criminal liability deriving from International criminal Law and from the provisions in the ICTY Statute, as well as by the provisions in Art. 25(3)(a) through (e) of the Rome Statute, as he [the legislator] significantly broadened the possible acts of perpetration and of accessory in the perpetration of criminal acts.[96]

The international judicial interpretation of the term "perpetrated" in Article 7(1), which was incorporated into domestic law as Article 180(1), specifically provides: (1) that JCE is a form of co-perpetration that establishes personal criminal liability; (2) that "perpetration" as it appears in Article 7(1) of the ICTY Statute (and hence also in Article 180(1) of the CC of BiH) includes knowing participation in a joint criminal enterprise; and (3) that the elements of JCE are established in customary international law and discernable. This Panel, in applying the term "perpetrated" in Article 180(1) must consider the definition of that term as it was understood when it was copied from international law into the CC of BiH.[97]

(ii) Command Responsibility: Article 180(2) and Article 7(3) of the ICTY Statute

The concept of command responsibility is expressly part of the Criminal Code of BiH and has been since Article 180(2) of the CC of BiH incorporated Article 7(3) of the ICTY Statute. Article 180(2) sets out the ways in which personal liability for the crimes of subordinates is incurred by a supervisor who fails to prevent or punish subordinates who commit particular crimes set out in Chapter 17, including crimes against humanity (Article 172), with which the Accused are charged. Article 180(2) reads in relevant part:

> The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Article 180(2) is derived from and identical to Article 7(3) of the ICTY Statute. Article 180(2) became part of the CC of BiH after Article 7(3) had been enacted and interpreted by the ICTY, and Article 180(2) brings into the Law of BiH that interpretation.

[96] *Commentary on the Criminal Codes in BiH*, Vol. I (Joint Project of the Council of Europe and the European Commission, Sarajevo 2005), Prof. Miloš Babić (team leader), Mag. Ljiljana Filipovioć, Dr. Ivanka Marković, Zdravko Rajić, pgs. 593, 594.

[97] The Constitutional Court of BiH has held that the ICTY Statute is an "integral part of the legal system of Bosnian and Herzegovina" as it is one of the documents that regulates the application of international law to which BiH is subject under Article III(3)(b) of the Constitution of BiH. *Abduladhim Maktouf*, Case No. AP-1785/06, Decision on Admissibility and Merits on the appeal from the Verdict of the Court of Bosnia and Herzegovina ("*Maktouf* Decision"), 30 March 2007, para. 70.

b. Customary International Law in the Law of BiH

As will be discussed in Sections A.3 and A.5 below, the concepts of joint criminal enterprise and command responsibility are established principles in customary international law and have been since before April 1992. Customary international law is part of the law of BiH.

As a general principle, "It seems that all national legal systems... accept customary international law as an integral part of national law."[98] However, in addition, from 1899 onwards, customary international humanitarian law has been expressly included in treaties of humanitarian law to which BiH is a party through the so-called "Martens clause". The most recent inclusion of the Martens clause occurred in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), where the following language appeared as Article 2:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom….[99]

Bosnia and Herzegovina is a party to the Geneva Conventions of 1949 and both Additional Protocols, as reconfirmed by the Constitution of Bosnia and Herzegovina, Article II(7) and Annex 1. Article III(3)(b) of the Constitution of Bosnia and Herzegovina establishes that "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities." The Constitutional Court of BiH has confirmed that the Geneva Conventions and their protocols "have a status equal to that of constitutional principles and are directly applied in Bosnia and Herzegovina."[100] In addition, Article 3 of the CC of BiH makes specific reference to criminal offenses defined by international law.

The Accused are therefore properly charged under the current criminal law of BiH as members of a systemic JCE, and are criminally liable under the principle of command responsibility: 1) because the Accused are subject to the authority of customary international law, which recognizes JCE and command responsibility; and, 2) because the Accused are subject to the statutory law of BiH, specifically Article 180 (1) and (2) of the CC of BiH, which incorporate the concepts of JCE and command responsibility.

2. The Principle of Legality: Systemic JCE and Command Responsibility

Because they are subject to liability under JCE and command responsibility principles now does not mean that their liability for committing crimes in the past can automatically be supported under JCE or command responsibility theories. The Accused are charged with commission of crimes beginning in April 1992, prior to the enactment of the current Criminal Code and current Constitution. Under the principle of legality, the Accused cannot be held responsible under a theory of liability that did not exist at the time of the perpetration of the crimes.[101] Therefore it must be established beyond doubt that JCE and command responsibility were part of the law to which the Accused were subject from April 1992

[98] Eileen Denza, "The Relationship Between International Law and National Law", in Malcom Evans (ed.), *International Law* (Oxford: Hart Publishing, 2003) pg. 415, 428.
[99] Additional Protocol I. *See also* Additional Protocol II, Preamble. Yugoslavia became a party in 1979.
[100] *Maktouf* Decision, para. 71.
[101] *See* CC of BiH, Art. 3, 4; ECHR, Art. 7; ICCPR, Art. 15.

through October 1994. Compliance with the principle of legality requires proof that the Accused incurred criminal liability under a principle of law to which they were at the time subject, and also that at the time of commission of the crimes, it was reasonably foreseeable that the Accused would be criminally liable under that principle.

a. The Accused were Subject to Customary International Law at the time the Crimes were Committed

Customary international law has long been accepted as a source of international law, along with treaty law and "general principles of law recognized by civilized nations".[102] The foundations of customary international law are twofold: the objective element which is the practice of states; and the subjective element, called *opinio juris*, which refers to the acceptance by states that a practice is part of international law.[103] Evidence that a rule has become customary international law can come from a variety of sources, including the case law of international tribunals and national courts applying international law.[104] Because of the way in which a rule of customary international law becomes law, the exact moment of its inclusion into international law can never be determined with certainty. But the presence of that rule can be tracked by documenting evidence of its existence in the practice of states and the reaction of states to that practice.

As will be discussed in detail below, in Sections A.3 and A.5, both systemic JCE and command responsibility were part of customary international law at the relevant time. Because these principles were part of the customary international humanitarian law at the time the crimes were committed, the Accused were subject to them.

Customary international law was "an integral part of national law" accepted by "all national legal systems" long before 1992.[105] In addition, the former Yugoslavia and its successor states were parties to the international humanitarian law treaties, including the Geneva Conventions of 1949 and both of Additional Protocols, and hence subject to the "Martens Clause" as it appeared in its various forms in these treaties and protocols.[106] The Martens Clause, as part of applicable treaty law, expressly places civilians and combatants under the authority of customary international humanitarian law. The Constitution of the SFRY, Article 210, provided for the direct application of treaty law, stating:

> Treaties shall be applied as of the date of their entry into force, unless otherwise determined by a ratification act or by a contract signed pursuant to the powers of an authorized body. *The courts shall directly apply the treaties that have been published*. (emphasis added).

[102] International Court of Justice ("ICJ") Statute, Art. 38(1)(b).
[103] The two elements have been repeatedly affirmed and explained by the ICJ in its jurisprudence. *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. U.S.*), Merits, 1986 ICJ Rep. 14 (June 27).
[104] These include as well "statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals." *Tadic* Appeal Judgment, para. 128.
[105] See footnote 8, *supra*.
[106] The former Yugoslavia was a party to the Geneva Conventions and the Additional Protocols. When Bosnia and Herzegovina declared independence, it filed its intention to be bound by these treaties, and the treaties were recognized as applicable to BiH from March 1992 forward.

The Accused were expressly under the "authority of the principles of international law derived from established custom" at the time the offenses were committed, and courts were under an obligation to "directly apply" that law.

b. Prosecution under Systemic JCE or Command Responsibility was Foreseeable at the time the Crimes were Committed

The European Court of Human Rights, in interpreting Article 7 of the ECHR, has held that in order to be found guilty under a principle of liability, that principle must not only have been part of the law to which the Accused were subject at the time of the commission of the crime but, in addition, that it was reasonably foreseeable that they would be subject to prosecution for commission of crimes under those theories of liability.[107] As discussed herein, the Panel concludes that systemic JCE and command responsibility were part of customary international law at the time the Accused perpetrated the crimes of persecution in the manner determined within this verdict; and the Accused were subject to the authority of customary international humanitarian law at the time they committed these crimes. The Panel further concludes that prosecution under either theory of culpability was foreseeable at the time the crimes were committed.

The European Court has often had occasion to rule on the principle of legality enshrined in Article 7 of the European Convention. Its pronouncements have not dealt specifically with the application of customary international law within the context of domestic trials. Customary law is, by its nature, unwritten, and evolving. However, the European Court has had occasion to review the application of Article 7 to domestic criminal law that is both evolving and non specific.[108] In those cases, that Court has examined whether there was a "settled" body of case law which was public and accessible, through which the requirements of the law were made clear. Where such a body of public and accessible case law existed, criminal Accused were deemed to have sufficient notice that their activities were subject to criminal sanction so that they could conform their conduct to the expectations of the law.[109] In those circumstances, Article 7 rights were not considered to be violated.[110]

In April 1992 and thereafter it was reasonably foreseeable to the Accused that their participation in the particular systemic JCE that existed at KP Dom could subject them to criminal liability as co-perpetrators. Both Accused were professional prison administrators who had worked at the KP Dom when it operated as a model penal institution and both were well aware of the point in April when it ceased to be such an institution and became a concentration camp. The notoriety which accompanied the Nazi concentration camp cases was well known throughout all countries that fought in World War II, as was the fact that many of those persons responsible for maintaining the Nazi concentration camps were tried and punished for their role in maintaining the camp systems. These were very publicly tried

[107] *Streletz, Kessler and Krenz v. Germany* (Apps. Nos. 34044/96, 35532/97 and 44801/98), 22 March 2001, para. 105.
[108] *See S.W. v. the United Kingdom* (App. No. 20166/92), 27 October 1995; *C.R. v. the United Kingdom* (App. No. 20190/92), 27 October 1995.
[109] See also Kokkinakis v. Greece (App. No. 14307/88), 25 May 1993, para 40; Radio France v. France (App. No. 53984/00), 30 March 2004, para 20.
[110] The Constitutional Court of BiH, in interpreting *Kokkinakis v. Greece*, stated the requirements of Article 7 as to foreseeability as follows: "The European Court specifically emphasized that this requirement of Article 7 of the European Convention is met when an individual referred to in the relevant provision, if necessary, by means of the Court interpretation, can understand which criminal activities and mistakes can make him/her subject to criminal prosecution." *Maktouf* Decision, para. 63.

and reported cases occurring in internationally overseen trials held in Germany in locations reasonably close to the former Yugoslavia, and the case law and conclusions of those tribunals were both public and accessible.

In addition, the Accused could reasonably foresee criminal liability arising from their activities in maintaining a criminal system, based on the existence of the written provision of Yugoslavian Law in 1992. Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("CC of SFRY") stated:

> Anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself committed them, irrespective of whether and in what manner he himself directly participated in the commission of ay of these acts.[111]

The Commentaries to this section recite that a perpetrator convicted under this provision:

> 1) is responsible for the acts that are directly included by the plan of the criminal group as well as those acts that are the result of this plan if they are of such a nature that their perpetration is in line with the realization of the goals of this group.
> 2) is liable for the single criminal acts perpetrated, even if he/she himself/herself did not take part in the perpetration at all.
> 3) will be sentenced in the same way as the perpetrator of the crime.[112]

The Commentaries further describe the common criminal plan of the group as usually "unwritten" and discernable through inference:

> If the goals of the group are known, the general criminal plan of this group can be inferred from this (knowledge). In this way it is possible to determine which acts are directly covered by the plan, …the acts that have to be perpetrated are usually not specified or individualized, the contents of the criminal plan is determined with regard to the general goal/aim of the group.

Given the similarity between the basic elements of the written domestic law applicable at the time, and systemic JCE as it existed in international law at the time, it is beyond doubt that the Accused had more than sufficient notice that they risked being prosecuted as perpetrators for their participation with others in maintaining a system through which inmates of a camp were subjected to persecution in violation of international humanitarian law.[113]

Likewise, the Accused could reasonably foresee criminal liability under the principle of command responsibility. In addition to the case law that developed in the post-World War II period, that principle was expressly incorporated in Additional Protocol I, which was duly

[111] Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the FRY No. 35/92.
[112] *Commentary on the Criminal Code of the Socialist Federal Republic of Yugoslavia* (Novi Sad 1978), Prof. Frano Bačić, Prof. Ljubo Bavcon, Prof Miroslav Đorđević, *et. al.*, pgs. 143, 144.
[113] In addition, Article 145 (2) of the Criminal Code of the Federal Republic of Yugoslavia criminalized membership in a group organized for the commission of genocide and war crimes, as a separate specific crime, although not as a mode of liability.

published in 1978 in the Official Gazette and part of the enforceable domestic law. Although Additional Protocol I itself would not directly apply to civilian superiors, the principle of command responsibility was sufficiently accessible through the existing treaty law for the Accused to be on notice that activities of the type in which they were engaged carried criminal consequences under this principle.

Article 7(2) of the ECHR states: "This article 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 the general principles of law recognized by civilized nations."

Article 7(2) of the ECHR is reflected in Article 4a of the CC of BiH: "Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law."

This concept was also part of the law of the SFRY and its successor states in April 1992. Article 15(2) of the ICCPR reflects Article 4a of the CC of BiH and Article 7(2) of the ECHR, and provides for the trial and punishment of persons for acts which were criminal "according to the general principles of law recognized by the community of nations." The former Yugoslavia became party to that treaty in 1971.[114] The Accused were on notice that they could be criminally prosecuted under principles of international humanitarian law at the time the offenses were committed.

In addition to this, what should be particularly taken into account is a provision in Article 21 of the 1988 Instruction on the Application of Rules of International Law of War in the Armed Force, in which provisions of the Geneva Conventions and Additional Protocol I were implemented and which explicitly established command responsibility in the then JNA. Furthermore, it follows from Article 30 of the CC of the SFRY, applicable at the time the crimes were committed, that this mode of liability constituted a part of the then criminal law. This provision defined "omission" to act as a mode of commission of criminal offense, and it concerned all criminal offenses, including the ones against international law referred to in Chapter 16 of the CC of the SFRY. The basis for command responsibility was found in this very provision, whose Article 2 set forth:

> "A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform."

The Panel concludes from the foregoing that criminal prosecution on the basis of command responsibility could be foreseen at the time of the commission of crimes.

3. Systemic JCE under Customary International Law

Evidence that a rule has become customary international law can come from a variety of sources, including the case law of international tribunals and national courts applying international law. By 1950, there was a significant record both of state practice and articulated acceptance by states for the principle of systemic JCE, by which persons accused of violating international humanitarian law by knowingly contributing to the maintenance of a system of criminal mistreatment of inmates in concentration camps could be charged, tried

[114] Ratified on 2 June 1971.

and punished as principals. By 1992, when the Accused began commission of the crimes with which they are currently charged, systemic JCE had crystallized into a theory of liability recognized by customary international law.

Because of the way in which a rule of customary international law becomes law, the exact moment of its inclusion into international law can never be determined with certainty. But the presence of that rule can be tracked by documenting evidence of its existence in the practice of states and the reaction of states to that practice. The trials of those persons accused of contributing to maintaining concentration camps in Nazi Germany provide the opportunity to examine the evidence indicating that systemic JCE as a theory of personal criminal liability was accepted by states as part of customary international criminal law and practiced by states in applying that law. The concentration camps run by the Nazis, and the trials of the war criminals that ran those camps, are well documented and infamous. In the two major series of trials of those who were involved with the running of four of those camps, Dachau, Mauthausen, Belsen and Auschwitz, scores of Accused were charged and convicted personally by tribunals established and overseen by the international community for their part in what is now referred to as a systemic JCE.[115]

In *Trial of Josef Kramer and Forty-four others* ("*Belsen*"), forty-five persons were alleged to have been members of the staffs of Belsen or Auschwitz concentration camps and of "having all knowingly participated in a common plan to operate a system of ill-treatment and murder in these camps."[116] The named victims were from ten separate European countries and though the proceedings were presided over by the British Military Court, "seats were provided behind the bench for each of the ten nations."[117] Thirty of the Accused were found personally criminally liable for their commission of war crimes under a theory of culpability now called systemic joint criminal enterprise.

At the same time the *Belsen* Trial was ongoing, additional trials were being conducted by the General Military Court of the US Zone in *Trial of Martin Gottfried Weiss and Thirty-nine others* ("*Dachau Concentration Camp*").[118] The forty Accused in that case were charged with acting "in pursuance of a common design to commit the acts hereinafter alleged as members of staff of Dachau Concentration camp… [and] did participate in the subjection of [the inmates] to cruelties and mistreatment."[119]

The United Nations Law Reports reflect that the Court found that three elements needed to be established to incur personal criminal liability under this theory of perpetration: "(1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, (3) that each accused, by his conduct… participated in enforcing this system."[120]

[115] The following information on the Nazi Concentration camp cases is derived from the United Nations Law Reports compiled by official reporters during the trials and archived by the United Nations. They are available in English at http://www.ess.uwe.ac.uk/genocide/war_criminals.htm.
[116] *Belsen*, British Military Court, Luneberg, Germany, 17th Septermber-17th November 1945, UNWCC, Vol. II, pg. 1.
[117] *Id.*, pg. ix.
[118] *Dachau Concentration Camp,* General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, Vol. XI, p. 5.
[119] *Id.*
[120] *Id.*, pg. 13.

These elements were again confirmed in *Trial of Hans Alfuldisch and Sixty others* ("*Mauthausen Concentration Camp*") three months later.[121] Sixty-one Accused where found personally criminally liable for their knowing participation in a system of mistreatment of the inmates. This personal criminal culpability extended to "every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian…." Reaffirming the need to establish definite knowledge of the criminal practices that made up the system, that tribunal found that the evidence of the crimes perpetrated against the inmates was so obvious that such definite knowledge was found to exist beyond doubt.[122]

By 1992 there is no doubt that the principle of joint criminal enterprise involving knowing participation in systemic commission of war crimes and crimes against humanity against prisoners in concentration camps, was solidly part of customary international law. This form of systemic JCE was also recognized and affirmed as part of customary international law by the ICTY, first by the Appeals Chamber in *Tadic*, and thereafter in a series of cases both at the trial and appellate levels.[123] The *Tadic* Appeals Chamber found that systemic JCE was one particular factual manifestation of general Joint Criminal Enterprise recognized by customary international law. In addition, the *Tadic* Appeals Chamber found a third form of JCE, which it labeled JCE 3. However, based on the facts of this case, this Panel is only concerned with systemic JCE, recognized in international customary law as a form of General JCE.[124] It will fall to other panels to determine whether JCE 3 was part of international customary law between 1992 and 1995.

4. Elements of Joint Criminal Enterprise Liability

Joint criminal enterprise is not a crime itself, but a manner of commission of a crime. If an Accused is charged with co-perpetrating a crime as part of a JCE, the Prosecutor must prove beyond doubt that a crime has actually been perpetrated, that its perpetration was achieved by those operating together in a joint criminal enterprise, and that the elements necessary to establish the Accused's liability for that perpetration have been met.

As discussed above, joint criminal enterprise generally, and systemic JCE in particular, were already part of customary international law by April 1992, and the elements and definition were established. The Trial Chamber specifically recognized this in its 7 May 1997 *Tadic* Trial Judgment.[125] Since that time, the Trial Chambers and Appeals Chamber of the Tribunal have had several occasions to apply the concept of JCE, and particularly systemic JCE, in cases involving detention camps maintained throughout Bosnia and Herzegovina between

[121] *Mauthausen Concentration Camp*, General Military Government Court of the United States Zone, Dachau, Germany, 29th March-13th May 1946, UNWCC, Vol. XI, pg. 15.
[122] *See generally*, *Kvocka* Trial Judgment, para. 294 ("The post World War II trials conducted by the Allies in Europe and Asia convicted people ranging from those acting at the highest levels of authority to those at the bottom merely following orders, including top political and military leaders as well as ordinary civilians or common soldiers, even concentration camp inmates who acquired positions of authority in the camps by spying on or mistreating other inmates on behalf of the captors.")
[123] *Tadic* Appeal Judgment, para. 195, 220. *See also Prosecutor v. Vasiljevic*, IT- 98-32-A, Judgment, 25 February 2004, para. 95, 96; *Krnojelac* Appeal Judgment, para. 29, 30.
[124] The ICTY has referred to general JCE as JCE I and systemic JCE as JCE II. For clarity, this verdict uses the terms "general JCE' and "systemic JCE".
[125] *Tadic* Trial Judgment, para. 669. *See also Tadic* Appeal Judgment, para. 220; *Stakic* Appeal Judgment, para. 62 (same); *Vasiljevic* Appeal Judgment, para. 96-99 (same).

1992 and 1995.[126] In so doing they have refined, but not changed, the understanding of general JCE and systemic JCE within the context of the conflict within the former Yugoslavia. This Panel is not bound by the decisions of the ICTY. However, the Panel is persuaded that the ICTY's characterization of systemic JCE, its elements, *mens rea* and *actus reus*, properly reflects the state of customary international law as it existed in April 1992 and thereafter.

The Appeals Chamber in *Tadic* was the first at the ICTY to identify and articulate three types of JCE in existence in international law at the operative time. This case is only concerned with the first two.

The first type is the general form of JCE, and is characterized by the Appeals Chamber as being represented by cases where a group of people act together pursuant to a "common design" and possess the same criminal intent. If a crime is committed by such a group, pursuant to that common design, persons who voluntarily participated in an aspect of that design and intended the criminal outcome can be held personally criminally liable as co-perpetrators. The second type of joint criminal enterprise, systemic JCE, is "a variant" of general JCE, and, in the words of the ICTY:

> [E]mbraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are Dachau Concentration Camp, decided by a United States court sitting in Germany and Belsen, decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes. In his summing up in the Belsen case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design. The convictions of several of the accused appear to have been based explicitly upon these criteria.[127]

The elements of JCE which are discernable from the customary international law are easily identified. The *actus reus* requires: more than one person; a common purpose; and participation by the accused in contributing to that purpose. When applied specifically to the facts in systemic JCE, the common purpose is to commit one or more specific crimes and it is achieved by "an organized system set in place."[128] The participation necessary to contribute to the common purpose of the system need not be actual commission of the underlying crime itself, provided that the participation by the Accused actively contributed to enforcing the

[126] *See, e.g.*, *Kvocka* Appeal Judgment; *Krnojelac* Appeal Judgment; *Krnojelac* Trial Judgment; *Kvocka* Trial Judgment.
[127] *Tadic* Appeal Judgment, para. 202 (citations omitted).
[128] *Id.*

system.[129] The *mens rea* for systemic JCE is: personal knowledge of the organized system set in place and its common criminal purpose and the intention to further that particular system.[130] If the common criminal purpose involves commission of a crime that requires specific intent, for example, persecution, then the participant must share that specific intent.[131] However, shared intent, even specific intent, may be inferred.[132]

5. Command Responsibility under Customary International Law

The concept of liability of a Commander for the crimes of subordinates was found in several cases arising out of the Second World War.[133] "[T]he development of a doctrine that attributes criminal responsibility to military and civilian leaders, not only where they have taken a personal or direct part in the commission of a crime, but also where they have failed to prevent or punish crimes of subordinates" has been called "one of the most significant advances of the post-war era."[134] Although, in 1948, the United Nations War Crimes Commission concluded, "The law on this matter is still developing and it would be wrong to expect to find hard and fast rules in universal application," those universal rules were articulated by 1977 in Additional Protocol I.[135] Article 87(3) of Additional Protocol I set out the principle of command responsibility as it has come to be understood in customary international law.[136] By 1992, command responsibility was "anchored firmly" in customary international law.[137]

"Command responsibility" developed from the concept of "responsible command" which was included in the early conventions on humanitarian law dating to the 1899 Hague Convention with Respect to the Laws and Customs of War on Land and Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land.[138] Responsible command placed on a superior the duty to establish conditions within which subordinates were capable of complying with international humanitarian standards. Command responsibility became, over time, the standard by which a superior could be personally criminally liable for failing to exercise the duty of responsible command regarding certain specific duties. It differs from other forms of criminal culpability in that it holds the superior responsible for the crimes of

[129] *Kvocka* Appeal Judgment, para. 99.
[130] *Tadic* Appeal Judgment, para. 203, 220 (citing *Belsen* and *Dachau Concentration Camp*).
[131] *Kvocka* Trial Judgment, para. 288.
[132] *Id.*
[133] *See, e.g.*, *Trial of Wilhelm List and others* ("*Hostage Case*"), Judgment of 19 Feb 1948, Green Series, Vol. XI. Likewise, in the *High Command Case*, the Tribunal offered "the opinion that command authority and executive power obligates the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that… inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality." *Trial of Wilhelm von Leeb and Thirteen Others* ("*High Command Case*"), Judgment of 28 October 1948, Green Series, Vol. XI, pg. 632.
[134] Guénaël Mettraux, *Command Responsibility in International Law: The Boundaries of Criminal Liability for Military Commanders and Civilian Leaders* (Oxford: Oxford University Press, forthcoming 2008).
[135] *Law Reports of Trials of War Criminals* ("TWC"), Vol. IV (1948), pg. 87.
[136] This is consistent with the conclusions drawn by the ICTY Appeals Chamber in *Celebici*: "The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature." *Prosecutor v. Delalic* ("*Celebici*"), IT-96-21-A, Judgment, 20 February 2001, para. 195.
[137] CDF Trial Judgment, para. 233. *See also Celebici* Appeal Judgment, para. 195.
[138] Thereafter, the concept of "responsible command" appears in Articles 18 and 33 of the 1929 Geneva Convention relative to the treatment of prisoners of War and Article 43(1) of Additional Protocol I.

subordinates even though the superior neither ordered the crimes nor participated in them. Nonetheless, the superior's failure to exercise responsible command, by failing to prevent the crime and/or by failing to punish the perpetrators, renders them liable for the commission of the underlying crimes.

