



International Tribunal for the  
Prosecution of Persons Responsible  
for Serious Violations of International  
Humanitarian Law Committed in the  
Territory of the Former Yugoslavia  
Since 1991

Case No.: IT-97-25-T

Date: 15 March 2002

Original: English

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IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Liu Daqun

Registrar: Mr Hans Holthuis

Judgment of: 15 March 2002

PROSECUTOR

v.

MILORAD KRNOJELAC

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JUDGMENT

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## I. SUMMARY OF THE CHARGES

1. Milorad Krnojelac ("Accused") is charged under the third amended indictment ("Indictment"), dated 25 June 2001, with 12 counts.<sup>1</sup>

2. The Prosecution alleges that, on 7 April 1992, Serb military forces began the occupation of Fo-a town. The occupation was completed on 16 or 17 April 1992. Once the Serb forces had gained control over parts of Fo-a town, military police, accompanied by local and non-local soldiers, started to arrest Muslim and other non-Serb inhabitants. Men and women were separated and arrested. Beginning on or around 14 April 1992, the Fo-a Kazneno-Popravni Dom ("KP Dom"), a prison, became the primary detention centre for Muslim and other non-Serb men, as well as for a few Serbs who had tried to avoid military service. The Prosecution alleges that the KP Dom was overcrowded during the first few months due to the continuing arrests, most of the detainees being civilians who had not been charged with any crime.

3. The Prosecution alleges that the Accused was the commander of the KP Dom from April 1992 until August 1993, and that as such he was responsible for running the detention camp. He was in a position of superior authority with respect to everyone in the camp and exercised powers and duties consistent with this superior position. The Prosecution alleges that he is individually responsible for the crimes charged against him pursuant to Article 7(1) of the Statute of the Tribunal ("Statute"), as well as (or alternatively) responsible as a superior for the acts of his subordinates pursuant to Article 7(3) of the Statute.

4. The Accused is charged under COUNT 1 with persecution on political, racial or religious grounds as a crime against humanity, pursuant to Article 5(h) of the Statute. It is alleged that, while acting as the camp commander, the Accused, together with the KP Dom guards under his command and in common purpose with other guards and soldiers, persecuted the non-Serb male civilian detainees at the KP Dom on political, racial or religious grounds. As part of the persecution of non-Serb male civilian detainees, it is alleged that the Accused participated in or aided and abetted the execution of the common

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<sup>1</sup> A Glossary of Terms is included in Annex I to this Judgment.

plan involving imprisonment and confinement, torture and beatings, killings, forced labour, inhumane conditions and deportation and expulsion.

5. Under COUNTS 2 and 4, the Accused is charged with torture as a crime against humanity, pursuant to Article 5(f) of the Statute, and as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. These counts are based on the Accused's alleged participation in torture and beatings carried out as punishment for even minor violations of the prison rules, such as passing messages to other detainees and giving an extra slice of bread to a fellow detainee when warned not to do so. The Accused is also alleged to have aided and abetted in torture and beatings during interrogations of the detainees.

6. Under COUNTS 5 and 7, the Accused is charged with inhumane acts as a crime against humanity, pursuant to Article 5(i) of the Statute, and cruel treatment as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. These charges are based on his alleged participation in beatings of detainees upon their arrival in the prison yard of the KP Dom on different occasions between April and December 1992. The Prosecution alleges that the Accused also participated in beatings which occurred between May and December 1992 while detainees were on their way to the canteen, as well as in arbitrary beatings of detainees during their confinement. In addition to these beatings, the Prosecution alleges that the Accused participated in beatings and acts of torture in the circumstances described under Counts 2 and 4.

7. Under COUNTS 8 and 10, the Accused is charged with murder as a crime against humanity, pursuant to Article 5(a) of the Statute, and as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. The Accused is alleged to have participated in the murders of detainees which occurred between June and August 1992 in the KP Dom. The Prosecution alleges that KP Dom guards selected groups of detainees according to lists provided by the prison authorities and took them into rooms in the administration building where they were beaten. These beatings are alleged to have resulted in the death of a number of detainees. The Prosecution alleges that the Accused incurred criminal responsibility by ordering and supervising the actions of the guards and by allowing military personnel access to the detainees for this purpose.

8. Under COUNT 11, the Accused is charged with imprisonment as a crime against humanity, pursuant to Article 5(e) of the Statute. The Accused is alleged to have participated in implementing the unlawful confinement of Muslim and other non-Serb civilians between April 1992 and August 1993 through his actions as warden of the KP Dom.

9. Under COUNTS 13 and 15, the Prosecution charges the Accused with having committed inhumane acts as a crime against humanity, pursuant to Article 5(i) of the Statute, and with cruel treatment as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. This charge is based on the Prosecution's allegation that, while the Accused was warden of the KP Dom, living conditions in the camp were characterised by inhumane treatment, overcrowding, starvation, forced labour and constant physical and psychological assault.

10. Finally, under COUNTS 16 and 18, the Accused is charged with enslavement as a crime against humanity, pursuant to Article 5(c) of the Statute, and with slavery as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised under the Slavery Convention and international customary law. The Accused is alleged to have participated in subjecting detainees to forced labour between May 1992 and August 1993. The Prosecution alleges that the Accused approved decisions to force individual detainees to work during May 1992. In July 1992, he, together with other high ranking prison staff, are alleged to have formed and supervised a workers' group of approximately seventy of the detainees with special skills. These detainees are alleged to have been kept in detention from summer 1992 until October 1994 for the primary purpose of being used for forced labour.

11. Counts 3, 6, 9, 12, 14 and 17, which pleaded charges pursuant to Article 2 of the Statute, were withdrawn prior to the commencement of the trial. The procedural background of this case is set out in Annex II.

## II. GENERAL REQUIREMENTS OF ARTICLE 3 AND ARTICLE 5 OF THE STATUTE

### A. Facts relevant to the general requirements of Article 3 and Article 5 of the Statute

12. The parties agree that, from April 1992 until at least August 1993, a state of armed conflict existed in the Republic of Bosnia and Herzegovina.<sup>2</sup> The parties to the armed conflict in Foca town and municipality were composed primarily of ethnic Serb forces on one side and of ethnic Muslim forces on the other.<sup>3</sup> The existence of an armed conflict is relevant to charges under both Article 3 and Article 5 of the Statute.

13. Foca town and municipality are located in the Republic of Bosnia and Herzegovina ("Bosnia and Herzegovina"), Southeast of Sarajevo, near the border of Serbia and Montenegro.<sup>4</sup> According to the 1991 census, the population of Foca consisted of 40,513 persons; 51.6% were Muslim, 45.3% Serb and 3.1% of other ethnicities.<sup>5</sup> Although ethnically mixed, individual neighbourhoods in Foca town or villages in the municipality could be identified as predominantly Muslim or Serb areas.<sup>6</sup> The following paragraphs represent findings made by the Trial Chamber based upon the evidence presented.

14. As in much of Bosnia and Herzegovina, Foca 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"). Tensions between the two major ethnic groups in Foca were fuelled by the Serbian Democratic Party ("SDS") on behalf of the Serbs and the Party for Democratic Action ("SDA") on behalf of the Muslims. Before the multi-party elections held in Foca in 1990, inter-ethnic relations

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<sup>2</sup> Prosecutor's Submission Related to Rule 65 *ter* (E)(ii) and (iii), 16 Oct 2000 ("Matters not in dispute"), par.8. Pre-Trial Conference, T 118.

<sup>3</sup> Matters not in dispute, par 4.

<sup>4</sup> Matters not in dispute, par 4.

<sup>5</sup> Matters not in dispute, par 5.

<sup>6</sup> Ex P 14, Ex P 15/1; FWS-33 (Ex P 106, p 469); Safet Avdic (Ex P 123, p 647); Osman Subašić (Ex P 286, p 4047). "FWS" is the acronym chosen by the Office of the Prosecutor to designate witnesses testifying in cases concerning the conflict in Foca for whom protective measures involving the use of pseudonyms were granted, and for consistency the Chamber has adopted this same system. The identity of all witnesses was known to the Accused.

appear to have been relatively normal,<sup>7</sup> but afterwards the inhabitants of Foca began to split along ethnic lines and inter-ethnic socialising ceased.<sup>8</sup>

15. Both the SDS and the SDA organised rallies or “promotional gatherings” in Foca, similar to those being organised throughout Bosnia.<sup>9</sup> The SDA rally was attended by Alija Izetbegovic, leader of the Bosnian SDA,<sup>10</sup> while the SDS rally attracted leading party members such as Radovan Karadžic, Biljana Plavšic, Vojislav Maksimovic, Ostojic, Kilibadar and Miroslav Stanic.<sup>11</sup> Nationalist rhetoric dominated both rallies.<sup>12</sup> In the period leading up to the outbreak of hostilities, members of the SDS leadership made various announcements which were hostile to the Muslim population. Maksimovic stated that the Muslims were the greatest enemies of the Serbs.<sup>13</sup> Karadžic said that either Bosnia would be divided along ethnic lines, or one of the nations (meaning ethnic groups) would be wiped out from these areas.<sup>14</sup> SDS leaders also said that, if they were to reach power, the political and economic affairs of Foca would be run by Serbs only.<sup>15</sup>

16. In the months before the outbreak of conflict in Foca, both Serbs<sup>16</sup> and Muslims<sup>17</sup> began to arm themselves with light weapons, though the Muslims were not able to do so as quickly as the Serbs,<sup>18</sup> leaving the latter better prepared for the conflict. The Serbs armed themselves surreptitiously at first, distributing weapons by truck in the evenings,<sup>19</sup> or from local businesses.<sup>20</sup> Immediately prior to the outbreak of the conflict, the distribution of arms to Serbs was done openly.<sup>21</sup> The Serbs also began to deploy heavy artillery weapons

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<sup>7</sup> FWS-66 (T 1047); FWS-33 (Ex P 106, p 446); FWS-182 (T 1573-1574).

<sup>8</sup> FWS-66 (T 1047-1048).

<sup>9</sup> FWS-111 (T 1296).

<sup>10</sup> FWS-33 (Ex P 106, p 541).

<sup>11</sup> FWS-66 (T 1050); FWS-86 (T 1447); FWS-33 (Ex P 106, p 448); FWS-111 (T 1296); FWS-182 (T 1572).

<sup>12</sup> See for example FWS-66 (T 1048-1049).

<sup>13</sup> Safet Avdic (Ex P 123, p 643).

<sup>14</sup> FWS-33 (Ex P 106, p 450).

<sup>15</sup> D`evad S Lojo (T 2519, 2522-2523).

<sup>16</sup> Osman Subašic (Ex P 286, p 4049, 4053); FWS-86 (T 1451); FWS-33 (Ex P 106, pp 456-457); FWS-182 (T 1574-1575) who described it as a “public secret” that the Serbs were arming themselves.

<sup>17</sup> FWS-182 (T 1658-1659); Slobodan Jovancevic (T 5545); Risto Ivanovic (T 6103).

<sup>18</sup> FWS-86 (T 1452); FWS-33 (Ex P 106, pp 575-576).

<sup>19</sup> FWS-33 (Ex P 106, p 575); FWS-86 (T 1451).

<sup>20</sup> FWS-73 (T 3191).

<sup>21</sup> FWS-15 (T 3001-3003).

on elevated sites around Foca,<sup>22</sup> controlling not only heavy weapons which belonged to the JNA,<sup>23</sup> but also the weaponry of the Territorial Defence.<sup>24</sup>

17. Administrative bodies in Foca, previously jointly controlled by Muslims and Serbs, ceased to function as had been envisaged by March 1992. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foca,<sup>25</sup> and both groups established Crisis Staffs along ethnic lines. The Muslim Crisis Staff was based in the Donje Polje neighbourhood of Foca.<sup>26</sup> The Serb Crisis Staff operated from a location in the Serb neighbourhood of Cerežluk,<sup>27</sup> with Miroslav Stanic, President of the SDS-Foca, as Chairman<sup>28</sup> and so-called "First War Commander" in Foca.<sup>29</sup> Daily meetings of SDS politicians in Foca began in early April.<sup>30</sup> 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.<sup>31</sup>

18. Immediately prior to the outbreak of the conflict, Serbs began evacuating their families and children from Foca, generally to Serbia or to Montenegro.<sup>32</sup> Some Muslims, alerted by the movements of their Serb neighbours coupled with general tension in the town, also fled or managed to evacuate their families before the outbreak of the conflict.<sup>33</sup> Although many Muslims had Serb friends, neighbours and relatives, few were warned about the coming attack.<sup>34</sup> Even for those who did get away, leaving Foca was not easy, with frequent military checkpoints en route to different destinations.<sup>35</sup>

19. In the days before the outbreak of the conflict, the first roadblocks appeared in Foca, mostly set up by the Muslims.<sup>36</sup> By 7 April 1992, there was a Serb military presence in the

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<sup>22</sup> FWS-66 (T 1050); FWS-111 (T 1191).

<sup>23</sup> Osman Subašić (Ex P 286, p 4061).

<sup>24</sup> FWS-86 (T 1450).

<sup>25</sup> Ex P 24.

<sup>26</sup> Osman Subašić (Ex P 286, p 4058).

<sup>27</sup> Osman Subašić (Ex P 286, pp 4055-4056).

<sup>28</sup> Ex D 73.

<sup>29</sup> FWS-33 (Ex P 106, p 500).

<sup>30</sup> FWS-86 (T 1448).

<sup>31</sup> FWS-33 (Ex P 106, pp 451-452); Osman Subašić (Ex P 286, pp 4050, 4054, 4058-4059).

<sup>32</sup> FWS-A (T 5521); Radomir Dolas (T 5811); FWS-54 (T 726); FWS-249 (Ex P 161, p 2074); Safet Avdic (Ex P 123, p 651); FWS-33 (Ex P 106, p 450).

<sup>33</sup> FWS-162 (T 1348) personally took his family out of Foca on 11 or 13 April, first to Ustikolina; FWS-A (T 5521); RJ (T 3824); FWS-249 (Ex P 161, p 2074); FWS-210 (T 4820).

<sup>34</sup> FWS-33 (Ex P 106, p 460); FWS-198 (T 941) was alerted by his Serb neighbour.

<sup>35</sup> FWS-162 (T 1350).

<sup>36</sup> Zoran Mijovic (T 6216); Radomir Dolas (T 5811); Risto Ivanovic (T 6070).

streets,<sup>37</sup> and some people failed to report for work, fearful of the rising tensions in the town.<sup>38</sup> A number of Serbs were mobilised on that day and issued with weapons.<sup>39</sup> That night, Serbs took over the Foca radio station, the warehouse of the regional medical centre and the Territorial Defence warehouse where weapons were stored.<sup>40</sup>

20. On 8 April 1992, an armed conflict broke out in Foca town,<sup>41</sup> mirroring events unfolding in other municipalities.<sup>42</sup> Roadblocks were set up throughout the town.<sup>43</sup> Sometime between 8.30 and 10.00 am, the main Serb attack on Foca town began, with a combination of infantry fire and shelling from artillery weapons in nearby Kalinovik and Miljevina.<sup>44</sup> Serb forces included local soldiers as well as soldiers from Montenegro and Yugoslavia, and in particular a paramilitary formation known as the White Eagles.<sup>45</sup> Most of the shooting and shelling was directed at predominantly Muslim neighbourhoods, in particular Donje Polje,<sup>46</sup> but the Serbs also attacked mixed neighbourhoods such as Cohodor Mahala.<sup>47</sup> Despite Muslim resistance, consisting mostly of infantry concentrated in Donje Polje and Šukovac,<sup>48</sup> Serb forces proceeded to take over Foca area by area, including eventually the hospital and the KP Dom prison facility.<sup>49</sup> The military attack resulted in large numbers of wounded civilians, most of them Muslims.<sup>50</sup>

21. 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 Foca altogether, thinking they would be safer.<sup>51</sup> Many of the Muslims in hiding gave up their

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<sup>37</sup> Slobodan Jovancevic (T 5541).

<sup>38</sup> Milomir Mihajlovic (T 5627); Safet Avdic (Ex P 123, p 653).

<sup>39</sup> Lazar Stojanovic (T 5724) (in Cere`luk).

<sup>40</sup> Osman Subašić (Ex P 286, p 4059); FWS-182 (T 1575).

<sup>41</sup> Lazar Stojanovic (T 5724); FWS-182 (T 1575); FWS-82 (T 1691) (saying that the conflict broke out on 6 April); FWS-142 (T 1816); FWS-119 (T 1929); FWS-249 (Ex P 161, p 2080). See agreed facts stated in par 12, *supra*.

<sup>42</sup> Such as Višegrad, Cajnice, Rudo and Rotagica, according to a broadcast of Radio Sarajevo: Dževad S Lojo (T 2530).

<sup>43</sup> Slobodan Solaja (T 5491); FWS-33 (Ex P 106, p 462).

<sup>44</sup> FWS-215 (T 825); Osman Subašić (Ex P 286, pp 4061, 4131); FWS-66 (T 1054) all reported that hostilities started on 7 April 1992. FWS-54 reported the first shelling as having started on 6 April 1992 (T 727); FWS-139 (T 311); FWS-86 (T 1450).

<sup>45</sup> FWS-139 (T 312); Safet Avdic (Ex P 123, T 659); FWS-172 (T 4548).

<sup>46</sup> FWS-54 (T 726).

<sup>47</sup> Slobodan Jovancevic (T 5556).

<sup>48</sup> Osman Subašić (Ex P 286, pp 4061, 4131).

<sup>49</sup> Slobodan Jovancevic (T 5559).

<sup>50</sup> Dr Amir Berberkic (T 3717-3718); FWS-172 (T 4547-4548).

<sup>51</sup> FWS-162 (T 1347); FWS-215 (T 826); FWS-82 (T 1693); FWS-03 (T 2226-2228); FWS-71 (T 2773-2774); FWS-15 (T 2996-2998); FWS-113 (T 2525); FWS-73 (T 3190); FWS-69 (T 4031); FWS-33 (Ex P 106, p 462).

personal weapons so that they could not be accused of participating in the conflict.<sup>52</sup> The attack continued for six or seven days, although the worst shelling and damage took place in the first few days.<sup>53</sup> Foca town fell to the Serbs somewhere between 15 and 18 April 1992,<sup>54</sup> with many of the Muslims who had remained during the fighting fleeing at that time.<sup>55</sup>

22. Following the successful military take-over of Foca town, the attack against the non-Serb civilian population continued.<sup>56</sup> Outside the town, Serb forces carried on their military campaign to take over or destroy Muslim villages in the Foca municipality.

23. Villages in Foca municipality sustained attacks until some time in early June.<sup>57</sup> Serb troops followed fleeing Muslims in the direction of Gora`de,<sup>58</sup> and captured the JNA fuel depot warehouse at Pilipovici where many Muslim civilians had been seeking shelter.<sup>59</sup> At the warehouse, Muslim men were separated from women and children.<sup>60</sup> After finding an SDA membership card which did not identify to whom it belonged, the Serb forces selected several men whose names were on a list and arbitrarily selected several others. In total, nine men were separated from the others and shot. Of these men, one escaped and one survived.<sup>61</sup>

24. The village of Brod, four kilometres from Foca, was attacked on 20 April 1992, after the village authorities did not respond to a Serb Crisis Staff demand that the village surrender.<sup>62</sup> Serb forces in Miljevina, approximately 18 kilometres from Foca town in the direction of Kalinovik and Sarajevo, set the surrounding Muslim villages on fire,<sup>63</sup> and

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<sup>52</sup> FWS-82 (T 1692-1693); FWS-210 (T 4822-4824).

<sup>53</sup> FWS-215 (T 828); FWS-33 (Ex P 106, pp 464-465); Osman Subašić (Ex P 286, pp 4061-4062); FWS-66 (T 1060) (who estimated between four and five days); FWS-85 (T 588).

<sup>54</sup> Osman Subašić (Ex P 286, p 4063); Lazar Stojanovic (T 5725).

<sup>55</sup> FWS-66 (T 1060).

<sup>56</sup> The Trial Chamber understands that the term "non-Serb" connotes both religious and political distinctions, but does not proceed upon the basis that different ethnicities within the former Yugoslavia constitute different races within the meaning of Article 5(h) of the Statute. See *Prosecutor v Tadić*, Case IT-94-1-T, Judgment, 14 July 1997 ("Tadić Trial Judgment"), par 714, in which the Trial Chamber found that the accused "shared the concept that non-Serbs should forcibly be removed from the territory, thereby exhibiting a discriminatory basis for his actions and that this discrimination was on religious and political grounds".

<sup>57</sup> See, par 35 *infra*.

<sup>58</sup> Safet Avdić (Ex P 123, p 660).

<sup>59</sup> FWS-104 (T 2153-2155).

<sup>60</sup> FWS-104 (T 2155).

<sup>61</sup> FWS-104 (T 2156-2157) and Jusco Tarragon (T 3006-3009).

<sup>62</sup> FWS-119 (T 1931-1933).

<sup>63</sup> FWS-144 saw Jelec, Susješno, Budanj and Izbišno burning (T 2294-2296). FWS-69 saw the villages of Podgaj, Banjine, Gradac, Ratina and Govze burning, as well as his own house in Jelec (T 4034, 4036-4037, 4052-4053). Close to the village of Laza, a soldier asked FWS-69 to confirm that certain houses were Muslim. After he did

arrested male Muslim civilians.<sup>64</sup> Jelec, about 22 kilometres from Foca near Miljevina, was shelled and then attacked by infantry and taken over by Serb forces on 4 or 5 May 1992.<sup>65</sup> When Serb forces set the village on fire, the population fled to a nearby forest.<sup>66</sup> Muslims who stayed in their homes or who tried to escape were killed.<sup>67</sup> Other male Muslim villagers were captured and detained in the Kalinovik and Bileca barracks and then transferred to the Foca KP Dom.<sup>68</sup> From Jelec it was possible to see houses burning,<sup>69</sup> and to see people fleeing from other villages.<sup>70</sup>

25. Muslim houses in Pilipovici and the neighbouring village of Paunci were burned to the ground around 25 or 26 April 1992.<sup>71</sup> Around 28 April 1992, Serb troops attacked Ustikolina where some Muslims had tried to form a resistance.<sup>72</sup> After taking the village, Serb forces set fire to Muslim houses.<sup>73</sup> From there, Serb forces continued attacking and destroying Muslim villages along the left bank of the Drina, downstream from Ošanica, while the population fled or was killed.<sup>74</sup>

26. On 3 July 1992, the Muslim village of Mješaja/Trošanj, situated between Foca and Tjenštište, was attacked by Serb soldiers. At the time of the attack, some Muslim villagers in Trošanj continued living in their houses but would sleep in the woods at night and only return to their homes during the daytime.<sup>75</sup> They were afraid because they were able to see other Muslim villages burning and they felt targeted because they were Muslim.<sup>76</sup> 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.<sup>77</sup>

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so, the houses were set on fire (T 4053). Nezir Cengic saw Govze, Drace, Poljice, Banjine, Izbišno and Mrdjanovici burning (T 4683, 4701). FWS-49 saw Govze, Jelec, Drace, Poljice, Banjine, Izbišno, and Mrdjanovici burning (T 4683).

<sup>64</sup> Nezir Cengic was arrested with four other elderly people from Rataja (T 4683-4685).

<sup>65</sup> FWS-249 (Ex P 161, pp 2099-2101); FWS-144 (T 2294-2296).

<sup>66</sup> FWS-144 (T 2295-2296); FWS-69 (T 4042-4044); FWS-249 (Ex P 161, p 2083); Safet Avdic (Ex P 123, pp 683-685).

<sup>67</sup> Safet Avdic (Ex P 123, pp 683-685); FWS-69 (T 4054); FWS-69 gave the number of people killed in Jelec as 35 (T 4043, 4046, 4048).

<sup>68</sup> Safet Avdic (Ex P 123, pp 684-685); FWS-69 (T 4054).