Although Additional Protocol I articulates the principle of command responsibility as it exists in customary international law, that principle is by no means constrained to the context of Additional Protocol I, which is limited to military commanders in international conflicts. Rather, as confirmed by the ICRC, "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflict."[139] Likewise, as early as the post WWII cases, in the Far East and Germany, the Tribunals and Courts recognized liability of non-military superiors for failing to prevent their subordinates from committing war crimes and for failing to punish those who did.[140] As a principle of customary international law, command responsibility is applicable to any hierarchical organization which exists in a context wherein its members could violate international humanitarian law. Therefore the principle, as a doctrine of customary international law, applies to any hierarchical structure where there is: 1) the subordinate-superior relationship, and 2) a risk that the subordinate will commit violations of international humanitarian law.

In a concentration camp environment, both of these factors are present. The danger to the victims is the same, and the rationale behind the principle of command responsibility is identical, regardless of whether the conflict is international or internal, and regardless of whether the superior-subordinate relationship is part of military command structure or an internal security command structure. If in fact there is proof that a war crime or crime against humanity has been committed by a subordinate in a hierarchical organization of any kind, then criminal liability will accrue to the actual perpetrator's superior if, in addition, the elements of command responsibility, as established in customary international law, have been met.[141]

[139] ICRC, *Customary International Humanitarian Law*, Vol. I, Rule 153 (*see also* the cases cited in pgs. 558-560).

[140] *See, e.g.*, *Trial of the Japanese Foreign Minister Koki Hirota* and the *Trial of Prime Minister Hideki Tojo and Foreign Minister Mamoru Shigemitsu*, The Tokyo War Crimes Trial, Vol. 20; *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others*, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany, Vol. XIV, TWC, Appendix B, 1097, 1136; and *Trial of Friedrich Flick and Five Others*, Judgment of 22 December 1947, Green Series, Vol. VI.

[141] There is a distinction made between military and non-military commanders in the Rome Statute with respect to command responsibility. For military commanders, the Rome Statute deviates from customary international law and requires a lower standard of *mens rea*, not applicable to the facts of this case. Rome Statute, Art, 28. *See also* Mettraux, *Command Responsibility*; K. Ambos, "Superior Responsibility", in A. Cassese *et al*. (ed.), *The Rome Statute of the International Criminal Court – A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, pgs. 823, 870. The ICTY has confirmed the position that command responsibility, as a principle of customary international law, applies to military and non-military superiors. The Appeals Chamber has noted: "[T]he Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control…." *Celebici* Appeal Judgment, para. 196. *See also Blaskic* Trial Judgment, paras. 300, 301 (citing *Celebici* Trial Judgment, para. 378).

6. Elements of Command Responsibility Liability

Article 180(2) of the CC of BiH provides:

> The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The elements of Command Responsibility set out in CC Article 180(2) are identical to those recognized by customary international law at the time of the commission of the offenses. These are:

1) The commission of a criminal act of the type set out in the applicable sections (which include genocide, war crimes and crimes against humanity).
2) The existence of a superior/subordinate relationship between the Accused and the perpetrators who carried out the criminal act.
3) The superior knew or had reason to know:
    a. the subordinate was about to commit the crime; or
    b. had committed the crime.
4) The superior failed to take reasonable and necessary measures to:
    a. prevent the crime; or
    b. punish the perpetrator of the crime.

The elements of command responsibility were already established in customary international law by April 1992.[142] The ICTY recognized this to be the case in a series of decisions, beginning with the judgment the Trial Panel rendered on 16 November 1998 in the *Celebici* case.[143] Since that time, the Trial Chambers and Appeals Chamber of the Tribunal have had several occasions to apply the concept of command responsibility, in cases involving military and non-military superiors. In so doing they have refined, but not changed, the understanding of command responsibility as it existed in customary international law within the context of the conflict within the former Yugoslavia. This Panel is not bound by the decisions of the ICTY. However, the Panel is persuaded that the ICTY's characterization of command responsibility, and its elements properly reflects the state of customary international law as it existed at the times relevant to the indictment. In addition, as Article 180(2) of the CC of BiH directly incorporates Article 7(3) of the ICTY Statue, and the Statute is an instrument of international law, domestic courts "must consider the parent norms of international law and their interpretation by international courts."[144]

[142] *See* Section A.5, *supra*.
[143] *Celebici* Trial Judgment, para. 343.
[144] Werle, Principles of International Criminal Law, p. 80. See also Gardiner, International Law p. 156; Higgins, Problems and Process: International Law and How We Use It, p. 206.

B. SYSTEMIC JOINT CRIMINAL ENTERPRISE AT THE KP DOM

"[T]here was in force … a system to ill-treat the prisoners and commit the crimes listed in the charges."[145]

1. Introduction

The evidence proves beyond doubt that from the middle of April 1992 until October 1994, a systemic joint criminal enterprise involving a plurality of persons from a plurality of organizations, institutions and bodies existed at the KP Dom. The common purpose of the systemic joint criminal enterprise was to persecute non-Serb civilians from the Foča area by illegally imprisoning them in the KP Dom under inhumane conditions, enslaving some detainees, subjecting the detainees to systematic and organized interrogation that often included beatings and torture, and then removing them permanently from the area of Foča where they had been lawfully present, by systematically murdering some detainees, forcibly disappearing other detainees, and finally deporting and forcibly transferring all remaining detainees. Having contributed to this persecutorial system, with knowledge of the common purpose to persecute, the types of crimes committed and the discriminatory intent of those crimes, and having intended to further the persecutorial system by their contributions, and sharing the discriminatory intent, the Accused are guilty of the crimes established in Counts 1 through 5 of the Verdict as co-perpetrators of the systemic joint criminal enterprise.

2. The Systemic Joint Criminal Enterprise

a. Background

As was previously noted, the KP Dom Foča began operating on 17-18 April 1992 as a detention facility for non-Serb civilians, particularly men, from the Foča area. The Panel has previously described how non-Serb civilians held in temporary detention facilities, such as the former Territorial Defense warehouses in Livade, were transferred to the KP Dom at that time. Similarly, the Panel noted that other non-Serb civilians were apprehended by members of the military police and soldiers at their residences, places of work and other locations and transported directly to the KP Dom. Finally, the Panel specifically concluded that these arrests were conducted in a systematic and organized manner, highlighting that some persons were apprehended according to lists of non-Serb civilians, while others were apprehended during the course of operations to clear neighborhoods of all non-Serbs using both arrests and expulsions.

Witness testimony establishes that the Užice Battalion or Corps of the JNA policed and controlled the KP Dom during the initial stages of operations. Some witnesses also testified that members of the White Eagles paramilitary group were present as well at the KP Dom during this time. While the testimonies of witnesses varied as to how long the army remained in control of the KP Dom, the evidence is that during the last week in April, although the military may still have been on the premises, Milorad Krnojelac had been appointed Acting Warden – as established by the testimonies of the Accused, Exhibit P-138 and Established Fact P78 – and Knrojelac, Todović and Rašević – as established by the testimonies of the Accused, the testimony of FWS 210 and Exhibits P-9 and P-138 – were present at the KP

[145] *Dachau Concentration Camp*, pg. 13.

Dom facility and had begun the transition to civilian control. During this time, Serb civilians who had previously worked at the KP Dom before the conflict, also began arriving and resuming their duties pursuant to war work assignments designated by Serb civilian and military authorities in Foča. By the beginning of May 1992, the army had withdrawn and the KP Dom was under the control of civilian authorities. These facts were established by the testimonies of numerous witnesses, including E, FWS 111, FWS 115, FWS 138, FWS 182 and FWS 210, and confirmed by Established Facts P77 and P78.

The evidence establishes that the systematic arrest and imprisonment of the non-Serb civilian detainees was merely the beginning of the organized and methodical persecution of the non-Serb detainees held at the KP Dom. This system of persecution was perpetrated by both civilian and military bodies, including the civilian staff of the KP Dom, the civilian Foča police force, the military police, paramilitaries, the local Crisis Staff and the Foča Tactical Group. While much of the decision-making was left to other actors, particularly the civilian and military command, the staff of KP Dom played a decisive role in the system.

b. The Common Purpose of the Criminal System

Non-Serb civilian men from Foča and surrounding areas were held in inhumane conditions at KP Dom as part of a two-phase process of: 1) interrogation and categorization; and 2) implementation. In phase one, non-Serb civilians were arbitrarily confined at the KP Dom without legal process, while interrogations were conducted by military and civilian police in the administration building of the facility. Throughout this process, detainees remained confined at the KP Dom in inhumane conditions, and during the course of the interrogations a number of detainees were subjected to beatings and torture in the administration building and segregation cells of the KP Dom. The information gained during these interrogations and from other sources was then analyzed by the civilian and military authorities, primarily the civilian and military commands, including the Crisis Staff and the Foča Tactical Group. The second phase was the actual implementation of the decisions made by these authorities, during which detainees systematically were murdered at the KP Dom, forcibly disappeared from the KP Dom or deported and forcibly transferred from the Foča area to other locations. During the entirety of their imprisonment, the detainees at the KP Dom were held in inhumane conditions and were subjected to beatings as punishment or solely for discriminatory reasons as part of this inhumane environment, and some detainees were enslaved and forced to labor in and around the KP Dom. All these crimes were committed with the intent to discriminate against the detainees by reason of their ethnicity, and the detainees were in fact discriminated against on that basis.

Accordingly, the common purpose of the system of persecution envisaged and embraced each of the types of offenses described in Counts 1 through 5 of the Verdict. Or, in the language of the jurisprudence on systematic joint criminal enterprises, there was an organized system to ill-treat the detainees and commit the types of crimes established in Counts 1 through 5 of the Verdict.

c. "Phase One": Imprisonment, Interrogation and Categorization

The first phase, which can be said to have lasted generally from April through June 1992, was an information-gathering process, marked by systematic interrogations of illegally imprisoned non-Serb detainees by civilian and military police within the compound of the KP Dom. The Panel established in Count 3 of the Verdict that the detainees were arbitrarily

deprived of their liberty by civilian and military police and paramilitaries, and that the continued detention of the detainees at the KP Dom constituted maintenance of that arbitrary deprivation of liberty. The imprisonment of the non-Serb detainees was quickly followed by their systematic interrogation. As the testimonies of the witnesses established, the purpose of these interrogations was to discover information regarding the activities and character of the detainees prior to the conflict and to discover information regarding non-Serb resistance in Foča. Specifically, the interrogations were intended to enable the Serb civilian and military authorities to determine which detainees were of greatest threat to the establishment of Serb supremacy in Foča and identify any other sources of resistance.

Initial or general interrogations conducted by civilian police and ministry of interior officials began almost immediately after the KP Dom opened, as established by the testimonies of E, FWS 86, FWS 182, FWS 210 and FWS 250 and the documentary evidence referenced below. These "civilian" interrogations were all conducted in a similar manner and nearly every detainee was interrogated by the civilian police. The detainees to be interrogated were called out of their room by a guard – at first, a military guard, but later, after they began assuming their duties in late April, a civilian KP Dom guard. Importantly, as established by the testimony of the Accused, the guards selected those detainees to be interrogated based upon lists presented to the KP Dom duty officer by the interrogators; the KP Dom duty officer then directed a KP Dom guard to bring the listed detainees to the interrogation rooms. As established by Exhibits P-26 and O-1-09, only persons specifically designated by the Foča Tactical Group according to an order – Exhibit P-26 – in the possession of the KP Dom duty officer could interrogate detainees. The KP Dom duty officer then directed a KP Dom guard to bring the detainees listed to the administration building at the KP Dom, where a number of rooms were used for interrogations. The civilian interrogations were conducted by one of at least three civilian policemen, all of whom were identified by name by the witnesses, including FWS 86, FWS 111, FWS 115, FWS 182, FWS 210, D, E and Ekrem Zeković.

The specific questions asked during these interrogations are particularly revealing of their purpose. As the numerous witnesses, such as C, D, E, FWS 86 and FWS 115, testified, the detainees were asked whether they were members of the SDA and whether they owned weapons or knew who owned weapons; some detainees were also asked specific questions about family members and friends or their activities and behavior prior to the conflict. For example, FWS 82 was told that he was a good man, but that it was known that he had leased property to an extremist and was asked about his brother and his brother's sons, one of whom he was told had a submachine gun. Similarly, FWS 111 testified that during his first interrogation, he was asked about his movement before the outbreak of the conflict, but that it appeared the interrogator was already very knowledgeable about his activities. Shortly thereafter, he was called for a second interrogation and was asked to explain what the police considered to be a suspicious photograph of him with a group of others, which he believed they had found after searching his apartment. In many cases, the detainees were then asked to sign a statement regarding the information they had been told and had given during the interrogation. The witnesses testified that they were not physically harmed during these civilian interrogations and that the interrogators did not treat them roughly.

The documentary evidence submitted by the Defense for the Accused Todović, specifically exhibits O-II-07 and O-II-11, similarly demonstrate the purpose of the interrogations that were conducted. O-II-07 is a report dated 1 May 1992 concerning the interrogation of thirteen detainees at the KP Dom on that date. The report states that the interrogators acquired a list of persons who have or obtained weapons from their party and are on the run,

including the names of the commanders for the Jošanica and Čohodor Mahala areas; the report also states that the interrogators learned that two individuals were staying in a certain apartment in Foča. O-II-11 is a collection of 7 written statements by detainees at the KP Dom, dated between 20 April 1992 and 6 July 1992. These 7 statements cover nearly identical subjects: the detainees activities prior to his arrest and detention; whether the detainee was a member of a political party of military formation; whether the detainee owned a weapon; whether the detainee was offered or acquired a weapon, particularly from a political party; whether the detainee knew of others who had weapons; whether the detainee knew of others who were active in political parties, particularly in arming military units; any knowledge the detainee had about the activities of political parties. The statement of Elvedin Čedić is particularly informative and illuminating; as it extensively details a large number of persons who were given weapons as part of the arming process prior to the conflict, as well as the specific weapons those persons were given. The Panel also notes that these statements all contain a *pro forma* assertion that the person giving the statement was treated properly. Finally, the Panel notes that the interrogators were represented in the statements as "authorized police station officials and a military command representative".

Following the conclusion of the interrogation, the detainees were then taken by the KP Dom guards to one of several rooms in the KP Dom previously used to house lawful convicts, sometimes a different room from where had been held previously. On some occasions, at the direction of the civilian interrogator, the KP Dom guards took the detainees to cells designated as "solitary confinement" (segregation cells), but often containing many other prisoners in squalid conditions. Although the Panel could not determine the specific organization of room assignments, largely because the witnesses, as survivors, were assigned to similar rooms and could not testify regarding the detainees who did not survive and their room assignments, the Panel is satisfied that the evidence establishes as a general matter that there was a scheme to the room assignments that was related to the decisions made concerning the fate of detainees, specifically the nature of the crimes to be committed against individual detainees. Particularly with regard to the large groups of detainees initially brought to the KP Dom shortly after it opened from collection points such as the Territorial Defense warehouses in Livade and "Šandal's house", those arriving at the KP Dom were initially placed together in large dormitory-like rooms with many other detainees. As detainees were taken for interrogation, they would often be re-housed in different rooms following their interrogation, although some witnesses testified that they were returned to their original room. The Panel was unable to determine from the evidence the exact nature of this scheme, but it is satisfied that the scheme existed and that it was a component of the criminal system in place at KP Dom.

Largely concurrent with these civilian interrogations of the non-Serb detainees were other interrogations, also in the administration building at the KP Dom, conducted by the military police and military; it appears that the civilian interrogators also participated in these coercive interrogations. These interrogations were of a very different character. Many witnesses described how, although they were not mistreated during their own interrogation, while being interrogated they could hear the sounds of violence and yelling from other rooms in the administration building. For example, FWS 82 described how during his interrogation by the civilian police, he could hear moans and voices yelling "Admit" or "Confess" from other, nearby rooms. Witnesses also described how some detainees were taken for multiple interrogations, and that those detainees who returned after these interrogations were almost always injured in some way; some persons mistreated during the interrogations were returned

to the rooms immediately, while others were first placed in segregation cells and either only returned later or not returned at all.

The evidence reveals that the detainees who were subject to coercive interrogations were those detainees whose previous answers were unacceptable to their captors. The coercive interrogations, which the evidence reveals were largely, but likely not exclusively, conducted by the military and military police, were for those suspected of being SDA members, those suspected of having weapons, those whose activities prior to the conflict raised the suspicion that they were Bosniak or Croat partisans or activists, and those believed to have some information about others suspected of being armed, SDA members or sympathizers.

The testimony of FWS 03 was particularly illuminating on the purpose and conduct of these interrogations. FWS 03 was specifically and individually arrested by military police from his residence. He was told that he had to come answer some questions and was then taken to the KP Dom. Immediately upon his arrival he was taken to an interrogation room in the administration building of the KP Dom to be interrogated by the military police. Lying on the floor of that room was a severely beaten …, Š.H. FWS 03 was struck by the military police, who told him to confess that he was a member of the SDA. When FWS 03 refused to admit that, another …, H.D., was brought into the room. H.D. had already been beaten at this point; according to FWS 113, H.D. was beaten on his way to the KP Dom. The military police asked H.D. if FWS 03 was a SDA activist, and H.D. said that he was. The military police then started beating H.D. again, saying that he was lying. FWS 03 and H.D. were then taken to the segregation cells, where they found two other Bosniaks. FWS 03 was subsequently transferred to another room the next day.

The testimony of FWS 119 was also particularly probative. FWS 119 testified that he was interrogated by three persons, including two civilian police officials mentioned by other witnesses. FWS 119 was asked a variety of questions, including what kind of weapons he had, who he socialized with, how many Bosniak soldiers there were and similar questions. He was told that he would not be mistreated during this interrogation, but that his answers would be given to the military. He was further told that if the military was happy with his answers, he would not be interrogated again, but that if they were not happy, he would be interrogated again and would be beaten.

The Panel also relies on the credible evidence found in connection with Count 1 of this Verdict, particularly the beatings and torture during interrogations of Dž.B., S.M. and Nurko Nišić described in Count 1b. Furthermore, a number of witnesses, such as FWS 111 and FWS 250, testified generally that detainees were taken out of the rooms to be interrogated and were beaten during those interrogations by military personnel. Finally, a number of witnesses testified to events that, in the context, are further strong circumstantial evidence of the first phase of the systemic JCE. For example, as referenced in Count 1, Ekrem Zeković testified that following his interrogation, he was taken to a segregation cell by a KP Dom guard, where he found Aziz Šahinović, a Rizvanović, and two others, who were severely beaten; later Zeković was taken back to be interrogated by a KP Dom guard, but the interrogator said that he had already given a statement and Zeković was taken back to his room. Similarly, FWS 86 named two other detainees, Nihad Pašović and Avdo Mehmedspahić, who were beaten and accused of being members of the SDA.

The crimes of torture and other inhumane acts perpetrated against Dž.B., S.M., and Nurko Nišić, as established in Count 1 of this Verdict, were part of this phase of the criminal system.

Only non-Serb detainees were called for interrogation and were beaten and tortured during such interrogations. Those Serb convicts also held at the KP Dom pursuant to lawful convictions and sentences were not interrogated, nor were they subject to beatings and torture during interrogations. The evidence clearly establishes, then, that the interrogations, beatings and torture described above were committed with the intent to discriminate against the non-Serb detainees on the basis of their ethnicity, and that those non-Serb detainees were in fact discriminated against on that basis.

d. "Phase Two": Murders, Disappearances, Deportations and Forcible Transfers

The interrogations conducted both with and without physical abuse, were the part of the persecutorial system through which the individual fates of the non-Serb detainees held at the KP Dom were determined. The "second phase" followed from, and was directly connected to, the first phase. Some detainees were simply released, particularly in the first weeks and months, as evidenced by the exhibits discussed below.[146] However, based on decisions that were made in the first phase, the large majority of detainees were condemned to never return to their homes in Foča again, but to suffer one of three fates: murder, forcible disappearance or forcible transfer/deportation, including through exchanges. These events were previously described in Counts 2 and 5 of this Verdict, and the Panel recalls and relies on the credible evidence found in connection with those Counts. As established, in June and July 1992, at least 18 detainees were murdered on the premises of the KP Dom. Shortly afterwards, the sustained process of "exchanges" began. Large numbers of detainees were called out of their rooms by the KP Dom guards for what they were told were exchanges. The KP Dom guards escorted the detainees to the gates of the KP Dom, where they handed the detainees over to members of the military, military police and civilian police; in a number of instances, staff of the KP Dom further accompanied detainees to other locations to be later exchanged. While, as noted previously, some of these detainees were in fact exchanged, more than 200 were forcibly disappeared. They have not been seen alive again, and no information has been provided regarding their fates, although the mortal remains of some have been discovered in mass graves and other locations. Those detainees who were not murdered, forcibly disappeared or forcibly transfer/deported in 1992 and early 1993 remained at the KP Dom awaiting their eventual forcible transfer from the Foča area, during which time all were subjected to continued inhumane conditions and treatment and some were enslaved.

The interrogations conducted in April, May and June and the murders, disappearances and forcible transfers that followed were part of the deliberate and organized process constituting a system in which the KP Dom facility and personnel played a decisive role. Like the interrogations, these crimes proceeded in a methodical and organized fashion according to established procedures, and each crime similarly involved multiple perpetrators from the civilian staff of the KP Dom, the civilian police, the military police, the military and civilian and military authorities acting in coordination to fulfill the common purpose of the system. The KP Dom guards did not simply randomly select detainees to be taken. Rather, as was noted in Counts 2 and 5, for all these crimes the same procedure was followed. A KP Dom guard came to the detainees' rooms and called out names; in nearly every instance, the guards carried lists of names and roll called the detainees to be taken. The Panel is satisfied that, as

[146] While the Panel recognizes that those non-Serb detainees who were released in the first few months after the KP Dom began operating as a detention facility for non-Serb civilians were eventually subjected to forcible transfer and deportation, those crimes were not pled as part of the persecutorial system in place at the KP Dom.

with the procedure for interrogations, these lists were produced by the military command, brought to the KP Dom by military personnel and given to the KP Dom duty officer, who then instructed a KP Dom guards to bring the detainees identified in the lists to the administration building. The documentary evidence admitted in these proceedings, as well as the statements made at trial by the Accused themselves, confirm the testimony of witnesses regarding this procedure.