<sup>69</sup> In Kozja, Luka and Budanj: FWS-249 (Ex P 161, p 2083); FWS-69 (T 4035).

<sup>70</sup> Sokolina, Cilec and Vis: FWS-69 (T 4043).

<sup>71</sup> Dr Amir Berberkic (T 3725-3727).

<sup>72</sup> Osman Subašić (Ex P 286, pp 4063-4066).

<sup>73</sup> Osman Subašić (Ex P 286, pp 4069-4070).

<sup>74</sup> Osman Subašić (Ex P 286, p 4069).

<sup>75</sup> FWS-96 (Ex P 186, pp 2501-2502, 2504).

<sup>76</sup> *Ibid.*

<sup>77</sup> FWS-96 (Ex P 186, pp 2504-2505, 2511-2512).

27. After the Serb take-over in and around Foca, there was a noticeable presence of Serb soldiers and Serb paramilitary formations.<sup>78</sup> Immediately after the Serb take-over, restrictions were imposed on the non-Serb inhabitants. Muslims were referred to by Serb soldiers by the derogatory term "balija",<sup>79</sup> and cursed when being arrested.<sup>80</sup>

28. It was announced on the radio during the second half of April 1992 that the administration of the entire municipality of Foca would be run by the Serbs.<sup>81</sup> From April 1992, Muslims were laid off from their jobs or were prevented or discouraged from reporting to work.<sup>82</sup> Those who had held management positions prior to the conflict found themselves fired or replaced by Serbs.<sup>83</sup> Although the Serb Crisis Staff ordered Serbs to return to work sometime at the end of April or beginning of May 1992,<sup>84</sup> Muslims were not allowed to do so.<sup>85</sup>

29. Restrictions were placed on the movement of non-Serbs. A police car with a loudspeaker went through the town announcing that Muslims were not allowed to move about the town.<sup>86</sup> A similar announcement was made over the radio.<sup>87</sup> At the same time, the Serb population could move around freely,<sup>88</sup> with the exception of a night curfew from 8.00 pm to 6.00 am imposed on all inhabitants.<sup>89</sup> Muslims were forbidden to meet with each other, and had their phone lines cut off.<sup>90</sup> In April and May 1992, Muslims stayed in apartments in Foca under virtual house arrest, either in hiding or at the order of Serb soldiers.<sup>91</sup> Houses such as "Planika's" and "Šandal's" were used as interim detention

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<sup>78</sup> FWS-113 (T 2518); Safet Avdic (Ex P 123, p 659).

<sup>79</sup> FWS-35 (T 2731); Muhamed Lisica (T 4834); Dr Amir Berberkic (T 3718); RJ (T 3827-3828); FWS-146 (T 3063, 3065).

<sup>80</sup> Safet Avdic (Ex P 123, p 679); FWS-73 (T 3192, 3209); Dr Amir Berberkic (T 3730); FWS-69 (T 4049); Juso Taranin (T 3005-3007).

<sup>81</sup> FWS-113 (T 2519).

<sup>82</sup> FWS-96 (Ex P 186, p 2498); FWS-215 (T 831-832); FWS-139 (T 316); FWS-66 (T 1061); FWS-35 (T 2740); FWS-69 (T 4030-4032); FWS-33 (Ex P 106, pp 485-486); FWS-138 (T 2039-2040); RJ (T 3823-3825, 3833, 3839); Dževad S Lojo (T 2527); Ekrem Zekovic (T 3435-3436).

<sup>83</sup> RJ (T 3840); Dževad S Lojo (T 2526); Safet Avdic (Ex P 123, T 673).

<sup>84</sup> Slobodan Solaja (T 5495).

<sup>85</sup> Safet Avdic (Ex P 123, pp 672-673); FWS-249 (Ex P 161, p 2087).

<sup>86</sup> FWS-03 (T 2230-2231); FWS-139 (T 316-317); FWS-35 (T 2739); Juso Taranin (T 3036-3037); Ekrem Zekovic (T 3437, 3440, 3519); RJ (T 3840); FWS-249 (Ex P 161, p 2096); Dževad S Lojo (T 2527).

<sup>87</sup> Juso Taranin (T 3048); Ekrem Zekovic (T 3436).

<sup>88</sup> FWS-139 (T 316-317).

<sup>89</sup> Divljan Lazar (T 6012); Slobodan Jovancevic (T 5572); Zoran Mijovic (T 6402); Zarko Vukovic (T 6759); FWS-66 (T 1063).

<sup>90</sup> Ekrem Zekovic (T 3437); FWS-33 (Ex P 106, p 488); FWS-249 (Ex P 161, p 2096).

<sup>91</sup> Rasim Taranin (T 1693-1694); FWS-104 (T 2198-2200); FWS-35 (T 2718-2719, 2721-2722, 2730-2731, 2733, 2736); RJ (T 3840); Muhamed Lisica (T 4825-4827); Dževad S Lojo (T 2633). The evidence led by the Defence that Muslims were restricted to their apartments for their own safety is rejected (Zoran Mijovic T 6389).

centres by the Serb military.<sup>92</sup> People wishing to leave Foca were required to get papers from the SUP (Secretariat of the Interior) permitting them to go.<sup>93</sup> Military checkpoints were established, controlling access in and out of Foca and its surrounding villages.<sup>94</sup>

30. In April and May 1992, Muslim households were searched by the Serb military police or soldiers for weapons, money and other items.<sup>95</sup> Serb houses were not searched,<sup>96</sup> or at most were searched superficially.<sup>97</sup> Muslims were ordered to surrender their weapons while Serbs were allowed to keep theirs.<sup>98</sup> Muslim businesses were looted or burned,<sup>99</sup> or had equipment confiscated.<sup>100</sup>

31. During the attack, neighbourhoods were destroyed systematically. 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.<sup>101</sup> Donje Polje,<sup>102</sup> the largely Muslim neighbourhood of Šukovac,<sup>103</sup> and Muslim houses in Kamerici<sup>104</sup> and in Granovski Sokak<sup>105</sup> were burned. The old town neighbourhood of Prijeka Caršija, with its oriental-Islamic style market, was burned down on or around 12 April 1992.<sup>106</sup> Some Serb houses were also burned down during the conflict, including that of the Accused.<sup>107</sup> Serb soldiers later burned Muslim

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<sup>92</sup> Muhamed Lisica (T 4825-4827).

<sup>93</sup> FWS-85 (T 580); FWS-33 (Ex P 106, pp 487-488). See also Ex D 40 which refers to the Operative Staff/Executive Committee of the Serbian Municipality of Foca. It contains an order for lists to be made identifying "loyal citizens" who would be allowed to leave by the authorities.

<sup>94</sup> FWS-162 (T 1342-1343); FWS-58 (T 2673).

<sup>95</sup> Safet Avdic (Ex P 123, p 670); FWS-215 (T 858); FWS-139 (T 317); FWS-182 (T 1579-1582); FWS-3 (T 2229-2230); Dževad S Lojo (T 2528); FWS-35 (T 2729, 2731, 2736); Ekrem Zekovic (T 3438); FWS-86 (T 1453, 1456); FWS-58 (T 2675, 2677) and FWS-249 (Ex P 161, pp 2093-2095). Juso Taranin (T 3037) said that the military police were searching for a radio transmitter.

<sup>96</sup> Juso Taranin (T 3038, 3048).

<sup>97</sup> FWS-249 (Ex P 161, p 2093).

<sup>98</sup> FWS-86 (T 1448); FWS-182 (T 1579-1582); Rasim Taranin (T 1692-1693); FWS-69 (T 4037-4040).

<sup>99</sup> FWS-162 (T 1340, 1346); FWS-182 (T 1575); FWS-73 (T 3188-3192, 3284).

<sup>100</sup> FWS-249 (Ex P 161, pp 2117, 2121).

<sup>101</sup> FWS-249 (Ex P 161, pp 2080-2081); FWS-66 (T 1061); FWS-111 (T 1188); FWS-86 (T 1457); FWS-113 (T 2529); Safet Avdic (Ex P 123 pp 674-676); FWS-138 (T 2020); Dr Amir Berberkic (T 3728); RJ(T 3842).

<sup>102</sup> FWS-139 (T 313, 315); FWS-33 (Ex P 106, pp 469, 486-487); FWS-A (T 5533); FWS-54 (T 727); FWS-111 (T 1191-1192); Safet Avdic (Ex P 123, pp 661-664).

<sup>103</sup> FWS-215 (T 834); FWS-A (T 5533).

<sup>104</sup> FWS-89 (T 4657).

<sup>105</sup> FWS-111 (T 1191-1192).

<sup>106</sup> See also FWS-33 (Ex P 106, pp 466, 470, 527); Safet Avdic (Ex P 123, pp 661-662); FWS-215 (T 833); Dževad S Lojo (T 2529).

<sup>107</sup> FWS-66 (T 1140); FWS-111 (T 1188); FWS-215 (T 930); Slobodan Jovancevic (T 5557); FWS-138 (T 2121); FWS-113 (T 2529); FWS-33 (Ex P 106, p 531); FWS-A (T 5533); Vitomir Drakul (T 5693); Risto Ivanovic (T 6080); Miladin Matovic (T 6422); Arsenije Krnojelac (T 6912-6913); Bozo Drakul (T 7171-7173); Bozidar Krnojelac (T 7364); Slavica Krnojelac (T 7495).

houses not destroyed by Serb shelling.<sup>108</sup> On one occasion, Muslim houses were found devastated beside an untouched Serb apartment identified with a note saying "Serb apartment – do not torch".<sup>109</sup> As Muslim houses burned, fire engines protected Serb houses.<sup>110</sup>

32. Other Muslim houses were dismantled for the materials,<sup>111</sup> or reallocated to Serbs who had lost their own homes.<sup>112</sup>

33. Several mosques in Foca town and municipality were burned or otherwise destroyed.<sup>113</sup> The Aladža mosque dating from 1555 and under UNESCO protection was blown up,<sup>114</sup> and the mosque in the Granovski Sokak neighbourhood was destroyed.<sup>115</sup> The mosque in Jelec was burned and its minaret destroyed.<sup>116</sup> Serb fire brigades stood by and watched as mosques burned.<sup>117</sup>

34. Following the Serb take-over of Foca town, non-Serb civilians were physically beaten by Serb soldiers and military police.<sup>118</sup> Civilians were beaten upon arrest and during transportation to detention facilities from neighbourhoods in town or from villages in the municipality.<sup>119</sup> On one occasion, a Serb soldier severely kicked and beat with a chair three patients in Foca hospital after learning that they were Muslim. The beating stopped only when the doctor intervened and called the police.<sup>120</sup> On 31 October 1992, a group of 35 non-Serb detainees was transferred from the KP Dom to Kalinovik in a military lorry. On their way to the Kalinovik police station, the detainees were beaten and at least one was seriously injured.<sup>121</sup>

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<sup>108</sup> Safet Avdic (Ex P 123, pp 674-675); FWS-54 (T 727-728).

<sup>109</sup> RJ (T 3826).

<sup>110</sup> FWS-249 (Ex P 161, pp 2099, 2166-2167); Safet Avdic (Ex P 123, p 665).

<sup>111</sup> FWS-73 (T 3188).

<sup>112</sup> FWS-139 (T 416).

<sup>113</sup> FWS-66 (T 1061); FWS-111 (T 1192-1193); FWS-139 (T 315-316); FWS-73 (T 3187); Safet Avdic (Ex P 123, p 669); FWS-54 (T 728); Rasim Taranin (T 1710, 1720).

<sup>114</sup> FWS-33 (Ex P 106, p 487); FWS-249 (Ex P 161, pp 2133-2134); FWS-96 (Ex P 186, p 2550); Safet Avdic (Ex P 123, p 668).

<sup>115</sup> FWS-111 (T 1191-1192).

<sup>116</sup> FWS-69 (T 4054); FWS-249 (Ex P 161, p 2133).

<sup>117</sup> RJ (T 3825); Safet Avdic (Ex P 123, p 665).

<sup>118</sup> FWS-144 (T 2315-2316); RJ (T 3901).

<sup>119</sup> FWS-215 (T 854-856); FWS-66 (T 1064-1066); FWS-182 (T 1586); Juso Taranin (T 3004-3006, 3008, 3044); FWS-109 (T 2359-2361, 2364); FWS-58 (T 2701-2702); FWS-71 (T 2820-2822, 2824); FWS-73 (T 3216-3217, 3263); RJ (T 3861); FWS-69 (T 4054-4056).

<sup>120</sup> FWS-146 (T 3063-3065, 3074, 3089); Nezir Cengic (T 4688-4690, 4693, 4701-4703).

<sup>121</sup> FWS-104 (T 2194-2197).

35. In mid-June 1992, about 27 Muslim civilians, mostly women and children, were killed in the ethnically mixed Cohodor Mahala neighbourhood.<sup>122</sup> More civilians were killed in Jelec,<sup>123</sup> Mješaja/Trošanj<sup>124</sup> and Pilipovici.<sup>125</sup> The bodies of others were found floating in the Drina River.<sup>126</sup> KP Dom detainees who were assigned to work duty at the riverbank were made to push bodies downstream using planks and sticks.<sup>127</sup>

36. Non-Serbs were arrested throughout the municipality of Foca. Muslim men were rounded up in the streets, separated from the women and children and from the Serb population.<sup>128</sup> Others were arrested in their apartments or in the houses of friends and relatives,<sup>129</sup> taken away from their workplaces,<sup>130</sup> or dragged from their hospital beds.<sup>131</sup>

37. During the conflict, many of the Muslims arrested were taken to be detained at the Territorial Defence military warehouses at Livade.<sup>132</sup> Around 14 or 15 April 1992, Muslims and some Serbs were arrested in the centre of Foca town. While the Serbs were allowed to return home after a few hours, the Muslims were required to stay.<sup>133</sup>

38. Between 14 and 17 April 1992, Muslim civilians from other areas of Foca town were arrested and detained in Livade, including several doctors and medical staff from Foca hospital.<sup>134</sup> During the arrests, several of the detainees were severely beaten up and injured.<sup>135</sup>

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<sup>122</sup> FWS-33 (Ex P 106, pp 491-494).

<sup>123</sup> See par 24, *supra*.

<sup>124</sup> See par 26, *supra*.

<sup>125</sup> See par 25, *supra*.

<sup>126</sup> Ex P 287 (under seal); Ex P 288, Ex P 289, Ex P 290. See also Osman Subašić (Ex P 286, pp 4101-4110, 4140); Dr Amir Berberkic (T 3809-3810).

<sup>127</sup> Ekrem Zekovic (T 3545); FWS-250 (T 5051-5054); Ex P 9/1.

<sup>128</sup> Dževad Lojo (T 574); FWS-215 (T 834); FWS-54 (T 730); FWS-139 (T 318); FWS-86 (T 1454); FWS-182 (T 1582); FWS-142 (T 1816); Ahmet Hadzimosic (T 1936); FWS-144 (T 2296); FWS-109 (T 2352); FWS-120 (T 3114).

<sup>129</sup> FWS-66 (T 1066); FWS-198 (T 943); FWS-215 (T 827, 856); FWS-54 (T 729); Dževad Lojo (T 551); FWS-86 (T 1453).

<sup>130</sup> FWS-111 testified that he, the director of his working place and the other Muslim worker were taken to the basement, that their hands were tied with bandages and they were taken out through the side door of the building (T 1195-1196). FWS-172 testified that Dr Aziz Torlak was taken away from the hospital on 24 April and that he himself was taken away with two colleagues, Enver Cemo and Izet Causevic, on 25 April from his working place (T 4554).

<sup>131</sup> Dr Amir Berberkic testified that he had not yet recovered from his leg wounds and was not able to stand on his feet without crutches when he was taken from Foca hospital to the KP Dom (T 3731). Safet Avdic corroborated the evidence that sick people were brought directly from the hospital (T 682).

<sup>132</sup> FWS-33 (Ex P 106, p 484); Bozo Drakul (T 7250).

<sup>133</sup> FWS-33 (Ex P 106, pp 473-478, 511, 619). See also, FWS-142 (T 1816-1818).

<sup>134</sup> FWS-33 (Ex P 106, p 478).

<sup>135</sup> FWS-33 (Ex P 106, p 479); FWS-111 (T 1195-1203); FWS-182 (T 1583-1586).

39. Muslim women were transferred to Buk Bijela, Foca High School and Partizan Sports Hall. Serb soldiers repeatedly raped Muslim women and girls, either at these locations or elsewhere.<sup>136</sup> KP Dom detainees who took part in a failed exchange in Cajnice met some of the rape victims there, who told them about their ordeal.<sup>137</sup>

40. On 17 April 1992, all the male Muslim civilians detained at Livade were transferred to the KP Dom, which had served as a prison prior to the conflict. At this time, soldiers from the Užice Corps in Serbia were running the facility, the control of which was transferred to local Serbs during the course of the following few weeks.<sup>138</sup> Other non-Serb civilians from the municipality were also unlawfully arrested and detained in the KP Dom.<sup>139</sup> Several of them arrived at the KP Dom severely beaten and injured.<sup>140</sup>

41. The illegal arrest and imprisonment of non-Serb civilian males was carried out on a massive scale and in a systematic way. Hundreds of Muslim men, as well as a few other non-Serb civilians, were detained at the KP Dom without being charged with any crime.<sup>141</sup> At all times from the end of the fighting until the end of 1994, up to several hundred Muslim civilian men were thus arbitrarily interned at the KP Dom.<sup>142</sup> They were detained there for periods lasting from four months to more than two and a half years.<sup>143</sup>

42. Apart from a short period at the beginning of their detention at the KP Dom, Muslim detainees were denied any contact with the outside world or with their families,<sup>144</sup> and (for a long time) with the Red Cross.<sup>145</sup> The legality of their detention was never reviewed by the Serb authorities.

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<sup>136</sup> FWS-96 (Ex P 186, pp 2516, 2531-2532, 2560, 2597, 2599-2600).

<sup>137</sup> FWS-186 (T 1534).

<sup>138</sup> FWS-33 (Ex P 106, pp 506-507); Safet Avdic (Ex P 123, p 691).

<sup>139</sup> Safet Avdic (Ex P 123, pp 676, 757); FWS-249 (Ex P 161, pp 2102-2107); FWS-58 (T 2679-2684).

<sup>140</sup> See for example FWS-33 (Ex P 106, pp 481-482, 483).

<sup>141</sup> See pars 116-124, *infra*.

<sup>142</sup> At its peak in the summer of 1992, there were about 500-600 detainees at 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. See, eg, FWS-66 (T 1078); FWS-111 (T 1218); FWS-162 (T 1313); FWS-139 (T 329-330); FWS-54 (T 743); FWS-85 (T 583-584); FWS-65 (T 548); FWS-86 (T 1531-1532); FWS-138 (T 2035, 2038); FWS-104 (T 2205); FWS-03 (T 2273); FWS-71 (T 2893); FWS-113 (T 2560); Ekrem Zekovic (T 3682); RJ (T 3898); FWS-69 (T 4163-4164); FWS-33 (T 508); Safet Avdic (Ex P 123, pp 686-687); Muhamed Lisica (T 4850-4851). See also par 35, *supra*.

<sup>143</sup> For instance, FWS-139 (T 319); FWS-66 (T 1068); FWS-82 (T 1700); FWS-73 (T 3194); FWS-250 (T 5021) were detained at the KP Dom for almost or more than two and a half years.

<sup>144</sup> See par 134, *infra*; Safet Avdic (Ex P 123, pp 689-690).

<sup>145</sup> Several detainees were in fact hidden from the Red Cross; see, FWS-111 (T 1267-1268); FWS-215 (T 880-881); FWS-65 (T 530); FWS-139 (T 332); FWS-162 (T 1437); FWS-182 (T 1588); FWS-82 (T 1750-1752); FWS-71 (T 2897); FWS-214 (T 3935-3937).

43. The conditions under which non-Serbs were detained were below any legal standard regulating the treatment of civilians in times of armed conflict.<sup>146</sup> Non-Serb detainees were given insufficient food, as a result of which many of them suffered substantial weight loss, sometimes more than 40 kilograms or up to a third of their weight.<sup>147</sup> They were kept in various rooms, including solitary confinement cells, which were not heated and were extremely cold during the harsh winter of 1992; clothes which they had made from spare blankets to keep warm were confiscated by guards.<sup>148</sup>

44. Hygienic conditions were deplorable and washing facilities minimal,<sup>149</sup> while medical care was inadequate and medicine in very short supply.<sup>150</sup> A basic medical service was provided but those in need of urgent medical attention were left unattended or given insufficient treatment. At least one detainee died as a result of the lack of or late medical care.<sup>151</sup>

45. Non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back.<sup>152</sup> Some, however, were taken out to work knowing that they would receive additional and much needed food if they did.<sup>153</sup>

46. Many of the detainees were subjected to beatings and other forms of mistreatment, sometimes randomly, sometimes as a punishment for minor breaches of the prison regulations or in order to obtain information or a confession from them.<sup>154</sup> The screams and moans of those being beaten could be heard by other detainees, instilling fear among all detainees.<sup>155</sup> Many were returned to their rooms with visible wounds and bruises resulting from the beating.<sup>156</sup> Some were unable to walk or talk for days.

47. The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They were not mistreated like the non-Serb detainees. The quality and quantity of their food was somewhat better, sometimes including

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<sup>146</sup> See pars 122-124, 133-144, *infra*.

<sup>147</sup> See pars 139, 149-155, 158, 160-165, *infra*.

<sup>148</sup> See pars 137-138, *infra*.

<sup>149</sup> See par 136, *infra*.

<sup>150</sup> See pars 140-141, *infra*.

<sup>151</sup> See FWS-66 (T 1086-1088); FWS-111 (T 1230-1234); FWS-162 (T 1393-1395); FWS-54 (T 750); FWS-139 (T 344-345); FWS-182 (T 1618-1619, 1686); FWS-08 (T 1782-1783, 1806).

<sup>152</sup> See par 134, *infra*.

<sup>153</sup> See par 374, *infra*.

<sup>154</sup> See pars 142, 217-306, *infra*.

<sup>155</sup> See par 143, *infra*.

<sup>156</sup> See pars 250, 260, 287, *infra*.

additional servings. They were not beaten or otherwise abused, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees.<sup>157</sup>

48. Many non-Serb detainees were taken out of the KP Dom during the period covered by the Indictment, allegedly to be exchanged or in order to carry out certain tasks such as picking plums. Many of them did not come back and were never seen again.<sup>158</sup>

49. The expulsion, exchange or deportation of non-Serbs, both detainees at the KP Dom and those who had not been detained, was the final stage of the Serb attack upon the non-Serb civilian population in Foča municipality. Initially there was a military order preventing citizens from leaving Foča.<sup>159</sup> However, most of the non-Serb civilian population was eventually forced to leave Foča. In May 1992, buses were organised to take civilians out of town,<sup>160</sup> and around 13 August 1992 the remaining Muslims in Foča, mostly women and children, were taken away to Rožaje, Montenegro.<sup>161</sup> On 23 October 1992, a group of women and children from the municipality, having been detained for a month at Partizan Sports Hall, were deported by bus to Goražde.<sup>162</sup> 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 who had been married to a Muslim.<sup>163</sup> In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serbian region ethnically cleansed of Muslims. By the end of the war in 1995, Foča had become an almost purely Serb town. Foča was renamed "Srbinje" after the conflict, meaning "Serb town".<sup>164</sup>

50. The detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foča municipality.

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<sup>157</sup> See pars 139, 442-443, *infra*.

<sup>158</sup> See pars 477-485, *infra*.

<sup>159</sup> Ex D 40, Zoran Mijovic.

<sup>160</sup> Ekrem Zekovic (T 3615); Juso Taranin (T 3030-3041).

<sup>161</sup> FWS-104 (T 2198-2199).

<sup>162</sup> Ex P 291; see also Osman Subašić (Ex P 286, pp 4111-4112).

<sup>163</sup> Amor Masovic (T 4239).

<sup>164</sup> FWS-96 (Ex P 186, p 2499).