For example, as was noted in Count 5, FWS 104 testified that he was taken for exchange on 13 October 1992, that is, during the same time other detainees were being forcibly disappeared from the KP Dom. FWS 104 testified that a KP Dom guard came to his room, roll called some detainees and informed them that they were to be exchanged; approximately 30 detainees were then taken to Kalinovik, from where they were exchanged. Exhibit O-I-12 is an order, dated 21 October 1992, from the Foča Tactical Group ordering 30 detainees, including FWS 104 to be taken from the KP Dom Foča for the purpose of exchange.[147]

Similarly, as previously described in Count 5, the forcible transfers of D and five others, FWS 76 and 3 others, FWS 119 and FWS 115 from the KP Dom were conducted pursuant to orders of the Foča Tactical Group.[148] Again, these witnesses testified that a KP Dom guard came to their room, roll called their names and told them that they were to be exchanged. As well, in Count 5, the Panel identified other orders and documents from the Tactical Group, the Herzegovina Corps and the RS Central Commission for the Exchange of Prisoners – namely, O-I-19, O-I-20, O-I-23, O-I-31, O-I-39 and O-I-41(a)(b) – concerning the transfer of detainees from the KP Dom to other locations for the purpose of exchange.

Exhibit O-I-48 is particularly probative. As previously noted, this document lists 35 detainees, described as prisoners of war, who it is stated are to be released from the KP Dom on the grounds that they did not commit crimes against the Serbian people. The order is dated 18 September 1992 and signed by the Commander of the Foča Tactical Group. Analysis of this order reveals that the persons listed were those who the Panel established disappeared after having been taken out of the KP Dom to pick plums. Again, the testimony of witnesses regarding this event is that, after first asking for volunteers, the KP Dom guards returned to the rooms, disregarded the volunteers and roll called the names of detainees from a list. The Accused Rašević further testified that military personnel arrived at the KP Dom to transport these individuals.

Documentary evidence regarding the release of some detainees is also relevant to the establishment of the systemic JCE because it is further evidence of the systematic and organized nature of events at the KP Dom. These releases, like the murders, forcible disappearances and forcible transfers and deportations that were established as crimes, constitute final dispositions for detainees, which followed from the initial phase of imprisonment, interrogation and sometimes torture. Accordingly, the Panel notes that orders to release detainees from the KP Dom – for example, O-I-15, O-I-16, O-I-17, O-I-18, O-I-21,

[147] For the following exhibits, the Panel recognizes that in most cases the exhibits postdate the events described by the witnesses. The Panel does not consider the exhibits as the actual documents or lists delivered to the KP Dom and used by the KP Dom guards, but it does consider that the exhibits corroborate the factual accounts given by the witnesses in their testimony regarding the existence of lists and the deliberative nature of the process.

[148] The Foča Tactical Group is designated in these documents as, variously, the Tactical Group Foča, the Tactical Group Drina and the 11 HPBR. It was clarified that these are different references to the same body, the Foča Tactical Group.

O-I-22, O-I-26, O-I-46 and O-I-47 – were drafted by the Foča Tactical Group, the Foča Crisis Staff and the War Presidency, and signed by representatives of the civilian and military authorities. The Accused Rašević stated in his testimony that these orders were transmitted to the KP Dom, and that the KP Dom officials required that these orders be tendered before they would release any of the illegally detained non-Serb prisoners.

Moreover, the Panel emphasizes the sheer number of crimes committed and victims involved. The Panel has already concluded that over 200 detainees were forcibly disappeared from the KP Dom between June 1992 and March 1993. Similarly, the Panel established that from July 1993 through October 1994, at least 140 detainees were forcibly transferred from Foča to detention facilities in Kalinovik, Rudo and Kula to be exchanged, while in August 1992, 35 detainees were deported from Foča to Montenegro. Finally, at least 18 detainees were murdered on the premises of the KP Dom in a short period of time and in similar circumstances involving severe beatings, torture and the disposal of bodies. The perpetration of so many crimes involving such large numbers of victims would necessarily require the organization and coordination detailed in the documentary evidence and witness testimony.

The crimes of murder, forcible transfer, deportation and enforced disappearance established in Counts 2 and 5 of this Verdict were perpetrated as part of this phase of the criminal system, including, specifically:

1) The murder of 18 named detainees, as established in Count 2 of this Verdict.
2) The deportation of 35 detainees to Montenegro in August 1992 and the forcible transfer from Foča of about 80 detainees from July 1993 to October 1994 and about 60 detainees in October 1994, as established in Count 5 of this Verdict.
3) The enforced disappearance of at least 200 detainees between June 1992 and March 1993, including the enforced disappearance of 20 detainees in August 1992 and the enforced disappearance of 35 detainees on 17 September 1992, as established in Count 5 of this Verdict.

The evidence is clear that these murders, forcible disappearances, forcible transfers and deportations were only committed against non-Serb detainees. Serb convicts were not murdered at the KP Dom. Serb convicts were not taken out of their rooms by KP Dom guards to be handed over to the police or military at the gates of the KP Dom. Serb convicts did not disappear from the KP Dom, never to be seen or heard from again. Serb convicts were not forcibly transferred to other prisons or deported to other States or locations with the intent that they never return to their homes. Only non-Serb detainees suffered these fates. Only non-Serb detainees were subject to these crimes. The Panel concludes, therefore, that these crimes were committed with the intent to discriminate against the non-Serb detainees on the basis of their ethnicity and that the non-Serb detainees were in fact discriminated against on that basis.

e. Imprisonment, Inhumane Conditions and Enslavement

In Counts 3 and 4 of the Verdict, the Panel detailed its factual and legal findings concerning the illegal imprisonment of non-Serb civilians, the inhumane conditions in which detainees were held at the KP Dom and the enslavement of certain detainees through forced labor throughout the period from April 1992 through October 1994. As was described, inhumane conditions were pervasive and endemic at the KP Dom. Detainees were fed starvation rations that were manifestly inadequate and were kept in crowded and locked cells at all times,

isolated from family, each other, and the outside world, and punished severely when efforts to reduce that isolation were attempted and discovered. During the winter of 1992-1993, the detainees were subjected to harsh winter temperatures in rooms without heating and in a number of cases without windows, and were further intentionally deprived of all means to keep themselves warm and mitigate their suffering. Hygienic conditions in the KP Dom were extremely poor, and detainees were denied the means necessary to provide adequate hygiene, including showers, soap, toothpaste, changes of clothes and changes of bedding. Some detainees were also kept locked in segregation cells as punishment for extensive periods of time.

The Panel also detailed the evidence supporting its conclusion that arbitrary punishments were inflicted on detainees by the KP Dom guards. As was described, detainees were arbitrarily punished for any attempt to mitigate or better their conditions in any way, such as by sewing winter clothing from blankets, attempting to heat water, picking up cigarette butts from the prison yard, gathering nettles for "tea", taking discarded food left over from the staff and Serb prisoners meals, or attempting to contact one another. These punishments included confinement in segregation cells and beatings by KP Dom guards. Although detailed in a different count of the Verdict, the Panel considers that the beating and torture of Ekrem Zeković established in Count 1c and the beating of FWS 71 established in Count 1b should be considered in relation to and as part of the punishments detailed in Count 3. These punishments were perpetrated by the same actors, namely the KP Dom guards, and the same methods of punishment were used, including beatings and confinement in segregation cells. Similarly, the punishments were inflicted for the same essential reason, "violations" of prison rules.

As was also established by the evidence recited in Count 4 of this Verdict, some detainees were enslaved and forced to labor for months at a time and throughout their detention. The Panel also reiterates its conclusion that FWS 109, FWS 141 and K.G., while detained at the KP Dom, were taken to the gates of the KP Dom by KP Dom guards, handed over to members of the military and military police and used as human shields.

The crimes of illegal imprisonment and other inhumane acts perpetrated against at least 700 non-Serb detainees as established in Count 3 of this Verdict, as well as the specific crimes of other inhumane acts and torture perpetrated against FWS 71 and Ekrem Zeković in Counts 1b and 1c of this Verdict, were part of the criminal system. Likewise the criminal system included the perpetration of the crime of enslavement against detainees forced to labor inside and outside KP Dom, as established in Counts 4a and 4b of this Verdict, and the instrumentally identical crime of other inhumane acts perpetrated against FWS 141, FWS 109 and KG through the use of these detainees as human shields to protect Serb convoys against landmines.

It is clear from the facts as established in Counts 3 and 4 of the Verdict that only the non-Serb detainees were subjected to illegal imprisonment in inhumane living conditions, enslaved and used as human shields. The Panel specifically notes that, while Serb convicts were imprisoned, their detention was preceded by legal process, and while they were also forced to labor, they were not enslaved for the simple reason that enforced work assignments do not violate international law when imposed on legally convicted persons. Accordingly, the Panel concludes that these crimes were committed with the intent to discriminate against the non-Serb detainees and that in fact the non-Serb detainees were discriminated against on that basis.

3. Legal Elements of Joint Criminal Enterprise Liability

a. The Systemic Joint Criminal Enterprise

(i) Plurality of Persons

In order to have a joint criminal enterprise it is of course necessary to have more than one person. However, it is not necessary to have any particular form of organization, nor is it necessary to limit the enterprise to membership in one or any organization. Several persons from several different affiliations can come together to form the criminal system. In the *Mauthausen Concentration Camp* Trial the plurality of persons that formed the system was made up of SS members from different divisions, guards, and civilians and even inmates who participated in enforcing the system.[149] At the Omarska prison camp, the *Kvocka* Trial Chamber found that the plurality of persons involved in the systemic JCE included outside interrogators, internal security guards, employees from the mine on whose property the Camp was located, members of the local Crisis Center, special outside security units, and members of the territorial defense.[150] Although the principle perpetrators, that is, those who actually commit the underlying criminal offenses, need to be identified as precisely as possible, where all co-perpetrators are not tried in the same proceeding, it would be unrealistic and unfair to attempt to identify each individual involved in the system.[151]

The success of the systemic JCE required the participation of a common plurality of perpetrators working together to implement the persecutorial system. Each group of actors was assigned discrete roles and performed discrete functions. Generally, civilian and military authorities in Foča, including the Crisis Staff, the War Presidency and the Tactical Group, were responsible for interrogating, determining the fates of individual detainees and issuing orders to implement these decisions. These orders were then transmitted to the KP Dom. The KP Dom staff had day-to-day control over the detainees, without which the detainees could not have been illegally detained or available to the other members of the JCE. The KP Dom guards retrieved detainees from their rooms according to the provided lists and handed them over to various persons, including civilian police, military police and military personnel. These actors then implemented the decisions of the civilian and military authorities, committing the crimes established in Counts 1 through 5 of the Verdict. Most decisively, the KP Dom staff both committed crimes and made possible the tasks and individual crimes committed by the others in the JCE by ensuring that the victims were secured in one place in demoralized and weakened condition, always available to participants in the JCE, and unable physically or psychologically to resist the perpetration of the crimes against them.

It is indisputable that the military and civilian command and others outside the KP Dom actively participated in the systemic JCE. That fact does not detract from the liability of the KP Dom staff for participating in the implementation and maintenance of the systemic JCE within which these crimes were committed. Systemic JCE by its legal definition must involve a plurality of persons, each of whom furthers the system and thereby the commission of the crimes even if they do not directly participate in the *actus reus* of the individual crimes.

[149] *Mauthausen Concentration Camp*, pg. 15.
[150] *Kvocka* Trial Judgment.
[151] *Krnojelac* Appeal Judgment, para 116.

The JCE as defined could not have functioned without the "others" who made up, along with the KP Dom staff, the plurality of perpetrators. It is not a defense that the Accused did not personally conduct all of the activities and commit all of the crimes necessary to carry out the common purpose of the JCE. It is sufficient that the roles they did play contributed to the *actus reus* of some of the crimes and contributed to the overall criminal purpose of the JCE to a decisive degree.

(ii) Common Criminal Purpose

In systemic JCE, the system itself has as its purpose the "commission of crimes which… could be considered as common to all offenders, beyond all reasonable doubt." [152] There is no need to prove an express agreement as to the crimes to be committed by the system, and the purpose may develop with or without formal planning.[153] However, in the absence of evidence of a formal agreement or plan, there must be sufficient evidence to convince a trier of fact beyond doubt that there exists a common criminal purpose.[154] That conclusion may be based on evidence such as that the participants were acting in unison or in tandem, the repetitive nature of crimes of a similar character, and the observable commission of the crimes.

The evidence reveals significant organization and coordination in the perpetration of all the crimes which the Panel found to be part of the criminal system discussed above. The same procedure was generally followed, in which orders and lists from the civilian and military authorities in Foča were brought to the KP Dom, on the basis of which the KP Dom guards removed detainees from their rooms and handed them over to civilian and military police and military personnel in the administration building of the KP Dom or at the gate of the KP Dom. Neither the police nor the military retrieved detainees from their rooms, nor did the KP Dom guards act on their own initiative. Rather, clear and formal procedures were in place that divided roles and responsibilities among different actors, and these procedures were consistently and uniformly followed.

The coordinated commission of repeated crimes by a multiplicity of actors throughout an extensive period of time can be sufficient evidence to establish the existence of a systemic JCE to commit those crimes. Nonetheless, the Panel need not here simply rely on those factors. In particular, circumstantial and direct evidence establishes the common purpose that defined and gave life to the KP Dom as a systemic JCE involving the commission of the crimes detailed in Counts 1 through 5.

In considering whether the crimes established in Counts 1 through 5 were committed as part of a systemic JCE pursuant to a common purpose, one critical fact is immediately apparent from the evidence when viewed as a whole. Simply, the KP Dom represented a hub or nexus that was the essential common link between *all* the individual crimes established in the Verdict. Whether the crimes were ultimately committed within or outside its walls, the KP Dom was the *condicio sine qua non*, the indispensable element. The murders, the enforced disappearances, the forcible transfers, all these crimes originated at the KP Dom and

[152] *Krnojelac* Appeal Judgment, para. 120.
[153] *Kvocka* Appeal Judgment, para. 117; *Krnojelac* Appeal Judgment, paras. 95-97.
[154] Prosecution of the Nazi War crimes cases did not face this dilemma, in that the criminal plan to exterminate captured persons was part of a written policy. See, e.g., *US v. Otto Ohlenforf et al.* ("*Einsatzgruppen*"), Green Series, Vol. IV.

depended on the acts and omissions of the staff and administration of the KP Dom, wherever their ultimate end points may have been.

Moreover, it is apparent that the KP Dom was intended to function as such a hub. That is, it was not merely a simple or common detention camp. The KP Dom was intended to fill and in fact did fill a much more extensive role. The course and pattern of events clearly reveal the outlines of the plans and designs of those who set and kept the KP Dom in motion. The crimes that originated at the KP Dom were not random or happenstance; they were not the result of individual perpetrators acting on their own initiative. Rather, the crimes were the result of an organized and deliberative system: at first, non-Serb civilians flowed into the KP Dom and information gleaned from interrogations flowed out; this stream then reversed, as orders and lists began flowing into the KP Dom and detainees began flowing out, to become victims of crimes. The execution of additional crimes was, then, integral to the KP Dom's role as a detention camp. Detainees were not merely imprisoned, but imprisoned in anticipation and fulfillment of further criminal acts.

As was consistently detailed above, orders and lists originating with the Serb civilian and military authorities, the Foča Tactical Group in particular, were repeatedly transmitted according to official procedures to the KP Dom. The KP Dom staff, in turn, according to official procedures formally laid out in orders and directives from the Foča Tactical Group and the KP Dom administration, implemented those orders. Civilian police arrived at the KP Dom for interrogations bearing orders and lists; the KP Dom guards retrieved the named detainees from their rooms and brought them to the administration building for those interrogations. Military police arrived at the KP Dom to commit torture and murders bearing orders and lists; the KP Dom guards retrieved the named detainees from their rooms and brought them to the administration building to be tortured and murdered. Military personnel arrived at the KP Dom for "exchanges", whether real or ostensible, bearing orders and lists; the KP Dom guards again retrieved the named detainees from their rooms and brought them to the gates of the KP Dom to be handed over and either disappeared or forcibly transferred. Over and over again this pattern of events, laid out in procedures created through official orders and directives from the Foča Tactical Group to the KP Dom and from the KP Dom administration to the KP Dom staff, repeated itself. This repetition and organization demonstrate that the KP Dom was intended to and did function as the hub of a criminal system embracing the perpetration of the types of crimes established in Counts 1 through 5.

Moreover, the crimes were themselves systematically and thematically linked, emphasizing again the centrality of the KP Dom. The pattern of crimes originating at the KP Dom reflect an organized and systematic progression, from imprisonment, to the creation of inhumane conditions, to beatings and torture in the course of interrogations, to final dispositions through murders, enforced disappearances, forcible transfers and deportations. The interrogations that began immediately after the KP Dom opened as a detention camp reveal the common purpose behind these crimes; the beatings and torture of detainees during interrogations directly served this initial task; the crimes that followed fulfilled the common purpose – all of which served to complete the ethnic cleansing policy that directed the widespread and systematic attack against the non-Serb civilian population of Foča.

The fact that from the first, the KP Dom was central to a systemic JCE that was designed to persecute non-Serb men in Foča by imprisoning them, sorting them, and disposing of them is confirmed through the testimonies of a number of witnesses. FWS 138 described a conversation the detainee R.J. had during his detention with Milorad Krnojelac, who was his

neighbor and former co-worker. R.J. and Krnojelac talked in the latter's office two or three times, and after one such conversation, R.J. related to FWS 138 that Krnojelac had told him that the non-Serb detainees were being divided into four groups. According to R.J., Krnojelac described these four groups as follows: one group would stay at the KP Dom; one group would be exchanged; one group would go to free territory; and one group would face military court martial. Similarly, FWS 210 testified that he was told, in April 1992, by one of the civilian interrogators at the KP Dom that the detainees were being sorted into three groups. FWS 210 was told that he was in the first group, those who did not commit crimes against the RS, who would be released. He was further told that the second group was those who committed crimes, who would go to prison, and the third group was those who committed severe crimes, who would be killed. FWS 210 specifically related this to his prior experience in his neighborhood: he had given a statement, as had his supervisor at his workplace, and then based on those statements and his standing in the community, a decision was made by the local Serb command.

This direct evidence of the common purpose and system at the KP Dom identified above was further confirmed by numerous other pieces of evidence. FWS 182 testified that he had worked before the war with the person who interrogated him; when FWS 182 went for interrogation, this interrogator said he didn't need to ask any questions since he knew FWS 182 and that FWS 182 would be sent to room 15 since it was the safest room. FWS 182 was told that it would only be for a short while and that no one in that room would be harmed. Similarly, FWS 86 testified that at some point during the summer he was classified as an inmate to be treated better, although he did not know the reasons for that. FWS 86 also described how, when he arrived at the KP Dom, he was told by a member of the Užice Corps that the "fundamentalists" were being sorted out for interviews and interrogation. FWS 83 provided further evidence by relating a conversation after Ekrem Zeković's escape between his father and the Accused Todović, who were friends before the war. FWS 83 also described how he hoped that his father's friendship with Todović would protect him as well, but that shortly after he arrived at the KP Dom, he became very afraid that he wasn't protected. He described one incident when he was being driven to unload flour, and the driver told him that, although his father was safe, they knew what FWS 83 had said and they knew what his fate would be. Finally, FWS 85 testified that he concluded, based on what he saw and heard, that there was an investigative and sorting process ongoing at the KP Dom during April, May and June 1992, and that the interrogations were intended to determine who should stay at the KP Dom, who should be exchanged and who should be killed.

The Panel recognizes that there are some differences in the details of the common purpose of the system described by the witnesses. These testimonies are consistent, nonetheless, in describing a system founded upon persecution of non-Serb civilian men by their illegal imprisonment; categorization according to information obtained through interrogations; and permanent removal from Foča through the commission of distinct crimes against each category. Further, the Panel does not exclude the possibility that the exact details of the systemic criminal purpose of the KP Dom altered from the initial conception to actual implementation. Nonetheless, as established, the common purpose, embracing the specific crimes in Counts 1 through 5, was in place by the time those crimes were committed.

The inhumane conditions and enslavement supported and were inextricably part of the system. The inhumane conditions served to demoralize, weaken and intimidate the detainees, and helped to ensure order in the KP Dom, discouraged escape, and supported the interrogations, murders and forcible disappearances by creating a climate of fear and

submission. The inhumane conditions also helped to ensure that the detainees would not return to Foča after they were released, deported, or forcibly transferred by implicitly emphasizing that non-Serbs would suffer if they tried to return. The enslavement of some detainees at the KP Dom served many of these same goals, and also served specifically to extract whatever benefits could be extracted from the detainees while the detainees remained at the KP Dom; to, in essence, exploit the detainees' labor to serve the needs of the Serb civilian and military authorities in Foča before discarding the detainees and expelling them from Foča.

The commission of the crimes established in Counts 1 through 5 of the Verdict, therefore, was part and in furtherance of the common purpose of the KP Dom as a systemic joint criminal enterprise. The "common denominator" was the plurality of persons as identified above and the common purpose described herein, which included the crimes that were in fact committed. To more narrowly define the common denominator of the system would be to unjustifiably exclude the weight of evidence which this Panel had before it.

It is indisputable, of course, that some crimes were ultimately committed outside the walls of the KP Dom. The enforced disappearance of detainees is just one example. Although the common purpose of a camp as a system will often correspond directly to the crimes committed within the camp itself, nonetheless, the common purpose of a systemic joint criminal enterprise is not solely a spatial issue. The crimes that were ultimately realized outside the walls of the KP Dom were intrinsic to the KP Dom as a systemic joint criminal enterprise. It is also possible that some of the crimes committed as part of the systemic JCE were intended to achieve purposes in addition to furthering the criminal purpose of the JCE. For example, forcible transfer was part of the criminal purpose of the JCE. In addition, in carrying out the forcible transfer, it is clear that detainees were effectively viewed as bargaining chips to be used in exchanges. The documentary evidence reveals that other military commands, such as the Herzegovina Corps, directed requests or orders to the Foča Tactical Group to exchange detainees held at the KP Dom for captured Serb soldiers. Similarly, as numerous detainees testified, they were held at other detention facilities, such as the KP Dom Kula, until they were exchanged, in some cases for many months or up to a year. However, this ancillary purpose behind many of the forcible transfers is fully consistent with the common purpose the Panel identified. Whether detainees were specifically used in prisoner exchanges or whether they were simply released in a location outside Foča, the end result was the same: the non-Serb detainees were persecuted and forcibly displaced by expulsion and other coercive acts from their homes in Foča.

Likewise, there were some suggestions that the forcible disappearance of at least some detainees was linked to events on the frontlines, particularly when Serb forces suffered significant casualties. The evidence on this was unclear, but the suggestion is certainly credible. Nonetheless, this again does not detract from the Panel's conclusion that there was a common purpose to the crimes committed at the KP Dom. Even assuming that at least some detainees were forcibly disappeared in revenge for Serb military losses, the common purpose was still realized.

The Panel has previously noted and concluded that all the crimes committed in Counts 1 through 5 were committed with the intent to discriminate against the non-Serb detainees on the basis of their ethnicity, and that the detainees were in fact discriminated against on that basis. The criminal system itself only applied to the non-Serb detainees and was designed to specifically persecute non-Serbs, through the commission of the type of crimes that were

committed. Accordingly, the Panel concludes that the KP Dom was a systemic joint criminal enterprise, and that the crimes committed, as established in Counts 1 through 5 of the Verdict, were pursuant to and in furtherance of the systemic joint criminal enterprise, with the common purpose to persecute non-Serbs in the manner described above.

b. Individual Criminal Responsibility: *Actus Reus*

"[E]ach accused, by his conduct… participated in enforcing this system."[155]

Individual criminal responsibility for the crimes committed as part of a systemic joint criminal enterprise requires the contribution of the Accused to the operation of the joint criminal enterprise, personal knowledge of the system and the intent to further the system. Where the common purpose of the system is to commit persecution, it must also be established that the Accused shared the specific discriminatory intent. The Panel will consider each of these elements with respect to the Accused.

To incur liability under systemic JCE, the accused must make a contribution to the criminal system, although the accused not required to actually take part in the *actus reus* of the underlying criminal offenses.[156] As the Trial Chamber stated in *Krstic*, "General Krstic did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign."[157] In doing so, his level of participation made him "a principal perpetrator of these crimes".[158]

It is not necessary that an accused be present at the time the crimes are committed.[159] However, liability has not so far extended to crimes committed in the system which occurred either before the accused joined the systemic JCE or after he separated himself from it.[160] Evidentiary factors which bear on whether an accused has made a contribution to the common criminal purpose include: the *de facto* or *de jure* position of the accused within the system,[161] the size of the criminal enterprise, the amount of time present at the site of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the intensity of the criminal activity, the type of activity he actually performed, and the manner in which he performed his functions within the system.[162]

(i) The Accused Todović

Prior to April 1992, the Accused Todović was a long-standing employee of the KP Dom. He had begun working at the KP Dom as a guard in January 1974, and following his graduation from law school, he was appointed to a position in the legal affairs section at the KP Dom in charge of criminal sanctions for convicts. He continued in this position until 7 April 1992, when the prison ceased to exist as it had before the conflict. He did not report to work on that day and soon after left Foča.

[155] *Mauthausen Concentration Camp*, pg. 15.
[156] *Kvocka* Appeal Judgment, para. 112.
[157] *Krstic* Trial Judgment, para. 644.
[158] *Id.*
[159] *Kvocka* Appeal Judgment, para. 112; *Krnojelac* Appeal Judgment, para. 81.
[160] *See, e.g.*, *Kvocka* Trial Judgment, para. 349.
[161] *Kvocka* Appeal Judgment, para. 101.
[162] *Kvocka* Trial Judgment, para. 311.

Todović testified that he first returned to the KP Dom pursuant to a war work assignment on 22 or 23 of April 1992. Exhibit P-9 states that the Accused's work assignment began on 20 April 1992. As the Panel previously noted, the Užice Corps of the JNA was in control of the KP Dom during most of April and was replaced by returning civilians, some of whom, like Todović, were previously employed at KP Dom, during the last week of April. Todović was, from time to time, ordered temporarily to the front line to assume military duties. During these absences, he continued to be assigned to the KP Dom. The first, and longest, absence of this nature was from 20 May until the end of June 1992, after which time he retuned to his duties at the KP Dom. Notwithstanding the testimony of the Accused Todović and witnesses presented by him that he was at the family farm during the month of July, the Panel notes that this testimony is not sufficiently supported or credible to place in doubt the consistent and clear testimony that Todović was present at the KP Dom during July 1992. In particular, the Panel considered the specific and detailed testimony of FWS 210 very persuasive on this issue, as well as the confirmation of numerous other witnesses, including FWS 71, FWS 250, C and Ekrem Zeković.

FWS 210 specifically testified that, while he did not see Todović between late May and the end of June, he did begin seeing him again at the KP Dom at the end of June or beginning of July 1992. FWS 210 was in general a highly credible witness, and more importantly, his testimony established that he had regular contacts with the KP Dom administration and staff, particularly during the summer of 1992. FWS 210 knew and spoke regularly with Krnojelac, both Accused, a number of the KP Dom guards and other staff, including the civilian supervisor of the metal workshop. His testimony regarding these regular contacts demonstrate that he was friendly with the administration and staff, spoke relatively freely with them and learned a good deal of information from them. In addition, FWS 210's testimony established that, as a result of these regular contacts and relations, he noticed and recognized when Krnojelac and the Accused were absent from the KP Dom. Accordingly, the Panel considered FWS 210 a highly credible witness as to this issue, as his testimony makes clear that he was in a position to know and did in fact know approximately how long Todović was absent from the KP Dom in May, June and July 1992.

FWS 210's testimony was confirmed by FWS 71, FWS 250, C and Ekrem Zeković. These witnesses testified, in response to questioning by Todović, that they did see him at the KP Dom between the end of May and the middle of July 1992. In particular, the Panel notes that Ekrem Zeković, like FWS 210, had regular contacts with the KP Dom administration and staff and testified that he saw Todović at the KP Dom during that time. While these witnesses were not specific as to when they saw Todović, they were clear that they saw him at the KP Dom during that period. The Panel considers that these testimonies confirm the testimony of FWS 210 that Todović returned to the KP Dom at the end of June or early July 1992, as they establish that Todović was present at the KP Dom at some point between the end of May and the middle of July 1992. They are further not inconsistent with FWS 210's testimony, as these witnesses did not specify when they saw Todović, only that they saw him during the period Todović himself identified in his cross-examination.

Moreover, the Panel notes that no former detainee testified that Todović was absent from the KP Dom for two months during the summer of 1992. The Panel considers this fact corroborative of the testimonies above. While some witnesses, such as FWS 113, testified that they did not see Todović for the first time until late in the summer, none of the witnesses, particularly those who arrived in April or early May 1992, testified directly that Todović was present at the KP Dom and then left for a period of two months. While it is credible that the

detainees would not necessarily notice if Todović was absent from the KP Dom for up to a month, it is highly improbable that no detainee would notice if Todović was been absent from the KP Dom for a full two months.

The Panel found that the testimonies of Todović and the alibi witnesses he called on his behalf regarding Todović's presence in his home village in July 1992 were not credible, particularly in light of the testimonies above. The testimonies of the defense witnesses were general and non-specific, in contrast to the testimony of FWS 210. Moreover, the Panel did not find it credible that, given the clear need for manpower at the KP Dom, Todović would be permitted to spend an entire month in his home village when there was insufficient personnel, particularly experienced personnel, at the KP Dom at the time. Finally, Exhibit P-150 corroborates that the wartime assignment of the Accused Todović at the KP Dom included the periods from 18 April 1992 to 21 May 1992 and from 21 June 1992 to 1 March 1995. Accordingly, the Panel concludes that the Accused Todović was only absent from the KP Dom on a military assignment from 20 May until the end of June 1992.

The Panel further concludes that the Accused remained a participant in the systemic joint criminal enterprise that was established at the end of April 1992, even during his absences from the KP Dom, and that he did not separate himself from the joint criminal enterprise. His absences were temporary, he was not replaced by other personnel as a consequence of his absences, and he resumed his place in the system each and every time he returned to it. When he was not on military assignment, he was seen by the witnesses to be at the camp not only during regular business hours, with which Todović admits he strictly complied, between the hours of eight and three, but in addition on nights and weekends. His office was in the administration building, and he was frequently seen walking around the KP Dom, present on the grounds and around the dining hall during mealtime, and inspecting the rooms in which detainees were held. Witnesses, including FWS 85, FWS 119, FWS 139, FWS 182, A and others, spoke of his demeanor, in contrast to Rašević, as invoking fear and as expressing a high degree of authority.

In assessing Todović's position at the KP Dom and participation in the systemic joint criminal enterprise, a number of fundamental considerations must be recognized. As the testimonies of the Accused and the witnesses who were among the first to arrive at the KP Dom established, the situation at the KP Dom when the Accused arrived was disorganized and uncertain. The facilities at the KP Dom were devastated by the conflict, as both Accused noted in their testimonies: the armory was destroyed, the warehouses had been looted, windows throughout the complex were broken, the contents of the strongbox had been stolen, and the offices were destroyed. The KP Dom had been subject to shelling by both forces, and control had alternated between the opposing forces. Moreover, even after the JNA took over the KP Dom complex, the scope of their authority was uncertain and clearly temporary, as civilians quickly began to be assigned to the KP Dom even while the military was present. Simply, then, in April 1992 the situation at the KP Dom was chaotic. The military and civilian staff were attempting to deal with the influx of non-Serb civilians arrested throughout Foča without a clear understanding of their roles and responsibilities, and the physical state of the complex would have obviously required significant repair and reorganization.

It was in these circumstances that Todović arrived at the KP Dom in late April 1992. As he testified, he quickly recognized the burden placed upon himself and other pre-war staff returning to the KP Dom. Both the Accused noted their surprise at finding Milorad Krnojelac as temporary warden, as he had previously only been a school teacher and did not have the

qualifications for the position of warden of a large prison complex. Besides the Accused Todović and the Accused Rašević, there were few other civilians with knowledge of how to organize and run a prison. As Todović testified, at that time there were only about 15 pre-war guards at the KP Dom, while another 20 civilians on the staff were assigned to work at the KP Dom only because they were unfit for military service. Moreover, one of the pre-war guards, Slavko Koroman, had already retired and was only called back to work and designated senior guard because there were so few qualified guards. Exhibit O-I-06 confirms that the KP Dom was severely understaffed.

Todović was then in the position, as one of the few experienced and knowledgeable members of what was an already clearly insufficient civilian staff, of having to quickly organize and set up the KP Dom as a detention camp for the large numbers of non-Serb civilians already there and arriving daily. Because of his experience, and attention to detail, and his dedication to his work, all of which he testified about, his contribution to bringing order to the chaos that existed in April and May was invaluable. By his own testimony he acknowledged that he had neither an official title nor any written memorandum of his duties, but was obliged to perform whatever tasks the warden asked him to do. Todović himself admitted that he was devoted to the work of the KP Dom. Food would have had to be arranged, civilian staff assigned, facilities in need of repair identified, room assignments made, procedures arranged, particularly with regard to the involvement of the civilian and military police and military, and a thousand other steps taken to make the KP Dom operational and keep the detainees imprisoned. Further complicating the situation would have been the demands placed on the KP Dom staff by the military authorities and civilian police, who, as previously noted, continued to interrogate detainees throughout this period. The key role Todović would have played in this process is apparent from his own testimony and confirmed by the testimony of FWS 210, who described how, soon after he arrived on 18 April, he saw Krnojelac, both Accused and the senior guard meeting together and inspecting the compound.

The Accused himself highlighted the key place he had in the operation of the KP Dom by virtue of his experience. In noting how the situation at the KP Dom changed drastically due to personnel changes in the summer of 1993, Todović testified that the staff after that time was excellent, with a number of highly-qualified persons assuming positions at the KP Dom. In contrast, the Accused noted, Milorad Krnojelac could only rely upon himself and the Accused Rašević before that time. As the Accused described the difference, "If you have excellent staff, it is easy to be good. Krnojelac only had … me and Rašević." Todović admitted that his responsibilities and tasks at the KP Dom during the summer of 1992 exceeded the terms of his "official" war work assignments and that he did the tasks of other positions that were unfilled. He did those tasks that needed to be done to allow the camp to operate.

The Panel considers these factual considerations and admissions to be key insights into the distribution and exercise of responsibilities and authority at the KP Dom, particularly in the summer and fall of 1992. Simply, it must be recognized that, however formally responsibilities and authority were defined in the pre-war KP Dom, the exigencies of war created a more fluid and informal distribution of power after April 1992. This is further confirmed by the testimonies of a number of witnesses, such as FWS 86 and FWS 138, that Milorad Krnojelac did not interact with the detainees, was often absent and did not appear to be active in the management of the KP Dom, particularly with regard to the detainees. Accordingly, in determining Todović's participation, the Panel must look to the exercise of authority *de facto*.

There is clear evidence that Todović assumed additional responsibilities beyond those associated with whatever nominal position he may have held before the war, and that he exercised these responsibilities and authorities from 22 April 1992 onwards. The witnesses were unanimous in their understanding that the Accused exercised a great deal of authority at the KP Dom, particularly vis-à-vis the non-Serb detainees.

Many witnesses testified that they were told from the beginning of their detention by either the guards or other detainees that Todović was the deputy warden, while other witnesses testified that, even if they did not know his specific position, it was clear that the Accused was in charge of or responsible for the non-Serb detainees. These witnesses included Ekrem Zeković who testified that he learned from the people with whom he worked in the metal workshop shortly after he was assigned there in May 1992 that the Accused was the deputy warden and was responsible for the detainees, particularly their work assignments. This witness noted that when he requested to go to the hospital to work, the metal workshop supervisor told him that he couldn't, and that Todović had made that decision. FWS 104, who was exchanged in October 1992, also testified that he heard during his imprisonment that Todović was the deputy warden. FWS 138 testified that while he had not heard Todović's formal title, it was his impression that the Accused was deputy warden and was in charge of the non-Serb detainees. FWS 138 further noted that whereas the detainees hardly ever saw the warden, they often were in contact with Todović, particularly with regard to labor assignments. FWS 71 testified that Todović did rounds of the detainees' rooms, while FWS 85 testified that Todović often searched the detainees' rooms. FWS 85 also described how the Accused was a very prominent person at the KP Dom, being in close contact with the detainees and exercising a great deal of authority over them.

These broader descriptions were confirmed by the testimonies of a number of witnesses that Todović was responsible for punishment of the detainees. FWS 210 described how a KP Dom guard caught him attempting to smuggle a message while he was working at the hospital and reported this; Todović then confronted FWS 210, threatened him and sent him to the segregation cell for 10 days as punishment. FWS 182 described how on one occasion Todović caught him smuggling with Serb staff member and sent him to the segregation cells, while on another occasion Todović sent him to segregation for allegedly stealing another detainee's money. FWS 139 also testified that Todović sent him to the segregation cells on a number of occasions as punishment. Finally, FWS 65 testified that during the winter of 1992, the Accused searched his room and, after finding socks he had made out blankets, ordered him to be taken to the segregation cells and the socks confiscated. These duties are consistent with Todović's own admission that he was the officer for enforcement of penalties and distribution of sanctions. In addition to imposing sanctions on the detainees, it is also obvious, from his own admissions, that he had disciplinary power over KP Dom employees. In describing an incident in which he sanctioned FWS 182, noted above, he further recounted what he did with the Serb staff member with whom FWS 182 was charged with smuggling. Again, quoting Todović, "A man reported to me that someone took 100 marks, and I addressed this civilian. I told him it was shameful, and I reported to the warden. I proposed to the warden that he give a statement, and if he refused, to confine him. The warden said to the civilian to avoid shame, you should join the army and return the money. I returned the money to the damaged party, and I proposed to the warden the measure."

Witnesses, including FWS 76, FWS 82, FWS 86, FWS 115 and FWS 182 among others, testified that Todović was in charge of work assignments for detainees. These witnesses

testified either that Todović himself directly assigned them to work, or described how when they asked to be assigned to work or why they had been assigned to work, they were told by the KP Dom guards that Todović ordered the labor assignments. The witnesses were clear that the Accused's responsibility for work assignments existed during the first year of the camp. Todović agreed in his testimony that this was in fact one of his functions.

There is some evidence that other persons, including Milan Vujović, may have formally been designated deputy warden or the head of legal affairs, including labor assignments, in spring and summer 1992. However, the Panel concludes on the basis of the testimony of the witnesses cited above, whom the Panel find highly credible, that, whatever Todović's *de jure* assignment or position, he exercised the powers and authorities described above from 22 April 1992 onward. The witnesses consistently and uniformly testified that the Accused was deputy warden, in charge of the non-Serb detainees, enforcer of discipline and sanctions and responsible for all aspects of forced labor.

Only a very few detainees even knew the name of Milan Vujović and none described him or any person other than Todović as holding the position of deputy warden until Milutin Tijanić arrived in the summer of 1993. Therefore the Panel notes that the *de jure* appointment of Todović as "temporary deputy warden" in December 1992, verified in Exhibit P-24, was the formal recognition of his existing *de facto* status. Todović exercised the authority of deputy warden far in advance of his legal appointment to that position, and throughout the period beginning in April 1992. That authority is consistent with the description of the authority Todović testified was vested in him. According to Article 79 of the Book of Rules, Exhibit P-169, the "Deputy Warden shall work in agreement with the Warden and shall be directly responsible to him for his work and performance of the tasks of the department that he manages." Todović confirmed that his position prior to December 1992 mirrored this job description, when he testified that in addition to his prewar duties, he would do "everything else I was authorized to do by the warden." Article 73 of the Book of Rules further requires that "the warden shall have a deputy who shall replace him in case of his absence or incapacitation." Todović held the *de jure* authority of deputy warden for eight additional months.

In August 1993, upon the appointment of Milutin Tijanić as deputy warden of the KP Dom, Todović was reassigned to the position of Assistant for Legal and Financial Affairs, which continued to include responsibility for detainee and convict work assignments. After this period, which coincided with the appointment of Zoran Sekulović as warden of the KP Dom to replace Milorad Krnojelac, the authority and responsibilities of members of the KP Dom administration were more specifically defined, and accordingly the Panel is satisfied that from that point, Todović's *de facto* authority corresponded to his *de jure* authority.

In light of these conclusions, Todović's participation in the systemic joint criminal enterprise in place at the KP Dom was significant and his contribution to the systemic JCE decisive. As one of the key members of the KP Dom administration, the Accused's acts – both in reestablishing the KP Dom administratively and physically in the initial stages, and later in performing his daily tasks, particularly with regard to enforcing detainee "discipline" – decisively contributed to the smooth and efficient functioning of the KP Dom as a systemic joint criminal enterprise whose purpose was to persecute non-Serb men in the manner described in this verdict. Together with Rašević, he supported the warden and compensated for the warden's lack of experience and qualifications. Moreover, as a person in authority, by continuing to perform his duties and responsibilities at the KP Dom, and by his direct

participation in specific crimes of persecution, Todović encouraged subordinates at the KP Dom to continue their participation in the systemic joint criminal enterprise. In addition, it is clear that the Accused himself directly participated in the commission of at least some of the crimes committed pursuant to the joint criminal enterprise, including the beating and torture of Ekrem Zeković, the arbitrary physical punishment of detainees, such as FWS 65, the enslavement of detainees, and, most critically, the continued illegal imprisonment and persecution of the non-Serb detainees, to which he contributed directly through his mistreatment of those connected or suspected to be connected with the escape and his threats designed to discourage any further attempts to escape.

(ii) The Accused Rašević

Like the Accused Todović, the Accused Rašević was a long-standing KP Dom employee prior to April 1992. Beginning in February 1977, the Accused was employed as a guard at the KP Dom. After working at the prison in Mostar, and obtaining a faculty degree, Rašević returned to the KP Dom as an educational officer in 1988. He was then appointed temporary commander of the guards at the KP Dom in September 1991, which position he held until April 1992. These facts were established by Rašević's testimony and confirmed in part by Exhibits P-132 and P-137.

The Accused testified that he returned to the KP Dom on a war work assignment on or around 29 or 30 April. Pursuant to the order of Milorad Krnojelac dated 27 April 1992, which was admitted into evidence as Exhibit P-138, the Accused was appointed commander of the guards at the KP Dom, in which position he served until his appointment on 1 July 1993 by the Ministry of Justice as assistant manager for security at the KP Dom, which order was admitted into evidence as P-24. Notwithstanding the change in title, Rašević explained that his duties were the same, and he did not dispute these facts and that he served as commander of the guards at the KP Dom from the end of April 1992 until October 1994.

The duties and responsibilities of commander of the guards are set out in part by the Book of Rules adopted in August 1992, Exhibit P-169, which was in that respect identical to the prior effective Book of Rules. According to Article 8 of the Book of Rules, the Commander of the Guards managed the Guard service and was directly responsible to the Warden. The Commander of the Guards had direct responsibility for the guard supervisors, whose role was to "manage security of the institution." The Commander of the Guards also had responsibility to deploy all employees of his department on a daily basis to whatever task that was necessary for "the normal functioning of the service", Article 9, and to oversee the guards, who were responsible to him for the "regular and orderly performance of their duties" under Article 8.

In addition, by his own admission, he was in charge of food distribution within the camp. Although he claims not to have known at the time that the KP Dom staff and Serb convicts were getting more and better food than the non-Serb detainees, he admitted in his testimony that they "probably were". Under Article 7 of the Book of Rules, the Guard service, which he managed, was responsible for "tasks related to purchase, storage, and maintenance of material assets [of the facility] and other assets of the guard (equipment and armament)."

Rašević was a highly competent and professional Commander of the Guards. According to his own testimony, he worked every day, and sometimes weekends; he assigned the guards to their shifts and responsibilities; he inspected the segregation cells in the morning when he

arrived and saw who had been placed there the night before; he had access to the log book kept by the duty officer and could see the number of detainees who came in and went out, as well as others, including interrogators, who came and went throughout the day and evening hours when he was not present. Although he did not receive written reports from the duty officers, which he claimed went instead to the warden, he met with the duty officer in the mornings regarding the preceding evening's activities, as established by the testimony of FWS 210 and Ekrem Zeković. In Rašević's own words: "I organized the work of the guards. I entered the rooms and talked to detainees. I intervened when someone was placed in solitary." When asked by the Prosecutor if he had complied with the Book of Rules, he answered "yes".

And in fact the system did function in an orderly way. Detainees were only admitted upon written orders and records were kept of those who left the facility. The KP Dom guards, who were responsible to Rašević "for the orderly performance of their duties", fulfilled those responsibilities in an orderly way: interrogators were not permitted by the guards to conduct interrogations without orders, approved by the warden; detainees were not accepted into the facility by the guards without a written form, signed by a person in authority; detainees were not permitted out of the facility by the guards without a written form, signed by an authorized person; and guards complied with a formal process by which they were given lists of men that they were instructed to select and escort from their rooms and deliver to interrogations, beatings, torture, segregation cells, deportations, forcible transfer, enforced disappearances and murder. Rašević, in compliance with the Book of Rules, "managed the guard service". As he said, in answer to a Panel member's question, "I did all that I could to make it function as it should." His contribution to the system in place at KP Dom was significant and decisive.

Rašević, in addition, directly engaged in the *actus reus* of the crime of illegally imprisoning at least 700 non-Serb civilians by performing the tasks necessary to ensure that they continued to be illegally deprived of their liberty, including by assigning the KP Dom guards to secure the detainees inside KP Dom and on work detail outside the facility. The guard service was responsible for ensuring that the detainees remained within the control of KP Dom, whether they were inside or outside the facility. Article 7 of the Book of Rules gave to the guard service the duty to secure the "institution, worksites and premises in which prisoners stay, reside and work." The guard service thus enforced the illegal imprisonment of the detainees, and Rašević directly managed the guard service and assigned the guard service its tasks.

There is no dispute that Rašević tried to help some of the detainees at the camp. However, that help was rendered on an individual basis and was never designed to impede the efficient running of the camp, or the efficient management of the guards. To the contrary, what help he gave was given in secret. These acts of kindness will of course be considered by the Panel in sentencing, but they do not constitute evidence that casts doubt on Rašević's contribution to the systemic JCE.

c. Individual Criminal Responsibility: *Mens Rea* (Knowledge)

"[E]ach accused was aware of the system."[163]

To be liable as a co-perpetrator for the crimes committed by a systemic JCE, the Accused must have had personal knowledge of the organized system set in place and its common criminal purpose. Knowledge of the common criminal purpose requires that the Accused know the type and extent of the criminal activity in which the system is engaged. However, the Prosecution does not need to prove that the Accused had personal knowledge of each and every crime committed within the system.[164]

Evidence of knowledge can come from express testimony and it can also be inferred from the position of authority within the system held by the Accused.[165] In addition, other factors can shed light on the existence and extent of personal knowledge, including: the amount of time spent in the camp, the actual tasks performed, his work location within the camp, his access to other areas of the camp, the frequency with which he traveled throughout the camp, the extent of his contact with inmates and the nature of that contact, the nature and extent of his contact with other staff in both superior and inferior positions, the nature and extent of contact with outsiders entering the camp, evidence about what he saw, heard, smelled, or was informed of regarding the criminal activity of the system and his reaction to this information.[166]

(i) Personal Knowledge of the System

Witnesses testified that they learned directly from Serb soldiers, the civilian police interrogators and the warden of the KP Dom that there was a planned and organized persecutorial system in place at the KP Dom, and specifically that this system would include the commission of the crimes of imprisonment of non-Serb civilians and their removal from the Foča area by murder, disappearance, exchange or release. These witnesses were detainees, and their testimony regarding what they were told was born out by the facts as they unfolded. They are credible. However, it is not credible that detainees were able to learn these facts but that the Accused, who were important members of the KP Dom administration and management and would be responsible in part for implementing this system, were not informed.