## **B. General requirements under Article 3 of the Statute**

51. Two preliminary requirements must be satisfied for the application of Article 3 of the Statute.<sup>165</sup> First, an armed conflict, either internal or international,<sup>166</sup> must have existed at the time of the alleged commission of the offences.<sup>167</sup> An “armed conflict” is defined to exist “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>168</sup> Second, a close nexus must exist between the alleged offence and the armed conflict.<sup>169</sup> The “required relationship” is satisfied where the alleged crimes were “closely related to the hostilities”.<sup>170</sup>

52. In addition, four requirements specific to Article 3 must be satisfied, namely,

(i) the violation must constitute an infringement of a Rule of international humanitarian law; (ii) the Rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...]; (iii) the violation must be “serious”, that is to say, it must constitute a breach of a Rule protecting important values, and the breach must involve grave consequences for the victim. [...]; (iv) the violation of the Rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>171</sup>

Accordingly, depending on the specific basis of the relevant charges brought under Article 3, some of the requirements for the application of Article 3 may differ.<sup>172</sup> In the present case, the basis of the torture,<sup>173</sup> cruel treatment<sup>174</sup> and murder<sup>175</sup> charges under Article 3 is common Article 3 of the 1949 Geneva Conventions (“common Article 3”). It is well established by the jurisprudence of the Tribunal that Article 3 of the Tribunal’s Statute

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<sup>165</sup> *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995 (“*Tadić* Jurisdiction Decision”), pars 65, 67. Although these requirements are relevant to other Articles of the Statute as well, only Article 3 is of immediate concern.

<sup>166</sup> *Tadić* Jurisdiction Decision, par 137, confirmed in *Prosecutor v Delalić and Others*, IT-96-21-A, 20 Feb 2001 (“*Delalić* Appeal Judgment”), pars 140, 150.

<sup>167</sup> *Tadić* Jurisdiction Decision, par 67.

<sup>168</sup> *Tadić* Jurisdiction Decision, par 70.

<sup>169</sup> *Tadić* Jurisdiction Decision, par 70; *Prosecutor v Kunarac and Others*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 Feb 2001 (“*Kunarac* Trial Judgment”), par 402; *Prosecutor v Delalić and Others*, IT-96-21-T, Judgment, 16 November 1998 (“*Delalić* Trial Judgment”), par 193; *Prosecutor v Blaškić*, IT-95-14-T, Judgment, 3 Mar 2000, (“*Blaškić* Trial Judgment”), pars 65, 69.

<sup>170</sup> *Tadić* Jurisdiction Decision, par 70.

<sup>171</sup> *Tadić* Jurisdiction Decision, par 94; endorsed in *Prosecutor v Aleksovski*, IT-95-14/1-T, Judgment, 25 June 1999 (“*Aleksovski* Trial Judgment”), par 20.

<sup>172</sup> *Kunarac* Trial Judgment, par 404.

<sup>173</sup> Count 4.

<sup>174</sup> Counts 7 and 15.

<sup>175</sup> Count 10.

includes violations of common Article 3.<sup>176</sup> Common Article 3 in relevant part reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...]; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples. (2) The wounded and the sick shall be collected and cared for. [...].

Another requirement for the application of any Article 3 charge based on common Article 3 is that the victims must not at that time be taking part in the hostilities.<sup>177</sup> Enslavement under Article 3 has been charged on the basis of a specific convention and customary international law, not on the basis of common Article 3.<sup>178</sup>

### C. General requirements under Article 5 of the Statute

53. The following elements constitute the general requirements which must be met for an act to constitute a crime against humanity:<sup>179</sup>

- (i) there must be an "attack";<sup>180</sup>

<sup>176</sup> The Appeals Chamber has consistently interpreted Article 3 to be a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 of the Statute. *Tadić* Jurisdiction Decision, par 89, confirmed in *Delalić* Appeal Judgment, pars 125,136.

<sup>177</sup> *Delalić* Appeal Judgment, par 420. There is the unresolved matter of whether the common Article 3 phrase "each Party to the conflict shall be bound to apply" means that only parties to a conflict or individuals acting for such parties are bound by common Article 3. See *Kunarac* Trial Judgment, par 407; *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 Sept 1998 ("Akayesu Trial Judgment"), pars 631, 633; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999 ("Kayishema and Ruzindana Trial Judgment") pars 175-176; *Prosecutor v Rutaganda*, ICTR-96-3-T, Judgment and Sentence, 6 Dec 1999 ("Rutaganda Trial Judgment") pars 97-98; *Prosecutor v Musema*, ICTR-96-13-T, Judgment and Sentence, 27 Jan 2000 ("Musema Trial Judgment") pars 266, 274; Pictet (gen ed), *Commentary to Geneva Convention IV*, ICRC, 1958, pp 26-44; remarks of Special Rapporteur in Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-B, Article 2A, Federal Political Department, pp 332; *contra* the views expressed in *Le Procureur c/Akayesu*, Affaire ICTR-96-4-A, Arrest, 1er Jun 2001, pars 12-28, 425-446. The Trial Chamber considers it unnecessary to resolve this matter. Assuming that a link between a principal offender and a party to the conflict is required, the Accused clearly acted for the Serb side to the conflict.

<sup>178</sup> Count 18.

<sup>179</sup> *Kunarac* Trial Judgment, par 410.

<sup>180</sup> *Prosecutor v Tadić*, IT-94-1-A, Judgment 15 July 1999 ("Tadić Appeal Judgment"), par 251; *Kunarac* Trial Judgment, pars 415-417; *Kayishema and Ruzindana* Trial Judgment, par 122.

- (ii) the acts of the accused must be part of the attack;<sup>181</sup>
- (iii) the attack must be directed against any civilian population;<sup>182</sup>
- (iv) the attack must be widespread or systematic;<sup>183</sup> and
- (v) the principal offender must know of the wider context in which his acts occur and know that his acts are part of the attack.<sup>184</sup>

Additionally, the Statute of the ICTY imposes a jurisdictional requirement that the crimes be “committed in armed conflict”.<sup>185</sup>

54. An “attack” can be defined as a course of conduct involving the commission of acts of violence.<sup>186</sup> The concept of “attack” is distinct and independent from the concept of “armed conflict”.<sup>187</sup> In practice, the attack could outlast,<sup>188</sup> precede, or run parallel to the armed conflict, without necessarily being a part of it.<sup>189</sup> That is not to say that, in the context of an armed conflict, the laws of war play no role in the Tribunal’s determination as to whether the attack was, or was not, “directed against any civilian population”. On the contrary, that body of law plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether a civilian population may be said to have been targeted as such.

55. The acts of the accused need to be objectively part of the “attack” against the civilian population,<sup>190</sup> but need not be committed when that attack is at its height. These acts must not be isolated, but must form part of the attack.<sup>191</sup> A crime committed several months after, or several kilometres away from, the main attack against the civilian population could still, if sufficiently connected, be part of that attack.<sup>192</sup>

<sup>181</sup> *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, par 418.

<sup>182</sup> *Kunarac* Trial Judgment, pars 421-426; *Tadic* Trial Judgment, pars 635-644.

<sup>183</sup> *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, pars 427-431.

<sup>184</sup> *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, pars 433-435.

<sup>185</sup> See *Tadic* Jurisdiction Decision, par 141; *Tadic* Appeal Judgment, par 249.

<sup>186</sup> *Kunarac* Trial Judgment, par 415.

<sup>187</sup> *Tadic* Appeal Judgment, par 251.

<sup>188</sup> *Kunarac* Trial Judgment, par 420.

<sup>189</sup> *Tadic* Appeal Judgment, par 251.

<sup>190</sup> *Kunarac* Trial Judgment, pars 418, 592.

<sup>191</sup> *Prosecutor v Kupreskic and Others*, IT-95-16-T, Judgment, 14 Jan 2000 (“*Kupreskic* Trial Judgment”), par 550.

<sup>192</sup> See for example *Kunarac* Trial Judgment, par 417 ff.

56. The victims of the acts must be civilians and the attack must be directed against a “civilian population”.<sup>193</sup> A population may be civilian even if non-civilians are present – it must simply be predominantly civilian in nature. The definition of civilian is expansive, including individuals who at one time performed acts of resistance as well as persons *hors de combat* when the crime is perpetrated.<sup>194</sup>

57. The acts which form part of the attack must be either widespread or systematic. The adjective “widespread” connotes the large-scale nature of the attack and the number of victims,<sup>195</sup> while “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.<sup>196</sup>

58. This Trial Chamber is satisfied that there is no requirement under customary international law that the acts of the accused person (or of those persons for whose acts he is criminally responsible) be connected to a policy or plan.<sup>197</sup> Such plan or policy may nevertheless be relevant to the requirement that the attack must be widespread or systematic and that the acts of the accused must be part of that attack.<sup>198</sup>

59. In addition to the intent to commit the underlying offence, the accused must know that there is an attack directed against the civilian population and he must know that his acts

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<sup>193</sup> *Kunarac* Trial Judgment, pars 421-426.

<sup>194</sup> *Tadic* Trial Judgment, pars 638, 643; *Prosecutor v Jelusic*, IT-95-10-T, Judgment, 14 Dec 1999 (“*Jelusic* Trial Judgment”), par 54; *Blaškić* Trial Judgment, par 214; *Kunarac* Trial Judgment, 425.

<sup>195</sup> See *Kunarac* Trial Judgment, par 428; *Tadic* Trial Judgment, par 648; *Blaškić* Trial Judgment, par 206; *Akayesu* Trial Judgment, par 580.

<sup>196</sup> *Kunarac* Trial Judgment, par 429. See also *Blaškić* Trial Judgment, par 203; *Tadic* Trial Judgment, par 648.

<sup>197</sup> See fn 1109 in *Kunarac* Trial Judgment, at page 144 which relies, *inter alia*, upon the following authorities: the Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg 30 September/1 October 1946 (“Nuremberg Judgment”), reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945–1 October 1946, Vol 1, pp 84, 254, 304 (with respect to Streicher) and pp 318-319 (with respect to Von Schirach); Articles 9 and 10 of the Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, Berlin, 6 October 1945 (“Nuremberg Charter”); the Control Council Law No 10 case of the court at Stade (Germany) ILR 14/1947, pp 100-102; Supreme Court of the British Zone, OGH br Z, Vol I, p 19 and Vol II, p 231; *In re Altstötter*, ILR 14/1947, pp 278, 284; the Dutch case *In re Ahlbrecht*, ILR 16/1949, p 396; the Australian case *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501, Case FC 91/026 at 1991 Aust Highct LEXIS 63, BC9102602; Yearbook of the International Law Commission (“ILC”) (1954); Vol II, p 150; *Report of the ILC on the Work of its 43<sup>rd</sup> Sess*, 29 Apr–19 July 1991, Supp No 10 (UN Doc No A/46/10), pp 265-266, of its 46<sup>th</sup> sess, 2 May–22 July 1994, Supp No 10 (UN Doc No A/49/10), pp 75-76, of its 47<sup>th</sup> sess, 2 May–21 July 1995, pp 47, 49, 50, and of its 48<sup>th</sup> sess, 6 May–26 July 1996, Supp No 10 (UN Doc No A/51/10), pp 93, 95-96.

<sup>198</sup> See *Prosecutor v Kordic and Cerkez*, Case IT-95-14/2-T, Judgment, 26 Feb 2001 (“*Kordic and Cerkez* Trial Judgment”), par 182; *Kunarac* Trial Judgment, par 432.

are part of that attack, or at least take the risk that they are part thereof.<sup>199</sup> This, however, does not entail knowledge of the details of the attack.<sup>200</sup> It is sufficient that, through his acts or the function which he willingly accepted, he knowingly took the risk of participating in the implementation of that attack.<sup>201</sup>

#### **D. Findings in respect of the general requirements of Articles 3 and 5 of the Statute**

60. On the basis of the findings of fact made in Section A, the Trial Chamber is satisfied that all the general requirements of both Article 3, including common Article 3, and Article 5 of the Statute have been met.