This is particularly true in light of the general circumstances prevailing at the KP Dom in April and May 1992. As the civilian staff assumed control over the KP Dom from the JNA, a number of pressing questions would have to be answered as part of the process of reestablishing and organizing the KP Dom. The request of the Foča Tactical Group for use of part of the premises of the KP Dom to imprison non-Serb civilians would have made these questions even more pressing and immediate. For example, it would have been critical to determine the respective responsibilities and duties of the military and the civilian staff for these persons so that the KP Dom administration could direct the prison staff, and the KP Dom guards in particular, what was expected of them and what their daily duties would be. It would have also been important to learn how many non-Serbs would be imprisoned at the KP Dom and how long it was expected they would remain imprisoned. Both Accused needed to

[163] *Mauthausen Concentration Camp*, pg. 15.
[164] *Kvocka* Appeal Judgment, para. 276.
[165] *See, e.g.*, *Kvocka* Appeal Judgment, para. 203.
[166] *Kvocka* Trial Judgment, para. 324.

determine the KP Dom's capacity for legal convicts; and Rašević in particular had the specific duty to meet the KP Dom's material needs under Article 7 of the Book of Rules.

As experienced penal professionals and long-serving employees of the KP Dom, these and similar questions would have been particularly important to both Accused. A proper and legal prison, such as the KP Dom prior to the conflict, is a highly regulated and organized institution. The Book of Rules reveals that almost all aspects of the KP Dom's operations were specifically regulated and defined, from the duties and responsibilities of each staff position, to the duties of prisoners, to the procedures for many aspects of daily life. The Accused were faced upon their return to KP Dom in April with a facility in chaos, inadequate staffing and an acting warden with no experience or qualifications for that position, having up to that point been a teacher of mathematics. As Todović stated in his testimony, "Krnojelac only had me and Rašević." Based on what Krnojelac told detainee RJ about the JCE in place at KP Dom, confirmed by what actually occurred there and other reports by other witnesses, the Panel is convinced that Krnojelac knew the details of the systemic JCE, including its criminal purpose, from its inception. Having shared this information with a detainee, the Panel does not find it credible that Krnojelac would have withheld this information from Rašević and Todović, on whom he relied for the successful maintenance of that system.

(ii) Personal Knowledge of Nature and Extent of Criminal Activity

Even if the Accused were not specifically and directly informed of the existence of the system and its nature, which the Panel finds highly unlikely, the evidence establishes beyond a doubt that they must have been aware of the type and extent of criminal activity perpetrated at the KP Dom pursuant to the systemic joint criminal enterprise.

The Accused were, as established, in positions of authority at the KP Dom, were present during normal working hours and sometimes on weekends and evenings, had access to all areas of the compound and were seen by witnesses regularly inspecting the compound, including the segregation cells and detainees' rooms, the dining hall, the exercise yards, the factories, and, of course, the administration building where they had offices. In addition, they had consistent and frequent contact with the detainees. Several witnesses reported that Todović came to their rooms, and Rašević admitted, "Whenever I had the opportunity, I went to talk to these people." They were also present at the KP Dom, with limited exceptions, throughout the period from April 1992 to October 1994. Their senses alone would have informed them of the criminal purpose and design of the system they were maintaining and contributing to through their efforts. The evidence establishes beyond doubt that the Accused both knew that the KP Dom was a systemic JCE and knew the common purpose of that systemic JCE: the persecution of non-Serbs by illegally imprisoning them in inhumane conditions, interrogating and categorizing them, and permanently displacing them from Foča by illegal means.

(iii) Knowledge of Imprisonment and Inhumane Conditions

Both Rašević and Todović, when questioned at trial, admitted that they knew that the non-Serb men who were being brought to the KP Dom were not in fact prisoners of war, that they were actually civilians, and that they were not there either as legal detainees, charged with crimes and awaiting trial, or as convicts legally sentenced to imprisonment. The illegality of their imprisonment, as part of the system, was well known to both Accused. Both understood the difference between legally held persons and those whose imprisonment was not

sanctioned by law, by their experience in the pre-war correctional system and by education. In addition, Todović was and is a trained lawyer. That this was persecutory was made obvious by the fact that these men were all non-Serbs, and that the Serb prisoners were all there pursuant to legal process.

The Accused both admitted that they were aware that during the winter of 92-93 there was no heat, that windows were broken, and that temperatures were extreme; that food provided to the non-Serb detainees was inadequate; that hygiene conditions were abysmal. It was obvious that the non-Serbs were losing excessive amounts of weight, and Todović relied on the fact that they were starving and that an additional "meal" induced them into passive acceptance of the enslavement. It was obvious that the non-Serb detainees were deprived of basic hygiene, not only because there was no hot water, but because the detainees were denied even soap and toothpaste and toothbrushes. Rašević knew this when he secretly gave soap to a few of the detainees whom he knew. The Accused knew that the prisoners were kept in unnecessarily overcrowded conditions. They knew that "solitary confinement" cells were designed to house one inmate, yet they allowed prisoners to be segregated into these cells in excessive numbers under even harsher conditions than regular housing. Both visited these areas regularly and saw the squalor and overcrowding, as well as the prisoners who were often injured.

Both Accused could see that some of the detainees were being mistreated while in their detention and under their control. The Accused Todović directly perpetrated or ordered such mistreatment while the Accused Rašević visited the segregation cells, spoke with the detainees confined in these cells arbitrarily by the KP Dom guards, and witnessed the injuries which evidenced the physical mistreatment these detainees suffered. Likewise, simply by being present on a daily basis, they were aware that the detainees were exposed to psychological abuse through: isolation from other prisoners, visitors, and the outside world; fear induced by witnessing violence and the effects of violence on other detainees; humiliation and enforced subservience demanded by the guards; and the threat of arbitrary punishment. They likewise were aware that the Serb convicts did not suffer these conditions. In addition, both were aware of and in fact personally participated in the enslavement of the detainees: Todović by managing the forced labor of detainees in the manner established in Count 4 of the Verdict, and Rašević by driving the detainees to the farm to perform forced labor.

(iv) Knowledge of Interrogation and Classification Process

The interrogations as well as beatings and torture of detainees during interrogations were obvious. The coercive interrogations occurred during both the day and the evening, from the time the Accused arrived at the KP Dom and continuing over the course of a number of months; no attempts were made to hide or camouflage what was happening. While the Panel accepts that the Accused may not have been personally present during these interrogations, they admitted that they knew that detainees were being interrogated and it is clear that they saw from the physical condition of some of the detainees that they were being beaten and tortured. Witnesses described how the sounds of beatings and torture during interrogations were clearly audible within the administration building and the compound, and the physical injuries, including severe bruises, bloody faces and other marks of physical mistreatment, that resulted from these beatings and torture were similarly clearly visible. These interrogations were conducted in the administration building, where the Accused both had their offices. The Panel visited the KP Dom and noted that the administration building is of moderate size and

is perpendicular and in close proximity to the buildings which housed the detainees during the war. It is entirely credible that these sounds of beating and cries of victims were heard by the detainees and that they saw blood and marks of struggle in the administration building. The Accused were present in the administration building, visited the segregation cells where the tortured detainees were taken after interrogation, visited the detainees' rooms and were otherwise present in the KP Dom compound and able to see and hear what was occurring there. The Accused Rašević's actions with regard to the beating and torture of S.M., described in Count 1 of the Verdict, merely confirm that it was general knowledge at the KP Dom that detainees were being beaten and tortured during interrogations.

The evidence also establishes that the system by which the non-Serb detainees were sorted for release or further mistreatment as a result of interrogation must also have been known to those in charge of the KP Dom, particularly Rašević and Todović. When FWS 83's father, in July 1993 after Ekrem Zeković's escape, asked Todović why beatings and other mistreatment were occurring at the KP Dom, Todović reminded FWS 83's father what he had said during his interrogation and told him that if he, Todović, had not put those statements away, FWS 83's father knew what would have happened to him.

Documentary evidence, to which the Accused had access, also testifies to the Accused's knowledge of this phase of the system. The defense tendered into evidence several certificates whereby the guards and officials of KP Dom were ordered to release non-Serb detainees, after they had been imprisoned and interrogated at the KP Dom. These are certificates which the Accused would have seen or had knowledge about, and they were identified by Rašević during the trial. They confirm that part of the common plan referred to here as phase one: they are an express acknowledgment that these non-Serbs were detained, interrogated and a decision was made by members of the JCE as to their fate based on the interrogation. Exhibit O-I-16, for example, recites that the named detainee has been interrogated and a decision has been made by the person signing the certificate that he is to be released and ordered to report daily to the police. Exhibit O-I-18 explains that the named detainee is ordered released after spending the period between April 18 and May 8 in custody. It is signed by representatives for the police, army and crisis staff, already identified by the Panel as part of the "plurality" of perpetrators involved in the JCE. These exhibits are important for what they show, that is, that non-Serb civilians were imprisoned, interrogated, and a decision was made by a plurality of persons to release them. The absence of these certificates for other non-Serb detainees is important for what it implies: those non-Serb detainees were imprisoned, interrogated, and a decision was made by a plurality of people that they would be subject to some other fate which did not involve their release.

(v) Knowledge of Disposition: Murder, disappearance, deportation and forcible transfer

In addition to knowledge of the so-called first phase of the system's common criminal purpose, the Accused would also have had knowledge of the consequences of that phase, that is, the permanent removal of the detainees from the Foča area through murder, disappearance and forced transfer. As described in Count 2 above, the murders of 18 non-Serb detainees held illegally at KP Dom and subjected to interrogation, were carried out in June and July. There is no evidence that the Accused participated in the *actus reus* of these murders nor that they knew of each individual crime in detail. However, the evidence establishes that they did know that murders were occurring and that murders were part of the system of persecution to which they were contributing.

Rašević and Todović were conscientious about their duties at KP Dom. Rašević's primary obligation under Article 7 of the Book of Rules, personally and through his guards, was to "secure the institution, worksites, and premises in which prisoners stay, reside and work", that is, to keep the non-Serb detainees who were illegally imprisoned in KP Dom from leaving without official authorization, such as the certificates of release admitted as Exhibits O-I-16, O-I-17, O-I-18, O-I-21 and O-I-22. Todović also felt very strongly about his responsibility to keep the detainees imprisoned, as evidenced by the facts established in Count 1c of this Verdict regarding his reaction to the escape of Ekrem Zeković.

The Accused Rašević testified about, and provided material evidence of, a paper system in effect whereby detainees would not be accepted into detention without an order authorizing their detention and would not be released without a certificate authorizing their release. This paper system was further supplemented by the duty log kept by the duty officer in the administration building of the KP Dom, who was responsible for documenting events that occurred at the KP Dom, including admissions, interrogations and releases of detainees. As the Accused Rašević testified, a detention order was issued for those brought to the KP Dom to be imprisoned. This order was given to the KP Dom duty officer, who further registered the new detainees in the duty log. Thus, a register was created of all detainees imprisoned at the KP Dom. In addition, detainees could only leave the KP Dom on the basis of release orders, including release orders for the purpose of exchanges, which were discussed and documented above. Rašević confirmed that the KP Dom administration knew which and how many detainees were imprisoned, stating that the warden of the KP Dom, based upon the reports of the duty officer and the log book, knew that persons were detained, knew that persons were interrogated and knew that persons were taken away. Accordingly, it is clear that the administration of KP Dom knew which detainees were supposed to be present in the facility.

Further, as established by the testimonies of FWS 58 and FWS 250, there was a room leader system in place through which one detainee would be designated the room leader for each room. As these witnesses testified, this room leader was responsible for counting each evening the number of detainees in each room. The room leader then reported or gave the list of detainees to the duty officer. It is important to note that, as the room leaders these witnesses identified disappeared from the KP Dom in August and September 1992, it is clear that this system was in place at the time the murders established in Count 2 were perpetrated. The combination of this room leader system with the register and duty log system noted above demonstrates clearly that the KP Dom administration knew which detainees were actually present in the facility.

In addition, as established by the testimonies of FWS 82, FWS 210, A and many other witnesses who testified about the escape of Ekrem Zeković, it is clear that the KP Dom guards kept track of the detainees who were supposed to be present in the compound. Ekrem Zeković's escape was quickly discovered and reported to Rašević, Todović and Krnojelac. From this it is clear that the KP Dom administration knew which detainees were not present in the facility.

The facts established in Count 2 of the Verdict establish that at least 18 detainees were murdered in the evening hours in and around the administration building at the KP Dom during June and July 1992. The duty officer of the KP Dom would certainly have had knowledge of these events. As Rašević testified, the duty officer was responsible for documenting in the duty log when interrogators or other authorized persons arrived at the KP

Dom to interrogate detainees. Moreover, the duty officer, whose location in the center hall of the administration building was observed by the Panel on its visit to the KP Dom, would have been able to see and hear even more than the witnesses in Room 11 and other rooms in the housing units who saw and heard the beatings, torture and murders. Rašević and Todović would have also had knowledge of these murders. Even if Rašević and Todović only worked a day shift, and were not present at the KP Dom until the early morning, they would have known or been informed that a detainee who was supposed to be at the facility, and for whom no authorized certificate of release had been filed, was no longer at the facility. They certainly would have known or been informed about 18 such detainees. Not only would this information have been available from the log book, but, as established through the testimonies of FWS 210 and Ekrem Zeković, Rašević and Todović were briefed by the duty officer in the mornings and told about the occurrences of the preceding evening. Although the evidence establishes that Todović was absent from the KP Dom in June, these events continued into July.

Accordingly, the Panel concludes that Todović as the administrator in charge of the detainees, and Rašević, as the administrator in charge of security, knew about the 18 murders committed by members of the JCE. The fact that neither Accused reacted officially to these missing detainees is significant evidence that they knew that these killings were part of the common purpose of the JCE in which they were already participants, and that they acquiesced in it.

The Accused also knew that the system included disposal of detainees by "disappearance". That it was known that these were engineered under the guise of "exchanges" or "plum picking" is clear from the testimonies of FWS 139 and FWS 210. These witnesses testified that the Accused Rašević specifically told them, in response to their questions about when they would be exchanged, that the time was not right for their exchange and that they should stop insisting. The testimonies of numerous witnesses establish that it was generally known by the staff at KP Dom that at least some detainees who were taken out of the KP Dom for the ostensible purpose of exchange would be in fact disappearing. FWS 210 further testified that a KP Dom guard who was his neighbor told him that he should refuse at any cost to go for exchange; this fact was confirmed by Ekrem Zeković. Similarly, FWS 113, FWS 162 and Ekrem Zeković testified that the medical technician at the KP Dom consistently prevented a detainee, Fahrudin Malkić, who was his neighbor, from being taken for exchange; this detainee was only taken for exchange in December 1992 when the medical technician was away from the KP Dom. These witnesses further testified that when the medical technician returned and learned that Malkić had been taken for exchange, he was sad and worried, saying that if only he had been there he wouldn't have allowed Malkić to be taken for exchange. FWS 65 also testified that when he asked the medical technician when he would be exchanged, the medical technician told him that he should be quiet and that it was safer at the KP Dom. Considering that the Accused were in positions of authority and would have necessarily been more knowledgeable than a guard and the medical technician at the KP Dom, and based on Rašević's remarks to FWS 210 and FWS 139, the Panel concludes that they were aware that detainees were being forcibly disappeared after being taken out of the KP Dom for alleged exchanges and "plum picking".

Ultimately, with the knowledge of the Accused, the system achieved its persecutory purpose, consistent with the goal of the widespread and systematic attack on Foča, of cleansing all non-Serbs from Foča through transfer of the survivors of KP Dom to other prisons outside of Foča, to other states, and to exchanges, whereby they would be relocated to other territory

and removed from their homes in Foča. Although the forcible transfers and deportations of detainees were concluded outside the KP Dom, the Accused admitted that they knew detainees were being taken out of the KP Dom to be exchanged or released and were in fact being exchanged or released in other locations outside Foča.

d. Individual Criminal Responsibility: *Mens Rea* (Intent)

The intent necessary to incur liability for crimes committed in a systemic JCE is the intent to further the system. If the common purpose of the system involves commission of a crime for which specific intent is required, the Accused must share that specific intent as well. Shared intent, either the specific intent required for the underlying crime or the general intent to further the system, can be established by evidence other than express statements of intent. In this case the crime charged is persecution, a specific intent crime. The Appeals Chamber in *Kvocka* quoted with approval this example of evidence of shared intent offered by the Trial Chamber in its verdict:

> If the criminal enterprise entails killing members of a particular ethnic group, and members of that ethnic group were of a differing religion, race or political group than the co perpetrators, that would demonstrate an intent to discriminate on political, racial, or religious grounds… a knowing and continued participation in this enterprise would evince an intent to persecute members of the targeted ethnic group.[167]

Factors evidencing intent include the significance of the accused's contribution and the extent of his knowledge. The Appeals Chamber in *Krnojelac* concluded that if, because of the accused's position within the system and opportunity to observe, he has knowledge of the system, knowledge of the crimes committed by the system, and knowledge of the discriminatory nature of the crimes "a trier of fact should reasonably have inferred… that [the Accused] was part of the system and thereby intended to further it. The same conclusion must be reached when determining whether the findings should have led a trier of fact reasonably to conclude that [the Accused] shared the discriminatory intent…."[168]

The significance of the accused's contribution to the system can also evidence his shared intent. High rank within the system, undertaking increased responsibilities within the system after its criminal purpose has become obvious, the length of time an Accused remains a part of the system, the importance of his tasks to maintaining the system, the efficiency with which he carries out his tasks, verbal expressions regarding the system, as well as any direct participation in the *actus reus* of the underlying crimes are all factors that bear on a determination of shared intent.[169]

However, neither the intent to further the system nor the specific intent to discriminate that is required for the crime of persecution, oblige the Panel to find that the accused either liked the system or disliked the victims of the persecution. The motive for forming the shared intent is immaterial. "[S]hared criminal intent in JCE does not require the co-perpetrators' personal satisfaction or enthusiasm, or his personal initiative in contributing to the joint enterprise."[170]

[167] *Kvocka* Appeal Judgment, para. 109.
[168] *Krnojelac* Appeal Judgment, para. 111.
[169] *Kvocka* Appeal Judgment, para. 243; *Kvocka* Trial Judgment, para. 311.
[170] *Krnojelac* Appeal Judgment, para. 100.

In light of the foregoing, the Panel concludes that the Accused were acting with direct intent to further the systemic joint criminal enterprise in place at the KP Dom. They were aware of their deeds and they desired the perpetration. Moreover, they shared the discriminatory intent to persecute the non-Serb detainees at the KP Dom. As has been discussed, the Accused were in positions of authority at the KP Dom, had personal knowledge of the system in place and the type of crimes committed in that system. They remained part of the system and contributed their talents, leadership and experience to the system. Moreover, the Accused continued their participation with the knowledge that the crimes were committed with the intent to discriminate against the non-Serb detainees on the basis of their ethnicity, a fact made manifest daily by the non-criminal treatment of the Serb convicts at the same institution. The Accused's continued participation in positions of authority in full knowledge of the crimes committed and nature of the system was not momentary, but extended for over two years. Accordingly, while the Accused may not have derived personal satisfaction or enjoyment from their participation in the system of persecution, they nonetheless knowingly contributed to that persecutorial system, thereby evidencing the intent to further that system and the shared discriminatory intent.

C. COMMAND RESPONSIBILITY AT THE KP DOM

The Accused have been charged in the indictment with culpability as co-perpetrators of a systemic JCE and under the principle of command responsibility. The Panel, as reasoned in this verdict, has determined that both the Accused are criminally liable for the crimes proven in counts one through five as co-perpetrators of a systemic joint criminal enterprise. As to two of those crimes, the panel finds each Accused culpable under a theory of command responsibility as well. However, as co-perpetration of a JCE is the more factually appropriate mode of culpability, command responsibility will be used only in connection with sentencing.[171] In order to do so, the culpability of the Accused must be properly analyzed under the law on command responsibility, as charged under Article 180(2) of the CC of BiH, and as it existed in customary international law at the time of the offenses.

1. Commission of a Criminal Act

Article 180(2) of the CC of BiH requires that the prosecutor prove the commission of a crime as prescribed by Articles 171 through 175 and 177 through 179. The underlying crime must be one of those specifically referenced, and all of its elements must be proven. In addition the perpetrator of the crime must be a subordinate of the Accused, which means that the prosecution must prove beyond doubt that there existed between the perpetrator of the underlying crime and the Accused a superior-subordinate relationship. The ICTY has concluded that it is not necessary that the subordinate be the "principle" perpetrator, that is, that the *actus reus* was committed by the subordinate, and it is sufficient that the subordinate was an aider or abettor.[172] The crime itself, however, must be a completed crime.

The Panel concludes that the Accused are criminally responsible under the theory of command responsibility for the following crimes against humanity: the inhumane treatment of Dž.B. and FWS 71 by the KP Dom guards established in Count 1(b) of the Verdict and the participation of at least one KP Dom guard in the murders of detainees established in Count 2 of the Verdict. In addition, they are responsible under the theory of command responsibility for failing to prevent the KP Dom guards from implementing the illegal orders to unlawfully keep Dž.B. in inhumane conditions.

2. Superior-Subordinate Relationship

In order for the Accused to be held criminally liable under a theory of command responsibility, they must have been working within a hierarchical structure in which they held a superior position to the perpetrators of the offense, either formally (*de jure*) or practically (*de facto*); and by virtue of their positions in the hierarchy, the Accused must have had the authority to stop criminal activities of subordinates and/or the authority to punish subordinates for criminal activities.[173]

[171] *Accord Kordic* Appeal Judgment, paras. 34-35; *Blaskic* Appeal Judgment paras 91-92. *See also Kajelijeli*, Appeal Judgment, para. 81; CDF Case Trial Judgment, para. 251.
[172] *Prosecutor v. Oric*, IT-03-68-T, Judgment, 30 June 2006, paras. 300-302; *Blagojevic* Appeal Judgment, para. 280.
[173] *See Celebici* Appeal Judgment, para. 192 ("Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a de jure or a de facto form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.").

The Panel concludes that the Accused both had effective control over the KP Dom guards who perpetrated these crimes at the specific time these crimes occurred.

a. Hierarchical Structure at the KP Dom

It is evident that the relationships between the administration of the KP Dom and the staff of the KP Dom were defined through a formal hierarchical structure. This formal hierarchical structure largely replicated the hierarchy in place at the KP Dom prior to April 1992. Although civilian institutions, penal facilities like the KP Dom both prior to and during the conflict resemble military organizations in many ways. The civilian staff of a penal institution is charged with securing a prison population many times larger than itself and must perform that obligation in potentially dangerous circumstances while also ensuring the physical safety of that population. These demands necessitate a formal chain-of-command with clear divisions of responsibility and strict rules and procedures.

The Books of Rules for the KP Dom effective before and during the conflict, introduced as Exhibits P-168, P-169 and O-I-60, describe the formal hierarchical structure. Exhibit P-169, the 1992 Book of Rules, Articles 8, 72, 73, 79 and 80 in particular, define *de jure* a hierarchical command structure of subsidiary organizational units directed by organizational chiefs, all of whom were in turn responsible to and under the authority of the Warden of the KP Dom as the chief official of the institution. As defined in Article 72, the Warden of the KP Dom was broadly responsible for "manage[ing] the work of the Institution." This broad responsibility included the specific responsibilities to "manage the work of the employees in the Institution and organize performance of tasks and duties", "harmonize the work of certain services, supervise regularity and legality of the work of those services" and "provide for legal, regular and economic performance of tasks and duties and efficient operation of the Institution."

It is specifically provided that in the performance of these responsibilities, the Warden of the KP Dom would direct and rely upon subordinate heads of subsidiary organizational units. Article 8 provides, "The Guard Service shall be managed by the Commander of the Guards and for his work he shall be directly responsible to the Warden." Similarly, Article 80 provides, "The Heads of the Services of the Institution shall work in agreement with the Warden of the Institution and they shall be directly responsible to him for their work and performance of tasks and duties of the Service they manage." The Warden and his immediate subordinates also formed the board of directors of the KP Dom, defined in Article 87 as consisting of "the Warden, Deputy Warden, director of the Economic Unit, Assistant Warden in the Department and Chiefs."

It is clear, then, that there was *de jure* a formal hierarchical structure at the KP Dom: at the head of this hierarchy, the Warden of the KP Dom directed and had authority over his subordinates, the heads of the subsidiary organizational units; in turn, the unit chiefs directed and had authority over their subordinates, the staff of those organizational units.

As noted, within this hierarchical structure, the Commander of the Guards directed the work of the Guard Service. Article 8 further defines a hierarchical structure within the Guard Service itself. The Commander of the Guards' immediate subordinates were the "supervisors-commanders", who were responsible for "manage[ing] the security of the

Institution and responsible to the Commander of the Guards for their work."[174] The Commander of the Guards also had authority over the KP Dom guards, who were "responsible to the Commander of the Guards for regular and orderly performance of their duties." Article 9 makes clear that the Commander of the Guards' authority over the KP Dom guards was broad, as he could "by daily roster and as required by the Service, deploy the employee of the Guard to any guard job or task, regardless of his function, aimed at normal functioning of the Service." The primary responsibilities and duties of the Guard Service, for which the Commander of the Guards was responsible, were to "secure the Institution, work-sites and premises in which prisoners stay, reside and work", "provide for in-house and outside security of the Institution", "be on duty, escort prisoners and provide for their security" and "maintain the order and discipline among the prisoners inside the Institution".

The Deputy Warden of the KP Dom had broader, though less clearly-defined, responsibilities generally in relation to all aspects of the KP Dom's operations. Article 73 provides:

> The Warden shall have a Deputy who shall replace him in case of his absence or incapacitation. The Deputy Warden shall perform tasks and duties pursuant to the Law on Execution of Criminal and Minor Offense Sanctions, Law on State Administration, self-management by-law of the Institution and other regulations. …He shall also be responsible for total national defense tasks.

The provisions of Article 73 are similar to Article 72, which defines the responsibilities of the Warden of the KP Dom as including "tasks stipulated by law, other regulations and self-management by-laws of the Institution." Article 79 provides, "The Deputy Warden shall work in agreement with the Warden and shall be directly responsible to him for his work and performance of the tasks of the department that he manages." Article 76 also specifically defines the Deputy Warden as the manager of the Department for Women and Juveniles. As these provisions make clear, the responsibilities of the Deputy Warden – in contrast with, for example, the responsibilities of the Commander of the Guards – were more broadly concerned with the KP Dom as an institution. These provisions evidence that the Deputy Warden in many matters stood in for the Warden of the KP Dom and possessed significant responsibilities and authority over the operations of the KP Dom, even though they do not clearly specify the authority of the Deputy Warden vis-à-vis other administrators and the KP Dom staff.

b. Effective Control

Regardless of whether the authority held by the Accused is *de facto* or *de jure*, and whether the accused is in a military or civilian hierarchy, the prosecution must prove that the Accused had effective control. Effective control has been defined by the ICTY as "the material ability to prevent and punish the commission of these offences."[175] As one commentator has described it, effective control means that "there is an enforceable expectation of obedience on the part of the giver of that order, and a mirror expectation of compliance on the part of those receiving that order."[176]

[174] The "supervisors-commanders" position is the same as the "guards supervisor" position, which term the Panel has previously used.
[175] *Celebici* Appeal Judgment, para. 197 (quoting *Celebici* Trial Judgement, para. 377).
[176] Mettraux, *Command Responsibility*.

Evidence of effective control can be direct or circumstantial. Direct evidence relevant to a determination of effective control includes the title used by the Accused, whether or not formally appointed; the job description for that title; statements made by the Accused regarding his authority; statements made by others about his authority; his issuance of orders to the perpetrators or those in the same class as the perpetrators, and obedience to those orders; witnesses testimony that he inquired about and otherwise assumed investigative functions regarding the possible commission of misconduct; conference by him of rewards and or punishments on those lower in the hierarchy. Indirect evidence includes testimony that the Accused was frequently present; that rules were broken primarily when he was not present; that efforts were made to conceal from the Accused the rule breaking. Other indirect evidence of effective control in the camp cases include the ability of the accused to assist selected detainees, release them from confinement where they were placed by subordinates, and protect them. The Appeals Chamber commented on this type of indirect evidence of effective control: "Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which [the Accused] exercised and thus of his authority."[177]

(i) *De Jure*

De jure authority is that which comes from official appointment to a position of leadership over subordinates within a hierarchical structure. Documentation establishing such an official position is good evidence that the position was officially conferred, but absence of documentation is not fatal to establishing the official position if there is other evidence that the authority of a superior position was officially conferred.[178] However, whether established with or without documentation, the position cannot be merely a hollow one, but must carry with it the authority to exercise "effective control" over the subordinate who committed the offense.[179]

It is not sufficient to assume responsibility "solely" from the official title which the Accused held.[180] Nevertheless, as noted in the *Pohl* case:

> People are placed in high positions for the purpose of exercising authority and performing duties pertaining to that position…. If a defendant is designated as head of an *Amtsgruppe*, it is logical to assume that this was done with a purpose that he was expected and authorized to perform the functions of an *Amtsgruppe* Chief, and not merely to occupy an office with no duties or responsibilities or authority.[181]

The ICTY Appeals Chamber has stated that "a court may presume that possession of [*de jure*] power *prima facie* results in effective control unless proof to the contrary is produced."[182] Although this Panel does not agree that *de jure* authority shifts the burden to the Accused in any way, the Panel notes that it is an important factor in establishing the element of superior-subordinate relationship between the Accused and the perpetrators, to be considered along with other evidence to determine whether the holder of that authority has the requisite degree of control of the subordinate to prevent and/or punish crimes.

[177] *Celebici* Appeal Judgment, para. 213.
[178] *Kordic* Trial Judgment, para. 424.
[179] *Celebici* Appeal Judgment, paras. 197, 306; *Kordic* Trial Judgment, para. 418.
[180] *Blagojevic* Appeal Judgment, para. 302.
[181] *Pohl*, Green Series, Vol. V, pg. 1171.
[182] *Celebici* Appeal Judgment, para. 197.

(ii) *De Facto*

The formal conference of *de jure* authority is one important indication of a superior-subordinate relationship; however, as stated above, it is not dispositive. Likewise, it is not critical. The *Celebici* Trial Chamber noted, "The mere absence of formal legal authority to control the actions of subordinates should, therefore, not be deemed to defeat the imposition of criminal responsibility."[183] Citing the International Court of Justice, that Chamber went on to emphasize: "In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles."[184]

Evidence that *de facto* civilian superiors had authority sufficient to exercise effective control includes the manner in which their authority is demonstrated and acknowledged, and whether they show control over their subordinates similar to that exercised by *de jure* authorities;[185] and whether the context in which they exercise their authority and their manner of control is similar to that of military commanders, as evidenced, for example by their practice of issuing orders with the expectation that they will be obeyed.[186]

c. Effective Control by the Accused

The Accused Rašević held *de jure* authority as the Commander of the Guards, with the official designation by order dates April 1992. Although his title effectively changed in 1993, his function as Commander of the Guards continued through October 1994, and in fact until his retirement in 1997. The Accused Todović was Deputy Warden of the KP Dom from May 1992 until August 1993, and then served as Assistant for Legal and Financial Affairs, which included responsibility for detainee and convict work assignments. Although there is no documentation of his position as deputy warden until December 1992, the Panel for reasons set out in the section on joint criminal enterprise concludes that he was *de facto* Deputy Warden from May until his formal appointment in December and exercised all of the responsibilities of that office, as described in the Book of Rules.

Command responsibility requires: 1) that there exist a hierarchy, military or civilian, formal or informal; 2) that the Accused are within that hierarchy; and 3) that the perpetrators are less senior than the accused.[187] As the Trial Panel of the Court of BiH has held, there is no necessity that the perpetrator be the immediate subordinate to the Accused.[188] More than one person may be held responsible under the principle of command responsibility for the same crime committed by a subordinate.[189]

Both Accused had effective control over the KP Dom guards. The Accused were in positions of authority within a formal hierarchy. The Accused Rašević, as Commander of the Guards, was the direct superior of the KP Dom guards and possessed the responsibility and authority to ensure that the KP Dom guards performed their duties properly. The Accused Todović, as

[183] *Celebici* Trial Judgment, para. 742.
[184] *Id.*, para. 197 (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 1971, p. 16 at para. 118).
[185] *Kajelijeli* Appeal Judgment, para. 87.
[186] *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgment, 3 July 2002, para. 59.
[187] *Prosecutor v. Halilovic*, IT-01-48-A, Judgment, 16 October 2007, para. 59.
[188] *Momcilo Mandic*, X-KR-05/58, Verdict, 18 July 2007, at 153.
[189] *Prosecutor v. Strugar*, IT-01-42-T, Judgment, 31 January 2005, para. 365.

Deputy Warden of the KP Dom, while not the direct superior of the KP Dom guards, was clearly their superior by reason of the significant responsibilities and authorities invested in that position. There was an enforceable expectation of obedience on the part of both Accused vis-à-vis the KP Dom guards.

(i) Rašević

The Accused Rašević possessed effective control over the KP Dom guards. In addition to the *de jure* authority and responsibilities of his position as Commander of the Guards discussed above, other factual evidence demonstrates that there was an enforceable obligation of obedience and compliance between the Accused and the KP Dom guards under his command.

The Accused himself admitted that the KP Dom guards were under his control and that the security system was under his command. Nearly all prosecution witnesses confirmed that the Accused was Commander of the Guards and in charge of the KP Dom guards. FWS 138 and FWS 139 described the relationship between the Commander of the Guards and the KP Dom guards, noting that the guards were subordinate to the Accused and followed his orders. In addition, FWS 210 and Ekrem Zeković testified that the KP Dom guards reported to the Accused, and in particular, that the KP Dom guards informed the Accused in the morning when he arrived as to what happened at the KP Dom while the Accused was not present.

The Accused further testified, and numerous witnesses confirmed, that he questioned detainees as to whether they were being physically mistreated by the KP Dom guards. As the Accused noted, before the war he could often only learn about the mistreatment of convicts by the guards from the convicts themselves, and thus he continued the practice of asking the detainees whether they were mistreated in order to discover that information.

Finally, numerous witnesses testified, and the Accused confirmed, that the Accused toured the segregation cells every day, and that he released prisoners from those cells after they had been put there by the KP Dom guards. Numerous witnesses, including FWS 71, FWS 76, FWS 138, FWS 250 and many others, testified that when the Accused arrived at the cell they were held in, he asked them why they were there and then released them from the cells. FWS 162 specifically noted that the Accused released him from the segregation cells twice and on both occasions ordered a KP Dom guard to escort him back to his room.

Accordingly, the Panel concludes that it is clear the Accused Rašević had effective control over the KP Dom guards, and as such he had the duty and the ability to order them not to commit specific crimes against the prisoners with the expectation that such an order would be followed. In addition, he had the duty and the ability to invoke disciplinary action against guards who committed violations of duty against the prisoners.

(ii) Todović

The Accused Todović possessed effective control over the KP Dom guards.

The Panel previously established that on multiple occasions the Accused ordered the KP Dom guards to take detainees to the solitary confinement cells and that the KP Dom guards carried out these orders directly. The Panel notes that on these occasions, the Accused sent the detainees to solitary confinement to punish them for violating prison "rules" and other

offenses. As well, the Panel established that the KP Dom guards took detainees from their rooms for labor assignments based upon the orders and lists of the Accused.

These facts can be linked to the more general testimony previously described that the Accused was in charge of all matters relating to the non-Serb detainees. Specifically, the Panel considers that this evidence establishes that with respect to the detainees, the Accused, through his superior position, could and did issue orders to the KP Dom guards, expecting that they would be obeyed, regarding the detainees, and that the KP Dom guards then implemented these orders without consulting or seeking additional orders from another person, demonstrating their belief that they were obligated to execute the Accused's orders with respect to the detainees. Accordingly, whatever the Accused's responsibilities and authorities in other matters, the KP Dom guards were subordinate to and under the authority of the Accused in matters relating to the detainees, and thus the Accused possessed effective control over the KP Dom guards in these matters. Todović had the ability to order the guards not to commit specific crimes against the prisoners with the expectation that such an order would be followed. In addition, he had the duty and the ability to invoke disciplinary action against guards who committed violations of duty against the prisoners.

3. Disciplinary Procedures at the KP Dom

Chapter VIII of the Book of Rules defines the disciplinary procedures for KP Dom employees. Article 90 provides that KP Dom employees "shall be subject to disciplinary procedures for violations of work duties and other violations of work discipline." Article 91 defines violations of work duties as including:

> 16. Commission of an act which constitutes a criminal offense against official duty or other criminal offense, that is, minor offense, and which tarnishes the reputation of the Service and makes an employee unsuitable, in terms of morality and politics, to work in the Institution.
> 30. Unlawful treatment of the convicts and unlawful deprivation of their rights.
> 35. Any actions contrary to the law, other regulations adopted based on the law and self-management by-laws of the Institution.

The procedures for disciplining a KP Dom employee are set out in Articles 99-103, 107, 108, 111 and 112.

Although the role of the subordinate administrative staff, including heads of services and the Deputy Warden, is not explicitly defined in these regulations, it is clear that they had an integral role in disciplinary procedures. As Articles 101-103 provide, the Warden was primarily responsible for investigating any work duty violations and submitting requests for disciplinary proceedings to the Disciplinary Committee. While the Warden could in some circumstances independently learn about serious work duty violations through his activities, the Book of Rules implicitly foresees that he would rely primarily upon the heads of Services and his other subordinates to learn about such violations. Article 80 specifically provides that "the heads of the Services of the Institution… shall be directly responsible to [the Warden] for their work and performance of tasks and duties of the Service they manage." Similarly, Article 8 provides that the Commander of the Guards is responsible to the Warden for his work. One of his responsibilities, as defined in that Article, is to ensure that the KP Dom guards regularly and orderly perform their duties, chief of which, as defined in Article 7, is to

provide for the security of the prisoners. Finally, the Book of Rules foresees that the Deputy Warden, as the primary assistant to the Warden and with a broad range of tasks and duties related to the administration of the KP Dom, would be obliged to report to the Warden any violations of work duties he learned of during the performance of his duties. Accordingly, while not explicitly stated, it is clear that the heads of the KP Dom organizational units and the Deputy Warden were obliged to inform the Warden of any violations of work duties so that the Warden could then investigate and if necessary request disciplinary proceedings.

4. Knowledge of Superior

The *mens rea* element for command responsibility is that the Accused knew or had reason to know that the crimes were about to be committed or had been committed by the subordinate. "The same state of knowledge to establish superior criminal responsibility… is required for both civilian and military superior."[190] Criminal negligence is not sufficient to invoke liability, however, "a commander is not permitted to remain 'willfully blind' of the acts of his subordinates."[191]

a. Actual Knowledge

Actual knowledge has been defined by the ICTY as "the *awareness* that the relevant crimes were committed or were about to be committed."[192] Awareness of the crimes can be proven by direct evidence, such as statements made by the accused indicating that they were aware, or testimony of witnesses who observed them to be present when the crimes were committed. It can also be proven by circumstantial evidence.[193] Factors which establish actual knowledge circumstantially include: the types of criminal acts, the repetition of the crimes, and the similarity of the manner in which the crimes were committed, the geographic proximity of the superior, the reporting and monitoring structures in place, and the number of subordinates involved.[194] In order for circumstantial evidence to establish actual knowledge, it must be sufficient to conclude that the superior *must* have known.[195]

b. Reason to Know

The Appeals Chamber in *Celebici* recited the definition of "reason to know" as it exists relevant to the *mens rea* requirement for command responsibility in customary international law. Subsequent judgments have determined that the definition is in fact settled.[196] In the absence of actual knowledge, "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offenses committed by subordinates."[197] That information does not have to be specific, and it is enough that the Accused have "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[198]

[190] *Brdjanin* Trial Judgment, para. 282.
[191] *Prosecutor v. Halilovic*, IT-01-48-T, Judgment, 16 November 2005, para. 69.
[192] *Kordic* Trial Judgment, para. 427 (emphasis added).
[193] *Galic* Trial Judgment, para. 174
[194] *See Limaj* Trial Judgment, para. 524; *Blagojevic* Trial Judgment, para. 792
[195] *Kordic* Trial Judgment, para. 427.
[196] *See, e.g., Blaskic* Appeal Judgment, para. 62.
[197] *Celebici* Appeal Judgment, para. 241 (emphasis added).
[198] *Bagilishema* Appeal Judgment, para. 28.

The information need not be in any particular form. It could be written or oral, or it could come to the superior through his own senses.[199] The Appeals Chamber in *Krnojelac* concluded that based on what he saw and heard in KP Dom during the time he was warden, the Accused had information of a sufficiently alarming nature that "at the very least he should have carried out an investigation." The Appeals Chamber concluded that Krnojelac had "reason to know" that the crimes of torture and murder "might be committed" by his subordinates at KP Dom, and, given the existence of the other elements of command responsibility as well, found him liable under that principle.[200] The information available to the superior need not be sufficient to compel the conclusion that the crime has been, or is about to be, committed by the subordinate. It need only be sufficient to justify further inquiry.[201]

Evidentiary factors relevant to determining whether the superior has reason to know include: proximity of the superior to the place where the offenses were committed; observable physical evidence that crimes were being committed; reports from superiors and subordinates; widespread nature of the crimes; personality traits of the subordinates that might suggest propensity toward criminal behavior; and commission of crimes in the past under similar circumstances or involving the same people.[202]

c. Knowledge of Accused

(i) Dž.B.

As previously established in Count 1 of the Verdict, detainee Dž.B. was beaten by military personnel during an interrogation and was then placed and held in a segregation cell in inhumane conditions for about one month by the KP Dom guards. The Panel concluded that the acts of the KP Dom guards, specifically the detention in the segregation cell in inhumane conditions following the beating, constituted the crime of other inhumane acts.

The Panel previously established that the beatings and torture during interrogations, such as the beating of Dž.B., were pervasive at the KP Dom and that both Accused had knowledge that such beatings and torture were occurring. The Panel noted that the Accused, during the periods they were present at the KP Dom, would have heard the sounds of these beatings and torture and seen the physical evidence of this mistreatment. The Accused further knew that detainees were being held by the KP Dom guards in the segregation cells following these beatings and torture as a general practice. The Accused Rašević specifically admitted that he knew that the KP Dom guards, on the instructions of the interrogators, were taking detainees to the segregation cells and holding them there. The Accused Todović would have had the same knowledge, particularly given how obvious and pervasive this practice was. The Panel previously described in Count 1 how, as established through the testimonies of numerous

[199] *See Galic* Trial Judgment, para. 175.
[200] *Krnojelac* Appeal Judgment, paras. 171, 175-77.
[201] *Halilovic* Trial Judgment, para. 68.
[202] *See Krnojelac* Appeal Judgment, paras. 154, 171, 175-77. *See also Kvocka* Trial Judgment, para. 318 ("Information that would make a superior suspicious that crimes might be committed includes past behavior of subordinates or a history of mistreatment: 'For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.' Similarly, if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.") (citing *Celebici* Appeal Judgment, para. 238).

witnesses, it was a general practice to take detainees to the segregation cells following their interrogation and how the segregation cells were dramatically overcrowded at this time. As these facts were obvious to the detainees, they would have certainly been obvious to both Accused, particularly as the Accused worked in the administration building and toured the segregation cells. Moreover, both Accused specifically testified that they knew that the KP Dom guards were solely responsible for taking detainees to and from the interrogations, noting in particular that the interrogators and military personnel were not allowed in the KP compound but were confined to the administration building.

Accordingly, given their actual knowledge of the practice and pattern of events of which the treatment of Dž.B. was part, as well as their frequent presence at and visits to the segregation area, the Panel concludes that both Accused must have known that the KP Dom guards held Dž.B. in a segregation cell for about one month in inhumane conditions. In addition, given the length of time Dž.B. was held in the segregation cell, the Panel also concludes that the Accused must have learned that Dž.B. was being held in the segregation cell pursuant to the orders of the interrogators during the time he was being held.

(ii) FWS 71

As previously established in Count 1 of the Verdict, on 11 July 1992, detainee FWS 71 was taken out of his room and seriously beaten by two KP Dom guards, causing him to lose consciousness. The Panel concluded that these acts constituted the crime of other inhumane acts. The Accused had actual knowledge that detainees at KP Dom were being beaten on a regular basis and that beatings were occurring while detainees were under the supervision of KP Dom Guards. That knowledge was sufficient to justify further inquiry.

The facts establish beyond doubt that there was a pervasive pattern of beatings of non-Serb detainees by KP Dom Guards. The Panel established in Count 3 of the Verdict that the KP Dom guards beat detainees for a range of arbitrary purposes, including: taking an armchair out of the guards' office for a detainee who could not sleep; taking food from the kitchen; picking up cigarette butts from the prison yard; attempting to request medical assistance from staff at the local hospital; hiding a small radio; having extra blankets; attempting to heat water; attempting to contact other detainees; giving other detainees extra portions of bread; and asking for tea from the kitchen directly rather than asking the guards for permission first. In addition, the Panel notes that, in discussing the acquitted charges in Count 1b, it concluded that the KP Dom guards beat detainees FWS 71, FWS 76, I.I. and D.C. The Panel also concluded in Count 1a that K.K. and D.A. were beaten by the KP Dom guards, even though it did not conclude that all the necessary legal elements for the offenses charged were established.

The evidence also established that the Accused saw that detainees were often injured and were able to observe the nature of the injuries. Although the Accused knew that outside interrogators were beating and torturing detainees, they were also aware that the KP Dom guards had the greatest access to detainees, that many of the men serving as guards were untrained, and that all guards were of Serb ethnicity at a time when ethnic tensions were obviously high. The detainees were understandably reluctant to tell the Accused that the guards were mistreating them, even when asked about the possibility of mistreatment by Rašević, who acknowledged that abuse by guards occurred at KP Dom even before the war. One witness, Ekrem Zeković, testified that he in fact told the Accused about mistreatment by the KP Dom guards. Accordingly, at a minimum, the Accused had more than sufficient

alarming information to require them to investigate further and thus had reason to know that the KP Dom guards had committed crimes like the serious beating of FWS 71.

(iii) Murders in Count 2

As previously established in Count 2 of the Verdict, during June and July 1992, at least 18 detainees were killed on the premises of the KP Dom by members of the military and at least one KP Dom guard. The Panel concluded that these acts constituted the crime of murder.

The Accused knew that military personnel were beating and torturing detainees in the KP Dom administration building during the course of interrogations. Not only did the Accused Rašević personally interrupt and stop one such act of torture, but these acts were pervasive and conducted openly throughout the day and would have been obvious to the Accused. The Accused also knew that military personnel came to the KP Dom during the evening hours to conduct interrogations.

The Accused also knew and were responsible for knowing who was admitted to KP Dom, and who left. Certificates and written authorizations were required when detainees were admitted and when they were released or taken for exchange or deportation.[203] In addition, there were regular checks made of the prisoners to assure against escape and the process in place if a prisoner was missing, as evidenced by the reaction to the escape of Ekrem Zeković, required immediate notification of both Accused. The Accused would have known if a detainee, who had been present at the end of their shift on the preceding day, was no longer present when they returned the next morning or shortly thereafter. Certainly when that occurred 18 times, there is no question that they would have, and did, know that the detainees had not escaped, had not been released and had not been exchanged or transferred and were therefore missing, presumed dead.

That presumption would have been verified. The Accused Rašević testified that the KP Dom duty officer noted in a log book when military personnel arrived at the KP Dom pursuant to the orders and lists previously described to conduct interrogations. In addition, FWS 210 and Ekrem Zeković testified that regarding both Accused's knowledge of events occurring during the hours when the Accused were not on site. Ekrem Zeković testified that, while waiting in the morning to be taken outside the KP Dom compound to the metalworkshop, he overheard the KP Dom guards from the night shift briefing or reporting to both Accused and the Warden about what had occurred at the KP Dom during the evening. Similarly, FWS 210 testified that he was told by the guards that they informed the Accused Rašević when he arrived in the morning what had happened at the KP Dom during the evening. The murder of at least 18 persons in and around the administration building was noted by the detainees housed in the building next to the administration building. These events would certainly, then, have been witnessed by the duty officer who was directly present in the administration building.