61. In particular, the Trial Chamber is satisfied that, at the time and place relevant to the Indictment, there was an armed conflict and that the acts of the Accused were closely related to that armed conflict.<sup>202</sup> The acts with which the Accused is charged were committed as a direct result, in furtherance of and under the guise of the hostilities. The Trial Chamber is satisfied that a widespread and systematic attack by the Serb forces against the non-Serb civilian population took place in and around Foca in the period covered by the Indictment, and that the acts which took place at the KP Dom were part thereof. This attack included the systematic rounding up and imprisonment of non-Serb civilians, the burning and destruction of non-Serb, mostly Muslim, properties, the demolition of several mosques in the Fo-a town and municipality, the unlawful killing of non-Serb civilians, as well as the torture and mistreatment of many male non-Serb detainees at the KP Dom.<sup>203</sup>

62. The Trial Chamber is also satisfied that the Accused knew of the attack upon the non-Serb civilian population of Foca and surrounding areas. His role and position as the warden of the KP Dom, his continued presence at the KP Dom where the crimes were committed, his repeated contacts with the military and the general knowledge among Serbs about the situation of the non-Serb population at the time in Foca, all point to the conclusion that the Accused did in fact know that the Muslim civilian population was systematically

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<sup>199</sup> See *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, par 434; *Tadic* Trial Judgment, par 659; *Kupreskic* Trial Judgment, par 556; *Blaškic* Trial Judgment, pars 247, 251; *Kordic and Cerkez* Trial Judgment, par 185.

<sup>200</sup> *Kunarac* Trial Judgment, par 434.

<sup>201</sup> *Kunarac* Trial Judgment, par 434; *Blaškic* Trial Judgment, par 251.

<sup>202</sup> See Matters not in dispute, par 8.

<sup>203</sup> See pars 12-50, *supra*.

targeted and abused in many ways. The Accused conceded that he knew that the mosques in Foca were being destroyed and that prison camps for the detention of Muslims were set up in other municipalities of the area which subsequently became Republika Srpska.<sup>204</sup> He also conceded that he was aware of the danger to non-Serbs if they remained in Foca town and municipality, and that he knew that by the middle or the end of August 1992 most non-Serbs had been forced out of the area.<sup>205</sup> The Trial Chamber is further satisfied that the Accused knew about the conditions of the non-Serb detainees, the beatings and the other mistreatment to which they were subjected while detained at the KP Dom, and that he knew that the mistreatment which occurred at the KP Dom was part of the attack upon the non-Serb population of Foca town and municipality.<sup>206</sup>

63. With respect to the cruel treatment, torture, murder and enslavement charges under Article 3 of the Statute, the Trial Chamber finds that the four requirements specific to the application of Article 3 have been met.<sup>207</sup>

64. In particular, the offences of cruel treatment, torture and murder, as part of common Article 3, are violations of international humanitarian law.<sup>208</sup> At the time relevant to the Indictment, common Article 3 was customary in nature.<sup>209</sup> While it is not clear from the Tribunal's jurisprudence whether *all* violations of common Article 3 would be serious,<sup>210</sup> there is no doubt that cruel treatment, torture and murder constitute serious offences.<sup>211</sup> As offences constituting serious violations of common Article 3, cruel treatment, torture and murder entail individual criminal responsibility under customary international law.<sup>212</sup>

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<sup>204</sup> T 7887-7888, 7895.

<sup>205</sup> T 7890 7892.

<sup>206</sup> See pars 125-127, 169-173, 308-320, 486-502 (where findings in relation to individual charges are made), *infra*.

<sup>207</sup> See pars 52, 60-62, *supra*.

<sup>208</sup> *Delali*} Appeal Judgment, pars 143, 150.

<sup>209</sup> *Tadi*} Jurisdiction Decision, par 98; *Delali*} Appeal Judgment, par 143; See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, par 35.

<sup>210</sup> *Tadi*} Jurisdiction Decision, par 134 ("[...] customary international law imposes criminal liability for *serious* violations of common Article 3 [...]". (emphasis added)); *Kunarac* Trial Judgment, par 408.

<sup>211</sup> *Delali*} Appeal Judgment, pars 134, 147.

<sup>212</sup> *Tadi*} Jurisdiction Decision, pars 134; see also Chapter Sixteen of the SFRY Criminal Code, entitled "Criminal Acts Against Humanity and International Law", Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code falls within the said Chapter, and it provides as follows: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture; inhuman treatment [...], immense suffering or violation of bodily integrity or health [...] other illegal arrests and detention [...] forcible labour [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty." This Article gives effect to the provisions of Geneva Convention IV and Additional Protocols I and II; *Prosecutor v Tadi*}, IT-94-1-T, Sentencing Judgment, 14 July 1997, ("*Tadic* Sentencing Judgment") par 8; *Tadi*} Jurisdiction Decision, par 134; confirmed in *Delali*} Appeal Judgment, par 174.

These offences have also been committed against victims taking no active part in the hostilities at the relevant time.<sup>213</sup> The offence of slavery, charged on the basis of customary and treaty law and not common Article 3, also meets the four requirements specific to the application of Article 3.<sup>214</sup>

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<sup>213</sup> See, *inter alia*, pars 40-41, 61, *supra*.

<sup>214</sup> See reasoning and more detailed findings in par 350 ff, *infra*.

### III. GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

65. The Trial Chamber has assessed the evidence in this case in accordance with the Tribunal's Statute and its Rules of Procedure and Evidence ("Rules") and, where no guidance is given by those sources, in such a way as will best favour a fair determination of the case and which is consonant with the spirit of the Statute and the general principles of law.<sup>215</sup>

66. The Trial Chamber has applied to the Accused the presumption of innocence stated in Article 21(3) of the Statute, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the Accused, and, in accordance with Rule 87(A), the Prosecution must do so beyond reasonable doubt.

67. Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute was admitted pursuant to Rule 93(A) in the interests of justice.<sup>216</sup> Such evidence is similar to circumstantial evidence. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist.<sup>217</sup> Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion cannot be drawn.<sup>218</sup>

68. The Trial Chamber has taken the evidence given by the Accused into account in determining whether or not the Prosecution case should be accepted. His election to give evidence does not mean that the Accused accepted any onus to prove his innocence. Nor

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<sup>215</sup> Rule 89(B).

<sup>216</sup> Rule 93(A) limits the admission of such evidence to where it is in the interests of justice.

<sup>217</sup> *Delali*} Appeal Judgment, par 458.

<sup>218</sup> *Ibid.*

does it mean that a choice must be made between his evidence and that of the witnesses called by the Prosecution. The approach taken by the Trial Chamber has been to determine whether the evidence of the witnesses upon which the Prosecution relied should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence given by the Accused and the witnesses upon which the Defence relied.

69. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail. In determining whether any minor discrepancies should be treated as discrediting their evidence as a whole, the Trial Chamber has taken into account the fact that these events took place some nine years before the witnesses gave evidence. Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution more difficult, the lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.

70. In assessing the evidence of witnesses, the Trial Chamber has also taken into account the fact that many of the Prosecution witnesses relied upon notes made prior to the giving of their evidence, some recently and others closer to the events in question. In many cases, the notes made were made by reference to material which was not within the witness's own knowledge but which had been given to the witness by other persons. In such cases, the evidence of the witness was not the same as evidence given from a witness's own recollections, and the Trial Chamber has not given the evidence of such witnesses the same weight as evidence given from a witness's own recollection. Evidence of facts not within the testifying witness's own knowledge constitutes hearsay evidence and, whilst there is no prohibition against accepting such evidence, the Trial Chamber has been careful to scrutinise that evidence with care before determining to rely upon it, taking into account that such material is not capable of being tested by cross-examination, its source is not the subject of a solemn declaration, and its reliability may be affected by a potential compounding of errors of perception and memory.<sup>219</sup>

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<sup>219</sup> For example, the Trial Chamber and the Defence were informed by the Prosecution during the course of the proceedings that witness Muhamed Lisica had spoken to witness Ekrem Zekovic after that witness had given his evidence and prior to Muhamed Lisica giving his own evidence. The Prosecution claimed that the witnesses had

71. In some cases, only one witness has given evidence of an incident with which the Accused has been charged. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.<sup>220</sup> In such a situation, the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against the Accused.

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not discussed the trial. However, it was also disclosed by the witness Muhamed Lisica that, soon after his release from the KP Dom, he and witness Ekrem Zekovic met in Sarajevo and discussed the bloodstains on the Zastava Kedi vehicle (see pars 334-335, *infra*). On the basis of these conversations, witness Muhamed Lisica made a new statement to correct his earlier statement. In his new statement, he stated that he washed the vehicle alone whereas in his previous statement he claimed to have washed it with Ekrem Zekovic (T 4997-4999, 5010-5016). Rasim Taranin gave evidence that on 15 January 2001 he saw a portion of the trial from the public gallery. He only saw it briefly from the corner as he was asked to leave (T 1690). Ahmet Hadžimusic prepared his evidence in writing in 1999 when he knew that he would be coming to testify (MFI 15). He had not prepared himself for the statement he gave to investigators (T 1951, 1980, 1986-1988). Ekrem Zekovic prepared notes after his release from the KP Dom in 1994-1995. These notes were not comprehensive (T 3707). FWS-73 had spoken to other witnesses before giving evidence. The names are noted on Ex P 433 (T 3373-3375). FWS-172 gave evidence that he prepared a list of names of persons who disappeared just after he got out of prison. He compiled the list from memory and did so to enable him to answer the questions of families (T 4560). The list was entered into evidence (Exs P 299/P 299A/P 299A). The list was prepared on the basis of a joint shared memory (T 4611). FWS-73 gave evidence that he talked to a number of people prior to giving his evidence. They were witnesses who were to give evidence at trial. Their names were written down and tendered into evidence Ex P 433 (T 3373-3375). FWS-109 prepared a list of names of the persons taken out in the evenings about one month after his release (T 2386-2391, 2403 Ex P 421). Dževad S Lojo prepared notes prior to trial. He made notes in April 1993. The notes were compiled from his memory (T 2539-2540). However, the list of those names had been added to after he spoke to the Red Cross and saw their list of the missing (T 2453-2456). FWS-71 kept a private diary in the KP Dom which was taken from him when he was exchanged. About a month after he left, he wrote down notes which he later typed. He primarily relied on his own memory but also on the memory of others. The first notes he put down in December 1994. He consulted with the people who were in the camp with him and made the typed notes. He only had the typed notes with him when he gave evidence (T 2868-2873). FWS-162 prepared notes of the names of persons killed in the KP Dom (T 1397). FWS-137 made a list of the names of people who were taken out so that he could tell their families. The list was taken away from him when he left the KP Dom, and he made a new list and other notes when he knew he would be coming to the Tribunal. He made the original and the duplicate in 1993, Ex P 444 (T 4751-4556). FWS-215 made notes while detained at the KP Dom. They were taken away from him while detained at the KP Dom and reconstructed by him after his release (T 918-920).

<sup>220</sup> *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("Aleksovski Appeal Judgment"), par 62.

## IV. INDIVIDUAL CRIMINAL RESPONSIBILITY AND SUPERIOR RESPONSIBILITY

### A. Individual criminal responsibility under Article 7(1) of the Statute

72. Article 7(1) of the Tribunal's Statute provides that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

73. The Prosecution pleaded Article 7(1) in its entirety, and it includes within the terms of that Article the criminal responsibility of the Accused as a participant in various joint criminal enterprises. Such an approach is permitted by what was said by the Appeals Chamber in the *Tadic* Appeal Judgment:

191. [...] Although only some members of the group may physically perpetrate the criminal act, [...] the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.<sup>221</sup>

The Prosecution has sought to relate the criminal liability of a participant in a joint criminal enterprise who did not personally physically commit the relevant crime to the word "committed" in Article 7(1), but this would seem to be inconsistent with the Appeals Chamber's description of such criminal liability as a form of accomplice liability,<sup>222</sup> and with its definition of the word "committed" as "first and foremost the physical perpetration

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<sup>221</sup> *Tadic* Appeal Judgment, pars 191-192. This statement has been interpreted by the Prosecutor as meaning that an accused person who does not personally physically perpetrate the crime can still be held to have committed the crime when he or she participated in a joint criminal enterprise.