The Accused were also aware that at least one detainee died at the KP Dom under suspicious circumstances. FWS 210 testified that he discovered the body of Halim Konjo in the morgue while working at the hospital. When he discussed this with Slavko Koroman, a guard supervisor, he was told that Konjo had died as a result of a heart attack. FWS 210 specifically noted that Koroman denied that Halim Konjo died as a result of the beatings,

[203] *See, e.g.,* Exhibits O-I-16, O-I-17, O-I-18, O-I-21 and O-I-22.

which FWS 210 had previously heard. However, FWS 139 testified that R.J. told him that Krnojelac had told R.J. during one of their conversations that Halim Konjo had in fact died as a result of the beatings he suffered.

Finally, the Accused knew that the KP Dom guards played a significant role in connection with the nighttime interrogations, tortures, beatings, and deaths. They knew that the guards brought the prisoners to the administration building, remained in the administration building while the mistreatment was occurring, were armed, assured against the escape of the detainee, and on occasion followed the "orders" of the outside interrogators. Given what the Accused knew about the fate of at least 18 of the detainees, the presence of their subordinates during the commission of crimes, and the willingness of the guards to comply with orders from those committing the crimes, they should have been sufficiently "alarmed" to investigate further.

Although not acknowledging that he investigated the murders of these 18 people, the Accused Rašević testified that he did ask detainees from time to time whether they were being mistreated by the KP Dom guards and that they did not inform him of any such mistreatment. This was confirmed by the testimony of other witnesses. One detainee, Ekrem Zeković, testified that he told the Accused about mistreatment by the KP Dom guards, but not specifically regarding the murders. Given the other information the Accused had, the detainees' reasonable fear of retribution from the KP Dom guards if they informed, and the general nature of the inquiry, without taking further steps to ensure the anonymity and protection of the detainees who gave him information, Rašević could not have reasonably concluded that the crimes he had knowledge of or reason to know about did not occur.

The Panel concludes that this information, particularly in the context of events occurring at the KP Dom at the time, put the Accused on notice that the perpetrators of beatings and torture during the evening interrogations were also committing murder, and that the KP Dom guards may have been involved. The Accused should have, on the basis of this information, inquired further. Accordingly, the Panel concludes that the Accused had reason to know that at least one KP Dom guard participated in the murders established in Count 2 of the Verdict.

5. Superior Failed to take Reasonable and Necessary Measures

The final element of command responsibility requires analysis of what constitute reasonable and necessary measures, and what the obligations of prevention and punishment are under customary international law. The failure to prevent the crime and the failure to punish are two separate duties, and not alternatives. A superior cannot allow a crime to be committed by the subordinate which he knew or had reason to know would be committed, and then "cure" his breach by punishing the subordinate, nor can he take reasonable and necessary preventive measures and, if they fail, not incur separate liability for failing to punish. The two may be evidentially related. For example, superiors who give orders prohibiting violations of international humanitarian law, but who do not then punish subordinates for violations of those orders, may be seen as in implicitly accepting "that such orders are not binding," which in turn may be evidence of failure to prevent subsequent violations.[204] Superiors, all other elements having been met, are charged with both the duty to prevent and the duty to punish, and failure to perform either or both will incur liability under the customary international law principle of command responsibility.

[204] *Halilovic* Trial Judgment, para. 96. *See also Oric* Trial Judgment, para. 326; *Prosecutor v. Hadzihasonovic and Kubara*, IT-01-47-T, Judgment, 15 March 2006, paras. 1778-1780.

In determining what measures are necessary and reasonable, the Panel must be guided by those measures which are within the material control of the superior. A superior will not be held liable for failing to do what was outside his effective control. However, "the question of whether the superior had the *explicit legal capacity* to do so is irrelevant if it is proven that he had the material ability to act."[205] What is reasonable and necessary must be considered within the context of the actual events, but the measures taken by superior must, under international law, be "legal, feasible, proportionate and timely".[206]

a. To Prevent the Crime

At the point at which the Superior knew or had reason to know that a crime was being "prepared or planned" by a subordinate, he had a duty to act to prevent it.[207] The Special Chamber for Sierra Leone has interpreted the duty to prevent to extend to prevention of subordinates from obeying illegal orders that could lead to the commission of crimes. The *CDF* Trial Chamber held: "As part of his duty to prevent subordinates from committing crimes, the Chamber is of the view that a Superior also has the obligation to prevent his subordinates from following unlawful orders given by other superiors."[208] The Chamber concluded: "Fofana's duty to prevent included both the obligation not to comply with the unlawful orders… and the obligation to ensure that his subordinates did not obey those orders."[209]

Both Accused understood that the orders the KP Dom guards received to continue to hold Dž.B. in a segregation cell in inhumane conditions were illegal. They were obliged, both as an elementary legal consideration and pursuant to the Book of Rules, to ensure that their subordinates did not obey such illegal orders. They both further had the material ability to ensure that their subordinates did not obey such illegal orders. As the Book of Rules and the previous discussion make clear, both Accused possessed effective control over the KP Dom guards. Specifically, it is clear that the KP Dom guards understood that they had an enforceable obligation to carry out the orders of both Accused. Neither Accused issued orders to the KP Dom guards to disobey the illegal orders of the interrogators. It is speculative whether or not their orders would have in turn been countermanded by another authority, as neither Accused even took that first basic step they were obliged by law to take. Accordingly, the Panel concludes that both Accused failed to prevent the commission of the crime of other inhumane acts by the KP Dom guards against Dž.B.

b. To Punish Perpetrators of the Crime

The duty to punish arises after the commission of the crime by a subordinate and at such time as the superior knows or has reason to know of its commission.[210] The Superior is required to undertake all measures that are possible and he is not limited to those measures which are strictly within his legal competence if in reality he can exceed those measures. [211] If the measures open to him to punish are materially limited, he is still required to do everything

[205] *Celebici* Trial Judgment, para. 395 (emphasis added).
[206] Mettraux, *Command Responsibility* (and cases cited therein).
[207] *Kvocka* Trial Judgment, para. 317.
[208] CDF Trial Judgment, para. 248.
[209] *Id.*, para. 782.
[210] *Limaj* Trial Judgment, para. 527.
[211] *Halilovic* Trial Judgment, para. 100.

within his capacity to see that the perpetrator is punished. As the Trial Chamber stated in *Kvocka*: "The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process."[212] That includes, as a minimum, the duty to further investigate, establishment of facts,[213] and "exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities."[214] Civilian superiors have the same duty to punish as do military commanders. However, the measures which civilian superiors may materially take may involve reporting to authorities outside the hierarchy and their compliance with the duty may require consideration of their ability to "require the competent authorities to take action".[215]

As previously discussed, the Book of Rules provided for a clear disciplinary procedure for KP Dom employees who committed serious violations of their work duties, which Article 91(35) makes clear included violations of the law. After conducting an investigation, the Warden could submit a request to the Disciplinary Committee to conduct disciplinary proceedings against the employee named in the request. As further discussed, this disciplinary procedure clearly required the Accused to report to the Warden any information they learned regarding the possible commission of crimes. However, both Accused failed to report the crimes in Counts 1b and 2 that they had knowledge of or reason to know of, even though they could have and were in fact obliged to report that information to the Warden. Accordingly, even though the power to punish KP Dom employees was vested by the Book of Rules in the Disciplinary Committee, the Accused, by not taking a critical step in the disciplinary process, are responsible for failing to punish the KP Dom guards as perpetrators of the crimes established above. That the disciplinary process may have failed for any reason at a later point is irrelevant, as neither Accused took the first critical step in that process. It is also irrelevant that the KP Dom guards may have perpetrated those crimes pursuant to the orders of another person, as those illegal orders did not excuse the criminal liability of the KP Dom guards for perpetrating those crimes.

[212] *Kvocka* Trial Judgment, para. 316.
[213] *Halilovic* Trial Judgment, para. 100.
[214] *Limaj* Trial Judgment, para. 529.
[215] *Brdjanin* Trial Judgment, para. 283.

D. APPLICATION OF ARTICLE 29 TO JCE CO-PERPETRATION IN ARTICLE 180(1)

As reasoned above, Section A *supra*, the Accused are liable under the criminal law of BiH as co-perpetrators of a systemic JCE: 1) because the Accused are subject to the authority of customary international law, which recognizes JCE, and, 2) because the Accused are subject to the statutory law of BiH, including Article 180(1) of the CC of BiH, which incorporates the international legal definition and judicial gloss defining perpetration and establishing that systemic JCE is a form of co-perpetration under that statute.

Article 180 applies exclusively to some of the crimes, including crimes against humanity, set out in Chapter 17 of the Criminal Code. Article 29, in Chapter Five of the Code, sets out the requirements of co-perpetration for crimes generally covered by the criminal law of BiH. Article 29 reads:

> If several persons who, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense, shall each be punished as prescribed by the criminal offense.

As reasoned in this Verdict, the evidence establishes beyond doubt that each Accused is a co-perpetrator of the crimes for which they have been found guilty, having met the requirements of culpability established in customary international law for systemic JCE. However, the degree of participation necessary for co-perpetration as established in customary international law, and incorporated though the international jurisprudence which underlies Article 180(1), differs from the degree of participation called for under Article 29 for co-perpetration generally under the law of BiH.

In order to be guilty of co-perpetration under the terms of Article 29, the accused must either participate in the *actus reus* of the crime *or* take some act "by which a *decisive contribution* has been made" to the commission of the crime. If an accused participated with others in the crime itself, provided there is the necessary *mens rea,* that is sufficient under Article 29 to find him a co-perpetrator and punish him as a principle. However, if he did "some other act" toward the perpetration of the crime, then that act must represent a "decisive contribution" to the perpetration of the crime. The word "decisive" creates a higher burden of proof on the Prosecution. As the Commentaries to the CC of BiH explain, the evidence must establish that contributions of the accused to the commission of the crime were of such a character that "without which the offense would not be accomplished (at all or in a way as it is planned to be accomplished)."[216]

The Trial Chamber in *Kvocka*, after reviewing the facts in the camp cases for which convictions had been found at the ICTY, and reviewing the case law from the post-World War II cases, reached the conclusion that regardless of whether the participation in a systemic JCE was as a co-perpetrator or an aider or abettor, the degree of participation needed to be "significant".[217] Thereafter, in 2005, the *Kvocka* Appeals Chamber determined that it was generally *not* necessary to prove "the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator,"

[216] Commentaries to the CC BiH, pg. 174.
[217] *Kvocka* Trial Judgment, paras. 290-306.

although the significance of the contribution would be relevant to establishing other elements of JCE, such as intent.[218] However, unlike Article 29, there has been no distinction made between the degree of participation necessary for culpability by actual commission of some part of the *actus reus*, or "some other act" contributing to the enterprise.

The Panel concludes that there is no discrepancy between customary international law for JCE and Article 29 regarding the degree of participation necessary to establish co-perpetration when the accused has participated in any way in the *actus reus* of the crimes. However, there is a discrepancy when the accused has taken "some other act" toward the commission of an offense. Under customary international law, all other elements of JCE having been proven, the degree of participation which that "other act" constitutes need not be "substantial or significant". However, under Article 29, it must be "decisive". As the Prosecutor has charged co-perpetration under Article 180(1) in conjunction with Article 29, and argued that the Panel should apply both, it is necessary that more than the customary international law standard be proven.

In the case of both Accused, the evidence has met the standards of both customary international law and Article 29. The Accused have been found guilty of furthering a system of persecution in which they shared the discriminatory *mens re*a and directly and substantially participated in the *actus reus* by administrating, securing and maintaining the illegal imprisonment without which none of the other crimes by which persecution was committed could have occurred. By their direct participation in the *actus reus* of the criminal offense of persecution through illegal imprisonment, they each committed acts which made a decisive contribution to all other crimes that were known by them to be part of the criminal system which they furthered. In addition, it has been proven that both directly contributed to the *actus reus* of other crimes through which persecution was committed: both contributed directly to the inhumane conditions, both directly involved themselves in enslavement: Todović by organizing and overseeing the forced labor and Rašević by transporting detainees to the actual workplaces; Rašević participated on one occasion in the forced transfers, and Todović, on one occasion, participated in the act of torture. They have, in the words of Article 29, "participated in the perpetration of the criminal offense" of persecution through commission of the crimes of unlawful imprisonment, inhumane acts, enslavement, forced transfer and torture, and, through their "act" of illegal imprisonment, contributed *decisively* to commission of the other specific crimes that underlie the persecution charge. The evidentiary requirements necessary to establish co-perpetration under Article 29 have been met, as well as those necessary to establish systemic JCE under Article 180(1) of the CC of BiH and customary international law.

[218] *Kvocka* Appeal Judgment, para. 421.

IV. ACQUITTING PART OF THE VERDICT

Count 1a

The Accused are charged under Counts 1 and 1a of the Indictment with participating in maintaining a system of punishment and mistreatment of detainees during the period from April 1992 to May 1992 with respect to a number of specific events. Based upon the evidence before it, the Panel concludes that the Prosecutor did not establish beyond doubt the allegations contained in Counts 1 and 1a of the Indictment.

With regard to A.S., Č.M. and FWS 198, the Prosecutor did not introduce any evidence on this charge.

With regard to FWS 82, the Prosecutor did not prove all elements of the crime alleged. Specifically, FWS 82 only testified that he was kicked and slapped and did not testify as to the severity of any injuries he may have suffered. Accordingly, the Prosecutor did not establish that the physical mistreatment caused serious pain or suffering as required as an element of the offense of other inhumane acts.[219]

With regard to FWS 03, the Prosecutor did not prove all elements of the crime alleged. Specifically, FWS 03 only testified that he received a few blows from a member of the military police and did not testify as to the severity of any injuries he may have suffered. Accordingly, the Prosecutor did not establish that the physical mistreatment caused serious pain or suffering as required as an element of the offense of other inhumane acts.

With regard to H.D., the Prosecutor did not establish beyond doubt that the serious injury this victim suffered was the result of beatings at the KP Dom. In particular, the evidence establishes that H.D. was beaten prior to his arrival at the KP Dom and after his arrival, but the witnesses did not distinguish between these beatings with respect to the injuries they described. Thus the Panel concludes that it was not established beyond doubt that the beatings inflicted at the KP Dom caused serious pain or suffering as required as an element of the offense.

With regard to Enes Uzunović and D.A., the Prosecutor did not establish all elements of the crime alleged. Specifically, the witnesses testified only that these victims were taken from their rooms, beaten and then returned to their rooms. The witnesses did not describe the severity of any injuries these victims may have suffered. Accordingly, the Prosecutor did not establish that the physical mistreatment caused serious pain or suffering as required as an element of the offense of other inhumane acts.

With regard to Džemal Vahid and S.H., the Prosecutor did not establish the factual allegations as stated in the Indictment. The evidence did not establish an incident in which Džemal Vahid's jaw was first broken and then he was taken to a solitary confinement cell after the beating. Similarly, the evidence did not establish that an incident occurred during which S.H. was beaten to force him to confess that he was a SDA member, which caused him to faint twice and which occurred in April or May 1992. The factual allegations in the

[219] *See, e.g., Krnojelac* Trial Judgment, para. 176 ("It is important to emphasize that the mere description of the assaults as 'beatings' does not by *itself* establish that the assaults constituted … 'inhumane acts'.").

Indictment are essential to identifying the crime alleged, both so that the Accused may present a defense and so that the Panel may determine whether the incident alleged occurred beyond doubt. There is no evidence that this incident as described in the indictment occurred, or that this detainee suffered the treatment alleged in the indictment either at the alleged time, or at the alleged place, or in the alleged manner. Since these factual allegations were not proven, the Panel concludes that the Prosecutor did not prove the crime alleged in the Indictment.

With regard to K.K., the Indictment fails, pursuant to Article 284(a) of the CPC of BiH, to sufficiently plead the charge. Specifically, the Indictment merely states that this victim was "physically mistreated" but does not allege the severity of the act, the seriousness of the injury, or the extent of the suffering of this victim, essential elements of the crime.

V. APPLICATION OF SUBSTANTIVE LAW

In terms of application of the substantive law to be applied in the case of this criminal offense, in the context of the time of the perpetration of the criminal offense, and bearing in mind all the objections by the Defense to that effect, the Panel has ruled as set forth in the operative part herein with the application of the following provisions.

Article 3(2) of the CC of BiH – principle of legality – defining the principle of legality, reads: "No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law."

The acts of perpetration of this particular offense were committed in 1992, at the time when the law in effect was the CC of SFRY, which did not recognize the criminal offense with a separate name – Crimes against Humanity – as a separate offense. The new CC of BiH defines that offense as a separate criminal offense. According to the theory of law, the law which is in effect at the time of the commission of an offense which does not qualify that offense as a criminal offense should be considered a more lenient law. In that case there would be an obligation to apply a more lenient law because in case the law is amended in relation to the time of the perpetration of the offense, following the principle of legality, it would be necessary to apply the previous criminal code in effect, while retroactive application of the criminal code to the detriment of the perpetrator would be prohibited.

However, in terms of the criminal offenses of Crimes against Humanity, which was not defined by the laws which were in effect in Bosnia and Herzegovina during the conflict between 1992 and 1995, the Panel finds that this criminal offense is covered by the international customary law which was in effect at the time of perpetration, and in addition to that, it was also defined by the then CC of SFRY through individual criminal offenses under Articles 134 (Inciting National, Racial or Religious Hatred, Discord or Hostility), 142 (War Crime against the Civilian Population), 143 (War Crime against the Wounded and the Sick), 144 (War Crimes against Prisoners of War), 145 (Organizing and Instigating the Commission of Genocide and War Crimes), 146 (Unlawful Killing or Wounding of the Enemy), 147 (Marauding), 154 (Racial and other Discrimination), 155 (Establishing Slavery Relations and Transporting People in Slavery Relation) and 186 (Infringement of the Equality of Citizens). Thus, although Article 172 of the CC of BiH now prescribes this offense as a separate criminal offense, it did exist even at the time of perpetration of the offense in the sense that it was prohibited by international standards and, indirectly, through the cited offenses in existence at the time.

The customary status of punishability of crimes against humanity and the imputation of individual criminal responsibility for its commission in 1992 has been confirmed by the UN Secretary General,[220] International Law Commission,[221] as well as the case law of the ICTY and ICTR.[222] These institutions established that the punishability of crimes against humanity

[220] UN Secretary General Report on paragraph 2 of the Security Council Resolution 808, 3 May 1993, paragraphs 33-34 and 47-48.
[221] International Law Commission, Commentary on the Draft Code of Crimes against the Peace and Security of Mankind (1996), Article 18.
[222] ICTR, Trial Chamber Akayesu, 2 September 1998, paragraphs 563-577.

represents an imperative standard of international law or *jus cogens*,[223] therefore there appears indisputable that in 1992 crimes against humanity were part of international customary law.

Article 4(a) of CC of BiH refers to "general principles of international law". Since neither the international law nor the European Convention recognize such an identical concept, this term actually represents a combination of, on one hand, "principles of international law" as recognized by the UN General Assembly and the International Law Commission and on the other hand "general principles of law recognized by the community of nations" as recognized by the Statute of the International Court of Justice and Article 7(2) of the European Convention.

Principles of International Law as recognized by the General Assembly Resolution 95 (1) (1946) and the International Law Commission (1950) apply to the "Charter of the Nuremberg Tribunal and Judgment of the Tribunal" and thus also to crimes against humanity.

"Principles of the International Law recognized in the Charter of the Nuremberg Tribunal" and "in the Judgment of the Tribunal" adopted by the International Law Commission in 1950 and submitted to the General Assembly, Principle VI.c. stipulates Crimes against Humanity as a crime punishable under international law. Principle I stipulates that: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." Principle II stipulates that: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law". Therefore, regardless of whether it is viewed from the position of the customary international law or the position of "the principles of international law", it is indisputable that Crimes against Humanity constituted a criminal offense in the relevant time period or more precisely, that the principle of legality has been satisfied.

The legal ground for prosecution or punishment of criminal offenses pursuant to the general principles of international law is provided under Article 4a of the Law on Amendments to the Criminal Code of BiH (*Official Gazette BiH*, No. 61/04) which prescribes that Articles 3 and 4 of the Criminal Code of BiH 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. By this Article, the provision of Article 7(2) of the European Convention has been adopted in its entirety and thereby ensured an exceptional derogation from the principle referred to in Article 4 of the Criminal Code of BiH, as well as derogation from mandatory application of a more lenient law in proceedings which constitute criminal offenses pursuant to international law, such as the proceedings against the accused, because it concerns charges which include a violation of the rules of international law. In fact, Article 4a of the Law on Amendments to the Criminal Code of BiH is applicable to all criminal offenses falling under the scope of war crimes, since these particular criminal offenses are contained in Chapter XVII of the Criminal Code of BiH, the title of which is "Crimes Against Humanity and Values Protected by International Law". Crimes against humanity are accepted as part of international customary law and they constitute a non-derogative provision of international law.

[223] International Law Commission, Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 26.

When these provisions are correlated with Article 7 of the European Convention on Human Rights (hereinafter: the European Convention) which has priority over all other laws in BiH (Article II(2) of the Constitution of BiH), it can be concluded that the principle of legality referred to in Article 3 of the Criminal Code is contained in the first sentence of Article 7(1) of the European Convention, while the second sentence of paragraph 1 of Article 7 of the European Convention prohibits imposition of a heavier penalty than the one that was applicable at the time the criminal offense was committed. Thus, this provision prescribes a prohibition of imposing a more severe punishment, and it does not prescribe mandatory application of a more lenient law for the perpetrator in relation to the punishment that was applicable at the time of the commission of the criminal offense.

However, paragraph 2 of Article 7 of the European Convention contains an exception from paragraph 1, for it allows a 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 law recognized by civilized nations. The same principle is contained in Article 15 of the International Covenant on Civil and Political Rights. This exception is incorporated with a specific goal of ensuring the application of national and international legislation which came into force during and after World War II with regard to war crimes.

Accordingly, the case law of the European Court of Human Rights (*Naletilić v. Croatia* no. 51891/99, *Kolk and Kislyiy v. Estonia*, no. 23052/04 and 4018/04) stresses the applicability of the provision of paragraph 2 rather than of paragraph 1 of Article 7 of the European Convention, when such offenses are in question, which also justifies the application of Article 4a of the Law on Amendments to the Criminal Code of BiH in these cases.

Also, this issue was considered by the Constitutional Court of BiH in the appeal by A. Maktouf (AP 1785/06), which held in its decision dated 30 March 2007: “Para. 68. In the legislature of any country of the former Yugoslavia there was no possibility for imposing the sentence to life imprisonment or long term imprisonment, which the International Criminal Tribunal for the Crimes Committed in the Territory of the Former Yugoslavia did very often (cases *Krstić, Galić*, etc.). At the same time, the concept of the CC of SFRY was such that it did not prescribe long term imprisonment or life imprisonment, but it prescribed the death penalty for the most severe criminal offenses, and for less severe offenses a maximum sentence of up to 15 years imprisonment. Therefore, it is clear that one sanction cannot be separated from the overall goal which was intended to be achieved by the penal policy at the time of applicability of that law”. “Para.69. With regard to that, the Constitutional Court is of the opinion that it is not possible to simply “remove” one sanction and apply other more lenient sanctions and thereby practically leave the most severe criminal offenses inadequately punished.”

The principle of mandatory application of a more lenient law, in the opinion of the Panel, is excluded in the prosecution of those criminal offenses which at the time of their commission were fully foreseeable and generally known as contrary to the general rules of international law.

In analyzing the provision of Article 172 (1) of the Criminal Code of BiH, it is obvious that this offense is a part of one group of criminal offenses against humanity and the values protected under international law (Chapter XVII of the CC BiH). This group of offenses is specific because it is not sufficient to commit a criminal offense with certain physical activity, but instead it is required that the perpetrator be aware that by the commission of the

offense he is violating international laws, and that it is assumed that the perpetrator must be aware that the period of war, or conflicts, or atrocities, is particularly sensitive and particularly protected by the generally accepted principles of international law and, as such, that offense obtains even greater importance and its commission bears more severe consequences than the offense committed in some other period or circumstances. Thus, in the opinion of the Panel, the application of the CC BiH is justified and it is in accordance with the norms which establish standards for respecting human rights.

The meting out of a sentence is related to that, since Article 7 of the European Convention on Human Rights also encompasses a regime of criminal sanctions. Article 172(1), in addition to the listed subparagraphs of the CC BiH, prescribes a punishment of imprisonment for not less than 10 years or long-term imprisonment.

VI. SENTENCING

A. LAW ON SENTENCING

1. Sentencing that is Necessary and Proportionate to the Gravity of the Crime

In regard to the criminal act itself, participation in a systemic joint criminal enterprise the common purpose of which is to persecute at least 700 non-Serbs between April 1992 and October 1994 by the commission of crimes against humanity as described in the Verdict, the Panel considered the punishment that was necessary and proportionate to the following statutory purposes, and the relevant statutory considerations.

(A) The sentence must be necessary and proportionate to the danger and threat to the protected persons and values (Art. 2 of the CC of BiH). In connection with this, the Panel will also keep in mind the statutory consideration which specifically affects this purpose, that is, the suffering of the direct and indirect victims (Art. 48 of the CC of BiH). The direct victims of this offence were the non-Serb detainees illegally imprisoned in the KP Dom during the relevant time. All of these detainees were direct victims of the criminal system which illegally imprisoned them, kept them in inhumane conditions and permanently removed them from Foča and the surrounding areas. Some were in addition, direct victims of additional crimes which were part of the criminal system of the camp, including: at least 18 murders; at least 200 forced disappearances; torture of Nurko Nišić, S.M., and Ekrem Zeković; enslavement of many detainees, including FWS 71, D.M., K.Š., A., FWS 142, R.T., Z.A., Ekrem Zeković and FWS 83; inhumane treatment by use as human shields of FWS 141, FWS 109 and K.G.; and other inhumane acts against many others, including Dž.B. and FWS 71.

The suffering directly inflicted on these victims caused additional suffering to their families and their communities as well. That suffering continues: at least half of those disappeared from KP Dom are still missing and information about them continues to be withheld. In addition, the KP Dom criminal system negatively impacted on Foča, because it was a significant factor in ethnically cleansing the entire municipality, resulting in the loss of community and a way of life for all residents, but particularly for the non-Serb residents of Foča and the villages and hamlets that surround it.

The sentence must be proportionate to this degree of suffering, and in addition, it must be sufficient to (B) deter others from committing similar crimes (Arts. 6 and 39 of the CC of BiH). No one living in 20th century Europe could escape the images of the Nazi concentration camps from World War II or be ignorant of the trials and convictions of those who played roles in establishing and maintaining those camps. A major reason for criminalizing activity associated with "camps" as crimes against humanity under international law, and prosecuting the participants who established and maintained camps, was to prevent others in future conflicts from repeating this form of systemic crime against vulnerable civilians. That the KP Dom and other camps were used by all sides during the conflict in Bosnia is a disturbing indication that the lessons of Nuremberg have not yet been learned. It is therefore more necessary than ever that those who knowingly engage in establishing and maintaining camps be punished sufficiently to put others involved in future conflicts on notice that there is a serious price to pay for participating in this form of crime, even if the

participants do not personally take part in each of the crimes committed in these camps. In order to deter others, the sentence must be appropriate to convey the message that operating a "camp" is not blameless employment when it promotes the efficient management of a system, the purpose of which is to persecute civilians by methods which are criminal under international humanitarian law.

In addition, this sentence must reflect (C) community condemnation of the Accused's conduct (Art 39 of the CC of BiH). The community in this case is the people of Bosnia and Herzegovina and the international community, who have, by domestic and international law, made conduct of this nature a crime against humanity. These communities have made it clear that these crimes, regardless of the side which committed them or the place in which they were committed, are equally reprehensible and cannot be condoned with impunity.

The sentence must also be necessary and proportionate to the (D) the educational purpose set out in the statute, which is to educate to the danger of crime (Art. 39 of the CC of BiH). Trial and sentencing for this activity must demonstrate not only that crimes perpetrated in time of war will not be tolerated, but that the criminal justice process? is the appropriate way to recognize the crime and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the act can contribute to reconciliation by providing a legal, rather than violent, response; and promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved. The crime of persecution creates a danger not only to the immediate victims, but to society as a whole in that it contributes to an atmosphere of lawlessness, where the rule of law is undermined and those people who identify with the aggressor are encouraged to act with impunity.

All of these considerations relevant to the criminal acts committed by the Accused lead the Court to consider that a necessary and proportionate sentence reflecting the gravity of the crime itself should be 12 Years.

2. Sentencing that is Necessary and Proportionate to the Individual Offender

Sentencing considerations must also take into account the statutory requirement of fairness (Art. 39 of the CC of BiH) and the individual circumstances not only of the criminal act but also the criminal actor. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again (Art. 6 and 39 of the CC of BiH); and (2) rehabilitation (Art. 6 of the CC of BiH). Rehabilitation is not only a purpose that the Criminal Code imposes on the Court, but it is the only purpose related to sentencing recognized and expressly required under international human rights law, to which the Court is constitutionally bound. Article 10(3) of the ICCPR provides: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

There are a number of statutory considerations relevant to these purposes as they affect the sentencing of the individual convicted person (Art. 48 of the CC of BiH). These include: the degree of liability; the conduct of the perpetrator prior to the offence, at or around the time of the offence and since the offence; motive; and the personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts warrant. The point of these considerations is to assist the Court in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in

connection with the act itself and the effect on the community, but to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

B. THE ACCUSED TODOVIĆ

1. The Degree of Liability

For the reasons discussed above under the section on command responsibility, the panel concluded that Todović was *de facto* deputy warden from April 1992 until December 1992, when he became *de jure* deputy warden and continued in that post until August 1993. During that time, as established in the section on command responsibility, he had primary responsibility for the detainees and was second only to the warden in the hierarchy of the KP Dom. He had the day-to-day responsibility for the treatment of the detainees.

In addition, Todović, along with Rašević, exercised effective control over the guards and had the material ability and duty under international law to prevent them from committing crimes against humanity and to punish them for crimes committed. In that regard, Todović was liable under the theory of command responsibility for failing to prevent the KP Dom Guards from following the illegal order of the interrogators to commit the crime of inhumane acts against Dž.B. (Count 1b) and for failing to punish the KP Dom Guards for their involvement in the murders occurring at KP Dom (Count 2); and for the beating of FWS 71 (Count 1b). Because the evidence also established that Todović is guilty of these same offenses as a co-perpetrator of the systemic JCE, he cannot be convicted again for the same offense under command responsibility as a theory of liability. However, the fact that he failed in his duty of responsible command by failing to prevent or punish the guards over whom he had effective control, is a factor which the Panel considers in sentencing.

That he could have prevented the guards from following the illegal order of the interrogators is evident from the fact that Todović gave orders to the guards on a regular basis with the expectation that they would obey him and that expectation was met. That he had the ability to punish the guards for their complicity in the murders and the beating of FWS 71 is evidenced by the fact that there was a system of employee discipline set out in the Book of Rules with which Todović was familiar and that he in fact used. Todović in his testimony described how he implemented the disciplinary procedure against the staff member found to have been involved in smuggling with FWS 182. As Todović explained in his testimony, he investigated, reported the staff member to the warden, advised the warden on how to carry out the discipline and advised the warden as to the sanction that should be imposed. Todović failed to take similar measures when the crimes and the consequences to the victims were of considerably greater significance. Todović's position of authority at KP Dom and the manner in which he exercised that authority or failed to exercise that authority are aggravating factors.

2. Conduct and Personal Circumstances of the Accused

The conduct and personal circumstances of Todović prior to, during and after the commission of the offence present facts both in aggravation and mitigation, and are relevant to considerations of deterrence and rehabilitation.

a. Before the Offense

Todović prior to April 1992 appears to have had an exemplary career in the prison service. He began work as a guard at KP Dom Foča directly after completing his compulsory military service and worked his way up through the ranks of the prison system,. He earned a degree in law. At the time war broke out he was working as a lawyer at KP Dom with the task of implementing criminal sanctions He supported a family and raised two children. He had no criminal record. Todović's life before the offense is a mitigating factor.

b. Circumstances Surrounding the Offense

Todović was an experienced member of the prison administration when the war broke out. He was a middle-aged lawyer who knew how a legal prison system should be run and who knew the difference between people legally and illegally detained. He was assigned to KP Dom as a war assignment. He did not decline the appointment and there is no evidence that he ever attempted to transfer to other duty. Having chosen to stay, and maintain the system, he did so with an abundance of zeal and a demonstrable lack of compassion for the detainees in his control. Several witnesses testified that his manner and behavior toward them was demeaning and threatening. As the evidence in support of Count 3 of the Verdict points out, Todović not only oversaw a system which included inhumane living conditions and unlawful imprisonment, but he personally used threats against the detainees to enforce that system: threatening the lives of detainees if they attempted escape; threatening the lives of the detainees who worked with FWS 216 after he attempted to escape; threatening the lives of detainees for breaking rules by smuggling tobacco and passing notes to other detainees; and threatening detainees when they attempted to avoid forced labor. The manner in which he committed the offense is an aggravating factor.

c. Circumstances Since that Time

After the war Todović continued to work at the KP Dom until, for reasons which are not clear to the Panel or relevant to sentencing, he retired. He no longer has minor children to support, continues to be married, and his income is low. He has not committed any criminal offense since the conclusion of the war. These circumstances are neither aggravating nor mitigating.

d. Conduct During the Case

Todović was very involved in the conduct of his defense and questioned most of the witnesses himself. He expressed unhappiness with his *ex officio* counsel, but refused to select counsel himself when encouraged to do so by the Panel. His questioning of some of the prosecution witnesses was forceful, but within appropriate bounds for cross examination. He was always respectful to the Court and professional in his demeanour. His conduct during the case was appropriate and met the Panel's expectations, and is therefore neither an aggravating nor mitigating factor.

3. Motive

Motive in this case is not connected with intent. As reasoned above, both Accused possessed the intent to persecute the non-Serb detainees, as that crime is described in the law and established in the reasoning of the Verdict. However, there is nothing in the evidence to support any assertion that Todović was motivated by personal hatred of any ethnic group, nor that he had any particular vendettas or biases against individuals in the persecuted group that were underlying his conduct toward them. There is no clear indication what motivated this Accused to co-perpetrate the offenses with which he is convicted by his participation in the systemic JCE. Therefore motive is neither and aggravating nor mitigating factor.

4. Personality of the Accused

The Panel has no evidence regarding the personality of the Accused other than that revealed by his actions in committing the crime and that which could be observed from his behavior in the courtroom, both of which have been discussed above.

5. Statutory Reduction of Punishment

The Panel finds no reasons under Article 49 to reduce the sentence below the minimum prescribed by law.

6. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes and to make amends for his criminal actions.

7. Sentence: The Accused Todović

Therefore in evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in Article 48(1), for the reasons explained above, the Panel concludes that both mitigating and aggravating circumstances exist. The degree of injury to the protected object was already calculated in the first part of this sentencing analysis when considering the gravity of the offence itself and will not be "counted" twice. An extenuating circumstance considered by the Panel is the Accused's contributions to the criminal justice system before the war. Aggravating circumstances considered by the Panel are the Accused's superior position within the camp and the manner in which he used this position in connection with: the way he related to the detainees, having in mind his demeanor toward the detainees and the threats he made against them; and the way in which he related to those under his control, having in mind his failure to assert responsible command in preventing and punishing the guards for the crimes committed by the guards. On balance, the Panel concludes that the aggravating circumstances should be reflected in the sentence and that they do require recognition by an upward adjustment of the sentence from that calculated solely on the basis of gravity of the crime itself. The Panel concludes that a sentence of 12 years and 6 months is appropriate.

C. THE ACCUSED RAŠEVIĆ

1. The Degree of Liability

For the reasons discussed above under the section on command responsibility, the Panel concluded that Rašević was *de jure* Commander of the Guards from April 1992 until October 1994, and continuing thereafter. During that time, as established in the section on command responsibility as reasoned above, he was head of the security service and the guards were responsible to him. The evidence established that as commander of the guards he, along with the warden and the deputy warden, was one of the three people primarily responsible for maintaining the operations at KP Dom during the relevant time.

In addition, Rašević, along with Todović, exercised effective control over the guards and had the material ability and duty under international law to prevent them from committing crimes against humanity and punish them for crimes committed. In that regard, Rašević was liable under the theory of command responsibility for failing to prevent the KP Dom guards from following the illegal order of the interrogators to commit the crime of inhumane acts against Dž.B. (Count 1b) and for failing to punish the KP Dom guards for their involvement in the murders occurring at KP Dom (Count 2), and for the beating of FWS 71 (Count 1b). Because the evidence also established that Rašević is guilty of these same offenses as a co-perpetrator of the systemic JCE, he cannot be convicted again for the same offense under a theory of liability of command responsibility. However, the fact that he failed in his duty of responsible command by failing to prevent or punish the guards over whom he had effective control, is a factor which the Panel considers in sentencing.

That he could have prevented the guards from following the illegal order of the interrogators is evident from the fact that Rašević, as commander of the guards, was their immediate superior and they were directly responsible to him. He assigned the guards to their duties. He gave orders to the guards on a regular basis with the expectation that they would obey him and that expectation was met. That he could have investigated the activities of the guards which he had reason to know were illegal, and reported any findings of criminal activity to the warden, is apparent from the existence of an articulated disciplinary procedure in the Book of Rules, with which Rašević admitted he was familiar and with which he claimed he complied. Rašević's position of authority at the KP Dom and the manner in which he exercised that authority or failed to exercise that authority are aggravating factors.

2. Conduct and Personal Circumstances of the Accused

The conduct and personal circumstances of Rašević prior to, during and after the commission of the offence present facts both in aggravation and mitigation, and are relevant to considerations of deterrence and rehabilitation.

a. Before the Offense

Rašević prior to April 1992 appears to have had an exemplary career in the prison service. He began work as a guard at the prison in Mostar in 1983. He received a faculty degree and joined the staff of the KP Dom Foča in 1988 as an educator and was thereafter appointed

Commander of the Guards, which position he held at the beginning of the war. He supported a family and raised three children. He had no criminal record.

In early April when KP Dom was under fire, while it was still functioning as a lawful prison, he remained with the prisoners, who were then of all ethnicities. When some prisoners took the opportunity to escape, he gave the order to his guards not to shoot and they obeyed him. He and the guards and some other staff stayed with the remaining 98 prisoners and saw to their evacuation, at risk to their own personal safety. He expressed pride in the guards under his command that remained with him and helped him protect the prisoners. On order of the warden at the time, he and others destroyed the arsenal so that neither side would be able to use the weapons, an act that he knew would be used against him should the Serb forces prevail. His actions in early April 1992 were courageous and probably saved lives. His conduct before the commission of the offense is a mitigating factor.

b. Circumstances Surrounding the Offense

Rašević was an experienced member of the prison administration when the war broke out. He was a middle-aged professional who knew how a legal prison system should be run and who knew the difference between people legally and illegally detained. He was assigned to the KP Dom as a war assignment. He did not decline the appointment or ever attempt to transfer to another duty. Rašević enjoyed both formal and moral authority and had a reputation as an honourable man, according to his co-accused. He put that authority and reputation to the service of the establishment and maintenance of the systemic JCE.

However, at the same time that he was contributing to the effective maintenance of the system, he attempted to relieve some of the suffering that the system created. These efforts were carried out mostly in secret and did not detract from the common purpose of the system, nor did they prevent the commission of any of the crimes which were committed as part of the system. However, his efforts were of a consistent and pervasive nature, that is, he not only showed kindness to those with whom he may have been friendly before the war, but he treated all of the detainees with whom he came in contact with a compassion that was rare for the circumstances. Prosecution witnesses repeatedly testified that Rašević always interacted with the detainees in a fair way. Particularly, it was noted by many witnesses that he would make an effort to frequently visit the rooms where they were being held and try to raise their spirits and give them hope and encouragement. FWS 115 testified that Rašević would talk to the detainees and listen to their complaints about the conditions with sympathy. He listened to their fears about their families, and FWS 162, Ekrem Zeković and FWS 113 testified that he endeavoured to get information about their families and pass that on to them. On one occasion, he spoke with the wife of a detainee, Witness B, and told her that to kill B "they" would have to kill him first.

The Panel was told that Rašević went out of his way to try to help detainees who were ill at the KP Dom, and three specific examples were cited. FWS 182 testified that he had an ulcer, and that Rašević secretly brought him medicines, milk and extra blankets. Rašević was aware that Šefko Kubat was quite ill and intervened with the warden to get him hospitalized. When the warden gave him permission to take him to the hospital, Rašević arranged for Kubat to use a false Serb name because the hospital was full of Serb war wounded, and further arranged for Kubat's best man, a Serb, to look after him. Rašević repeatedly checked on his care and brought him fruit. Witness 5T was a young man whom Rašević did not know, but someone informed Rašević that 5T had a serious leg injury. Rašević took him to

the hospital in his own car and stayed with him and protected him from the Serbs who were making threats against him in the hospital and arranged for him to get treatment and socks.

FWS 139 testified that Rašević surreptitiously brought the detainees cigarettes, bread, soap, and clothing, and that he knew personally that Rašević had done things to help FWS 142, FWS 215, FWS 214, FWS 162, FWS 85 and many others. No prosecution witness testified that Rašević behaved unkindly to the prisoners. Witness 3O, an ABiH intelligence officer during the war, was tasked with interrogating non-Serbs released from KP Dom in order to collect information about war crimes. He testified that he asked specifically about Rašević, and that he was never told anything negative against him and was in fact told that Rašević had helped many, especially in keeping up their spirits.

These expressions of support for Rašević are highly credible. The witnesses testified for the Prosecution about the facts of the crimes perpetrated against them and showed no fear or constraint in relating incriminating information. They also were candid in their negative testimony against Todović. They do not live in the Foča area and most live outside of BiH. Their respect for Rašević was genuine and they showed no fear, hesitation or concern in their positive support. The circumstances surrounding the offense have elements of both aggravation and mitigation. However, on balance, the mitigating factors outweigh the aggravating factors to a significant degree.

c. Circumstances Since that Time

After the war, Rašević continued to work at the KP Dom until 1997, when he retired. He no longer has minor children to support, and continues to be married. He has not committed any criminal offense since the conclusion of the war. These circumstances are neither aggravating nor mitigating.

d. Conduct During the Case

Rašević behaved with the proper decorum and respect for the Court throughout the trial, and treated the witnesses appropriately and often with sensitivity. His conduct during the case was appropriate and met the Panel's expectations, and is therefore neither an aggravating nor a mitigating factor.

3. Motive

Motive in this case is not connected with intent. As reasoned above, both Accused possessed the intent to persecute the non-Serb detainees, as that crime is described in the law and established in the reasoning of the Verdict. However, the evidence establishes that Rašević took no personal pleasure from the crimes committed against the detainees, and in fact attempted to alleviate some of the suffering caused by them. Rašević offered that "one of his reasons" for remaining at KP Dom was that someone else as commander of the guards might not try to help the detainees at all. The Panel accepts that this may have been "one" of his reasons, but there is no clear indication what the other motivations were that led him to persist in his participation in the systemic JCE. The absence of a desire to cause personal harm to the victims is not sufficient to infer a positive motive for commission of the crime. Motive is therefore neither an aggravating nor mitigating factor.

4. Personality of the Accused

The Panel has no evidence regarding the personality of the Accused other than that revealed by his actions in committing the crime and that which could be observed from his behavior in the courtroom, both of which have been discussed above.

5. Statutory Reduction of Punishment: Deterrence and Rehabilitation

Article 49 of the CC of BiH lists two circumstances which permit the Panel to go below the limit prescribed by law and impose a milder sentence. These two circumstances are: a) when the law envisages the possibility of reduction; and b) "When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment." The minimum limit prescribed by law for co-perpetration of crimes against humanity is a term not less than 10 years or long term imprisonment, as stated in Article 172(1) of the CC of BiH.

It is established beyond doubt that Rašević co-perpetrated the crime of persecution through his participation in the systemic JCE; that he did so with the direct intent that the crime be committed; and that his participation consisted of both participation in the *actus reus* of some of the underlying crimes and commission of other acts which contributed to a decisive degree to the success of the systemic JCE. Participation in a crime of this gravity in which the individual has played such a significant role can not go unpunished. However, in looking at the individual considerations as required by law, and reasoned above, it is clear that the mitigating factors outweigh the aggravating factors, particularly those having to do with the manner of commission of the offence and the acts of Rašević immediately before the commission of the crime. These amount to highly extenuating circumstances that need to be recognized by the Panel. These extenuating circumstances indicate that some of the purposes of punishment, particularly deterrence and rehabilitation, have been already met in important ways.

Rehabilitation includes educating the offender to understand the suffering his actions have caused, developing empathy with the victims of his crimes and acknowledging remorse for his actions. Rašević understood and sympathized with the suffering of the victims of the crime even while he was committing the crime and tried to minimize that suffering. He also expressed regret for the suffering the crime caused. At the trial, he repeatedly expressed to the witnesses "his wholehearted regret" for what they had endured. The Panel believes this regret is sincere and not a recent invention prompted by the fact that he is on trial. FWS 02, a detainee at KP Dom, testified that Rašević saw him off when he was to be exchanged and even then asked his forgiveness. Many of the witnesses who testified for the Prosecution accepted that Rašević's remorse was real and expressed dismay at his further incarceration. Several of the Prosecution witnesses had agreed to testify as defense witnesses on Rašević's behalf.

Many of the witnesses, in describing the assistance and psychological support he gave to the detainees, supported the view that Rašević's remorse was sincere and his rehabilitative needs minimal. FWS 139, for example, told the Panel that if it had not been for Rašević, he would not be alive to testify before the Court. FWS 210, who lives a great distance from BiH, explained how he had called Rašević three times after the war to express gratitude to him and to see how he was doing. Witness 5T ended his testimony with the words: "I would like to thank you. You helped me a lot. God willing I will see you when you are free." Several

Prosecution witnesses asked the Panel's permission to shake hands or embrace Rašević at the conclusion of their testimony. These words and acts of the witnesses were genuine and their perspective was valuable to the Panel's conclusion that highly extenuating circumstances exist that indicate that the purpose of punishment can be achieved with less than the 10 year minimum sentence set out in Article 172(1) of the CC of BiH.

6. Sentence: The Accused Rašević

The Panel therefore concludes that a sentence of 8 years and 6 months is appropriate.

Credit for Time Served

The Accused Rašević has been in custody since 15 August 2003, while the Accused Todović has been in custody since 15 January 2005; their custody continued following the referral of the case to the Court of BiH, when they were also ordered into custody. Therefore, pursuant to Article 56 of the CC of BiH and Article 2(4) of the LoTC, the time the Accused spent in custody ordered by ICTY and this Court, from the above-mentioned dates until they are committed to serving the sentence, shall be credited towards their imprisonment sentence.

As regards the costs of the proceedings, the Panel decided to relieve the Accused of the duty to pay the costs. In deciding that, the Panel took into consideration that both Accused have spent a certain period of time in custody without significant income, that their financial situation is poor, and that they do not have regular income, and therefore, their obligation to pay the trial costs would jeopardize the subsistence of the families of the Accused, therefore, the Panel ruled as set forth in Article 188(4) of the CPC of BiH.

Based on the foregoing, the Panel rendered a verdict as stated in the operative part herein.

PRESIDING JUDGE
Hilmo Vučinić

MINUTES-TAKER
Dženana Deljkić Blagojević
Legal Advisor

INSTRUCTION ON LEGAL REMEDY: An appeal against the Verdict may be filed with the Appellate Panel of the Court of BiH within 15 (fifteen) days as of receipt of the written copy of the Verdict.