<sup>222</sup> *Tadic* Appeal Judgment, par 192.

of a crime by the offender himself".<sup>223</sup> For convenience, the Trial Chamber proposes to refer to the person who physically committed the relevant crime as the "principal offender".

74. The purpose behind the Prosecution's approach appears to be to classify the participant in a joint criminal enterprise who was not the principal offender as a "perpetrator" or a "co-perpetrator", rather than someone who merely aids and abets the principal offender. The significance of the distinction appears to be derived from the civil law, where a person who merely aids and abets the principal offender is subject to a lower maximum sentence.

75. The Trial Chamber does not accept that this distinction is necessary for sentencing in international law, and in particular holds that it is irrelevant to the sentencing practice of this Tribunal. The Appeals Chamber has made it clear that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.<sup>224</sup> The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a joint criminal enterprise with the principal offender must share that intent.<sup>225</sup>

76. Two recent decisions by Trial Chamber I have explored this issue of perpetration in some detail. In *Prosecutor v Krstic*, a distinction was drawn between an accomplice (as a secondary form of participation) and a co-perpetrator (as a direct and principal form of participation, but falling short of that of the principal offender).<sup>226</sup> In *Prosecutor v Kvočka*, a distinction was drawn between a co-perpetrator (who shares the intent of the joint criminal enterprise) and an aider and abettor (who merely has knowledge of the principal offender's

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<sup>223</sup> *Tadic* Appeal Judgment, par 188.

<sup>224</sup> *Delalić* Appeal Judgment, pars 429-430; *Aleksovski* Appeal Judgment, par 182.

<sup>225</sup> See *Prosecutor v Brdanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36 PT, 26 June 2001 ("*Brdanin and Talic* Decision on Form of Further Amended Indictment"), par 27, fn 108; see also *Prosecutor v Furundžija*, IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundžija* Trial Judgment"), pars 245, 249; *Kupreškić* Trial Judgment, par 772; *Tadic* Appeal Judgment, par 229; *Prosecutor v Furundžija*, IT-95-17/1-A, 21 July 2000 ("*Furundžija* Appeal Judgment"), par 118.

<sup>226</sup> *Prosecutor v Krstic*, IT-98-33-T, Judgment, 2 Aug 2001 ("*Krstic* Trial Judgment"), pars 642-643.

intent).<sup>227</sup> In determining the relevant category, the Trial Chamber said, the greater the level of participation, the safer it is to draw an inference that the particular accused shared the intent of the joint criminal enterprise.<sup>228</sup>

77. This Trial Chamber does not hold the same view as Trial Chamber I as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater sentence than the many functionaries who between them carry out the actual killing. Categorising offenders may be of some assistance, but the particular category selected cannot affect the maximum sentence which may be imposed and it does not compel the length of sentences which will be appropriate in the particular case. This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice.<sup>229</sup> This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadic*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice.<sup>230</sup> For convenience, however, the Trial Chamber will adopt the expression “co-perpetrator” (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender.

#### 1. Joint criminal enterprise

78. The *Tadic* Appeal Judgment identified three categories of criminal liability pursuant to a joint criminal enterprise. The first category is where all the participants in the joint criminal enterprise share the same criminal intent. The second category is similar but relates to the concentration camp cases. Neither the existence of this second category nor

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<sup>227</sup> *Prosecutor v Kvočka and Others*, IT-98-30/1-T, Judgment, 2 Nov 2001 (“*Kvočka* Trial Judgment”), pars 249, 284.

<sup>228</sup> *Kvočka* Trial Judgment, pars 287-289.

<sup>229</sup> The jurisprudence of the post-World War II cases surveyed by Trial Chamber I in *Kvočka* drew no distinction between the categories of co-perpetrator and aider and abettor in determining the criminal responsibility of the accused, as Trial Chamber I conceded: *Kvočka and Others* Trial Judgment, par 282, see also fn 488.

<sup>230</sup> An accomplice to a joint criminal enterprise refers to a person who shares the intent of that enterprise and carries out acts to facilitate the commission of the agreed crime: *Furundžija* Trial Judgment, par 245, 249;

its detailed definition was an issue in the *Tadic* Appeal. The Trial Chamber is satisfied that the only basis for the distinction between these two categories made by the *Tadic* Appeals Chamber is the subject matter with which those cases dealt, namely concentration camps during World War II. Many of the cases considered by the *Tadic* Appeals Chamber to establish this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as the SS, were themselves criminal organisations,<sup>231</sup> so that the participation of an accused person in the joint criminal enterprise charged would be inferred from his membership of such criminal organisation. As such, those cases may not provide a firm basis for concentration or prison camp cases as a separate category. The Trial Chamber is in any event satisfied that both the first and the second categories discussed by the *Tadic* Appeals Chamber require proof that the accused shared the intent of the crime committed by the joint criminal enterprise. It is appropriate to treat both as basic forms of the joint criminal enterprise.<sup>232</sup> The third category identified by the *Tadic* Appeal Judgment is distinguishable. It applies where all of the participants share a common intention to carry out particular criminal acts and where the principal offender commits an act which falls outside of the intended joint criminal enterprise but which was nevertheless a “natural and foreseeable consequence” of effecting the agreed joint criminal enterprise.<sup>233</sup>

79. For liability pursuant to a joint criminal enterprise to arise, the Prosecution must establish the existence of that joint criminal enterprise and the participation in it by the Accused.<sup>234</sup>

80. A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding

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*Kupreskic* Trial Judgment, par 772; *Tadic* Appeal Judgment, par 229; *Furundžija* Appeal Judgment, par 118.

<sup>231</sup> See Nuremberg Charter, Control Council No. 10.

<sup>232</sup> See *Brdanin and Talic* Decision on Form of Further Amended Indictment, par 27.

<sup>233</sup> See *Brdanin and Talic* Decision on Form of Further Amended Indictment, pars 24 - 27.

<sup>234</sup> *Tadic* Appeal Judgment, par 227.

or arrangement amounting to an agreement formed between them then and there to commit that crime.<sup>235</sup>

81. A person participates in that joint criminal enterprise either:

(i) by participating directly in the commission of the agreed crime itself (as a principal offender);

(ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or

(iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

82. If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission.<sup>236</sup>

83. To prove the basic form of joint criminal enterprise, the Prosecution must demonstrate that each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for that crime.<sup>237</sup> Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.

84. In the Indictment, the Prosecution specifically alleges that the Accused acted pursuant to a joint criminal enterprise with guards and soldiers to persecute the Muslim and

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<sup>235</sup> Decision on Form of Second Indictment, 11 May 2000, par 15; *see also Tadić* Appeal Judgment, par 227(ii); *Furundžija* Appeal Judgment, par 119.

<sup>236</sup> Decision on Form of Second Amended Indictment, 11 May 2000, par 15. In that decision, the direct participant in the joint criminal enterprise, ie the person who physically perpetrates the crime is referred to as a co-perpetrator rather than a perpetrator. Given the ambiguity surrounding the term co-perpetrator engendered by the Prosecution's arguments referred to above, the Trial Chamber prefers to use the term principal offender to make it clear that it is only the person who physically carries out the crime personally that commits that crime. In par (ii): the Trial Chamber refers to a person being present at the time the offence is committed by another. However, presence at the time a crime is committed is not necessary. A person can still be liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out.

<sup>237</sup> *Brdanin and Talić* Decision on Form of Further Amended Indictment, par 26.

other non-Serb male civilian detainees at the KP Dom on political, racial or religious grounds.<sup>238</sup> This was expressly interpreted by the Trial Chamber as alleging a basic joint criminal enterprise, but not an extended one relating to crimes which did not fall within the agreed aspects of that joint criminal enterprise.<sup>239</sup> The Indictment also alleges that the Accused acted “in concert” with others with respect to acts of torture, beatings<sup>240</sup> and enslavement.<sup>241</sup> The Trial Chamber interprets the words “in concert with” to connote acting pursuant to a basic joint criminal enterprise. Accordingly, the Accused is specifically alleged to have acted pursuant to a basic joint criminal enterprise<sup>242</sup> with respect to certain acts alleged as torture, enslavement, cruel treatment and inhumane acts.<sup>243</sup>

85. Even where a particular crime charged has not been specifically pleaded in the indictment as part of the basic joint criminal enterprise, a case based upon the Accused’s participation in a basic joint criminal enterprise to commit that crime may still be considered by the Trial Chamber if it is one of the crimes charged in the indictment and such a case is included within the Prosecution’s Pre-Trial Brief.<sup>244</sup> In the present case, the Prosecution Pre-Trial Brief sufficiently put the Accused on notice that a basic joint criminal enterprise was alleged with respect to all the crimes charged in the Indictment.<sup>245</sup>

86. Although there has been no relevant amendment made to the Indictment following the Trial Chamber’s express interpretation of the Indictment as alleging a basic joint criminal enterprise, but not an extended one, the Prosecution nevertheless sought in their Pre-Trial Brief to rely on the extended form of the joint criminal enterprise. It asserted that, even if it were not established that the Accused participated in a joint criminal enterprise of persecution, beatings, torture and murder, these crimes were “natural and foreseeable consequences” of the Accused’s participation in a joint criminal enterprise of illegal imprisonment of the non-Serb detainees and in particular of the Accused’s action in

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<sup>238</sup> Indictment, par 5.1.

<sup>239</sup> Decision on Form of Second Indictment, 11 May 2000, par 11.

<sup>240</sup> Indictment, pars 5.17, 5.21, 5.22 and 5.26.

<sup>241</sup> Indictment, par 5.41.

<sup>242</sup> That is, not within an extended common purpose.

<sup>243</sup> Although it is not necessary for the purposes of this case, the Trial Chamber notes that the Indictment also alleges that the Accused participated in or aided and abetted the execution of a common plan involving imprisonment, torture and beatings, killings, forced labour, inhumane conditions and deportation and expulsion as persecution (Indictment, par 5.2). This sufficiently put the Accused on notice that the common purpose was also alleged for those crimes identified as part of the persecution count where charged as separate offences.

<sup>244</sup> *Kupreškic* Appeal Judgment, par 14.

<sup>245</sup> Prosecution Pre-Trial Brief, pars 45, 47-56.

permitting outsiders access to the detainees.<sup>246</sup> The Trial Chamber in the exercise of its discretion considers that, in the light of its own express interpretation that only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly.

87. Where the Trial Chamber has not been satisfied that the Prosecution has established that the Accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a joint criminal enterprise, it has then considered whether it has nevertheless been established that the Accused incurred criminal responsibility for any of those crimes as an aider and abettor to them.

## 2. Aiding and abetting

88. It must be demonstrated that the aider and abettor carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender.<sup>247</sup> The act of assistance need not have actually caused the act of the principal offender,<sup>248</sup> but it must have had a substantial effect on the commission of the crime by the principal offender.<sup>249</sup> The act of assistance may be either an act or omission, and it may occur before, during or after the act of the principal offender.<sup>250</sup>

89. Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender.<sup>251</sup>

90. The *mens rea* of aiding and abetting requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.<sup>252</sup> The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal

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<sup>246</sup> Prosecution Pre-Trial Brief, pars 57-62.

<sup>247</sup> *Furund`ija* Trial Judgment, pars 235, 249.

<sup>248</sup> *Furund`ija* Trial Judgment, pars 233, 234,249; *Kunarac* Trial Judgment, par 391.

<sup>249</sup> *Aleksovski* Appeal Judgment, par 162.

<sup>250</sup> *Aleksovski* Trial Judgment, par 129; *Blaški}* Trial Judgment, par 285; *Kunarac* Trial Judgment, par 391.

<sup>251</sup> *Furund`ija* Trial Judgment, par 232; *Tadi}* Trial Judgment, par 689; *Kunarac* Trial Judgment par 393.

<sup>252</sup> *Aleksovski* Appeal Judgment, par 162; *Tadi}* Appeal Judgment, par 229; *Kunarac* Trial Judgment, par 392.

offender's *mens rea*. However, the aider and abettor need not share the *mens rea* of the principal offender.<sup>253</sup>

## **B. Superior responsibility under Article 7(3) of the Statute**

91. The Prosecution also alleges that the Accused incurred criminal responsibility as a superior under Article 7(3) of the Tribunal's Statute for each of the criminal acts charged. Article 7(3) provides that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed 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.

92. The elements of individual criminal responsibility under Article 7(3) of the Statute have been firmly established by the jurisprudence of the Tribunal.<sup>254</sup> Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates:

1. the existence of a superior-subordinate relationship;
2. the superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and
3. the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders thereof.

93. The existence of a superior-subordinate relationship requires a hierarchical relationship between the superior and subordinate. The relationship need not have been formalised and it is not necessarily determined by formal status alone.<sup>255</sup> A hierarchical relationship may exist by virtue of an accused's *de facto*, as well as *de jure*, position of superiority.<sup>256</sup> What must be demonstrated is that the superior had "effective control" over the persons committing the alleged offences. Effective control means the material ability to prevent offences or punish the principal offenders. Where a superior has effective control and fails to exercise that power he will be responsible for the crimes committed by his

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<sup>253</sup> *Aleksovski* Appeal Judgment, par 162.

<sup>254</sup> *Delali*} Appeal Judgment, pars 189-198, 225-226, 238-239, 256, 263; *Aleksovski* Appeal Judgment, par 72.

<sup>255</sup> *Delali*} Appeal Judgment, pars 205-206.

<sup>256</sup> *Delali*} Appeal Judgment, pars 192-194, 266.

subordinates.<sup>257</sup> Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.<sup>258</sup>

94. It must be demonstrated that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. It must be proved that (i) the superior had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates.<sup>259</sup> This knowledge requirement has been applied uniformly in cases before this Tribunal to both civilian and military commanders.<sup>260</sup> The Trial Chamber is accordingly of the view that the same state of knowledge is required for both civilian and military commanders.

95. It must be shown that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates. The measures required of the superior are limited to those which are feasible in all the circumstances and are “within his power”. A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.<sup>261</sup>

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<sup>257</sup> *Delali*} Appeal Judgment, pars 196-198.

<sup>258</sup> *Blaški*} Trial Judgment, par 303; *Aleksovski* Trial Judgment, par 106.

<sup>259</sup> *Delali*} Appeal Judgment, pars 223-226.

<sup>260</sup> *Delali*} Appeal Judgment, pars 196-197.

<sup>261</sup> *Delali*} Appeal Judgment, par 226.

## V. THE ACCUSED'S POSITION AS WARDEN

96. The Accused was, by his own admission, warden of the KP Dom prison facility from 18 April 1992 until the end of July 1993.<sup>262</sup> He was originally appointed as acting warden of the KP Dom by Radojica Mladenovic, the President of the Executive Committee of the Municipal Assembly of Foca, on 18 April 1993.<sup>263</sup> This appointment took the form of a work assignment.<sup>264</sup> Following the outbreak of the conflict in April 1992, many members of the local Serb population in Foca were given such work assignments.<sup>265</sup> The Accused held the position of acting warden of the KP Dom until 17 July 1992, at which time he was officially appointed warden by Momcilo Mandic, the Minister of Justice of the Serbian Republic of Bosnia and Herzegovina.<sup>266</sup> He occupied this position until he resigned or was dismissed by the Minister of Justice and Administration of the Republika Srpska.<sup>267</sup> The decision terminating the Accused's employment is dated 1 July 1993, but it was to enter into force on the day of its adoption. The Accused's replacement commenced work at the KP Dom on 9 August 1993.<sup>268</sup> In September 1994, the Accused began work as a school principal under a work assignment issued by the Ministry of Defence.<sup>269</sup>

97. The position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs. This general understanding of the position of warden accords with the structure of the KP Dom prior to the conflict.<sup>270</sup> The warden held the highest position of authority in the KP Dom and it was his responsibility to

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<sup>262</sup> The Accused gave evidence that he ceased working at the KP Dom at the end of July 1993 (T 7708). He filed a request with Radojica Mladenovic in June 1993 requesting that he be relieved of his duty in the KP Dom and he was replaced around the end of July 1993 when he received a decision on the termination of his employment (Ex P 46A, OTP interview 6 June 2000, pp 2-3). Although Ex P 3 would seem to indicate that the Accused remained as warden of the KP Dom until 8 September 1994, the Prosecution did not contend that this was the case. The Accused explained that it was possible that he stayed on the record for reasons of social security as he did not find a new job until 1994 when he started working as a school principal (T 7710). Some witnesses estimated when the Accused ceased to be warden of the KP Dom: FWS-139, early October 1993 (T 398-399); FWS-66, mid-1993 (T 1127); FWS-162, October 1993 (T 1406); FWS-215, mid-1993 (T 916); FWS-182, mid-1993 (T 1653); FWS-138, 1993 (T 2098); FWS-250, the escape of Ekrem Zekovic (T 5066-5067).

<sup>263</sup> The Accused (T 7599).

<sup>264</sup> Ex D 33A, Ex D 33-1-A (Decree on the Organisation and Discharge of Work Obligation for the Needs of the Defence).

<sup>265</sup> Milomir Mihajlovic (T 5642); Vitomir Drakul (T 5666-5667); Slobodan Jovancevic (T 5569); Zarko Vukovic (T 6757); Svetozar Bogdanovic (T 7081); Slavica Krnojelac (T 7495); Zoran Mijovic (T 6217); Miladin Matovic (T 6423); Arsenije Krnojelac (T 6984); Milan Pavlovic (T 6871).

<sup>266</sup> Ex D 77A. At one point in his testimony the Accused states that he was appointed both warden and director of the economic unit by the Ministry of Defence in August 1992, although he had already started working in this function in July 1992 (T 7638).

<sup>267</sup> Ex D 78A states that the Accused is dismissed from the position.

<sup>268</sup> Ex P 3, no 129.

<sup>269</sup> The Accused (T 7711).

<sup>270</sup> Ex P 2 (Letter from the warden of the KP Dom, Zoran Sekulovic, submitting information on the KP Dom).

manage the entire prison.<sup>271</sup> In effect, the warden was responsible for the convicted male detainees,<sup>272</sup> and all the business units and work sites associated with the prison.<sup>273</sup> The deputy warden,<sup>274</sup> the commander of the guards,<sup>275</sup> the chief of service for rehabilitation and the head of the economic unit were all subordinate to the warden.<sup>276</sup> Each of these persons was required to report to the warden with respect to the management of their areas of responsibility.<sup>277</sup>

98. The Trial Chamber is not satisfied that the position or powers of the warden within the prison hierarchy significantly changed once the conflict commenced. Counsel for the Accused submitted that the powers of warden were severely limited during the conflict and that documents would be produced before the Court to this effect.<sup>278</sup> It was alleged that the work assignment of the Accused clearly stipulated that his role as warden within the KP Dom was limited to carrying out repairs and the commencement of production in the work units.<sup>279</sup> A certificate was produced from the Ministry of Defence, dated 11 January 2000, which purported to summarise data from an inspection of original documents kept as official records by the Ministry of Defence.<sup>280</sup> The certificate was said to confirm that the Accused was the manager of the KP Dom responsible only for preserving the property of the KP Dom. Following an objection by the Prosecution to the tender of the certificate, the Trial Chamber questioned what weight could be given to the certificate. It was of recent origin and sought to place a limitation upon the clear wording of a contemporaneous document already tendered into evidence from the Ministry of Justice which appointed the Accused the warden of the KP Dom without any such limitation.<sup>281</sup> The Trial Chamber advised the Defence that, if it wanted weight to be given to the certificate, the Trial

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<sup>271</sup> FWS-139 (T 297).

<sup>272</sup> Prior to the conflict, the KP Dom was a prison for convicted male detainees: FWS-139 (T 294). The capacity of the KP Dom was between 1000-1200 inmates, although it appears that just prior to the conflict in 1992 there were only about 200-400 prisoners: FWS-138 (T 2021).

<sup>273</sup> FWS-139 (T 295); Zoran Mijovic (T 6376).

<sup>274</sup> FWS-138 (T 2025); FWS-139 (T 297).

<sup>275</sup> FWS-139 (T 298).

<sup>276</sup> Divljan Lazar (T 6050).

<sup>277</sup> FWS-139 (T 298).

<sup>278</sup> In the Opening Statement of the Defence, Counsel stated that "The Defence intends to tender many exhibits, and that will show how unfounded many of the counts in the indictment are in view of the true role and position that Milorad Krnojelac had in the KP Dom Foca" (T 5162), and "There is clear-cut evidence that prisoners of war of Muslim ethnicity, as well as detainees who had violated regulations in the army of the Republika Srpska, [were] under full factual and formal control of the military command and the military authorities. For this purpose the Defence will submit many documents which unequivocally show that the accused, Milorad Krnojelac, was the civilian warden and that he did not have any authority, either formally or factually, over these persons" (T 5177).

<sup>279</sup> (T 7599); Ex D 77A.

<sup>280</sup> The Defence sought to tender the document through witness Milenko Dundjer (T 5349-5358).

<sup>281</sup> Ex D 30A; T 5353-5354.

Chamber would need to know upon what contemporaneous records the Ministry of Defence relied in interpreting the Accused's appointment. If it relied upon official records of the Accused's appointment, then this would have included the appointment made by the Ministry of Justice. The Trial Chamber would need to know upon what basis the Ministry interpreted the clear wording of that document as limiting the Accused's responsibility to the preservation of the property of the KP Dom.<sup>282</sup> The Defence said that it would seek to obtain the documents upon which the Ministry of Defence relied and re-offer the certificate for tender at that stage.<sup>283</sup> These documents were never produced and the Defence did not seek to enter the certificate into evidence at any later stage.<sup>284</sup> The Trial Chamber takes these circumstances into account, in conjunction with other facts discussed below, in reaching its conclusion that the Accused's work assignment was not limited in the way the Defence alleged.

99. The Trial Chamber is satisfied that the Accused voluntarily undertook the position of acting warden and then warden until his departure from the KP Dom in July 1993. In his defence, the Accused claimed that work orders could not be refused and that any attempt to do so would run the risk of imprisonment. While some evidence was heard to this effect,<sup>285</sup> the Trial Chamber is satisfied that no such risk was present in the instant case. On the contrary, there is evidence that two individuals turned the position down with no adverse consequences before it was assigned to the Accused.<sup>286</sup> There is no evidence that any threats were made to the Accused concerning the consequences which might follow should he refuse the position.<sup>287</sup> The Chamber further notes that the Accused appears to have

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<sup>282</sup> T 5356, 5357.

<sup>283</sup> T 5358.

<sup>284</sup> The Prosecutor attempted to cross-examine the accused on the certificate. Counsel for the accused objected on the ground that the certificate had not been admitted into evidence (T 7867-7870).

<sup>285</sup> Milomir Milhajlovi} (T 5651-5653); Svetozar Bogdanovi} (T 7084); Slavica Krnojelac (T 7533); Zoran Vukovic (T 5777-5779); Krsto Krnojelac (T 5921-5922).

<sup>286</sup> These two individuals are Radojica Tesovi} and Veselin Cancar. Tesovi} was the previous warden who was either replaced because he did not agree with SDS policy, or refused to continue working in the position as warden after the conflict started and became the director of the farm at Brioni: FWS-214 (T 3939); Ex P 438 (under seal); Risto Ivanovi} (T 6105); FWS-109 (T 2348); FWS-138 (T 2024); FWS-182 (T 1648); FWS-113 (T 2612). In criminal proceedings against him before the Canton Court in Sarajevo, Veselin Cancar stated that members of the Crisis Staff had tried to persuade him to take up the post of KP Dom Director. He claimed that his refusal was accepted and that he was sent to the field as a quartermaster instead, an appointment he agreed with: Ex P 36A p 4, Ex P 37A p 2.

<sup>287</sup> The Accused gave evidence that he was not threatened by Mladenovic to accept the position. However, he said that he believed that if he had not accepted the position the military police would have been called in (T 7855). Two witnesses gave evidence that the brother of the Accused, Arsenije Krnojelac, had criticised his acceptance of the position as warden calling him an idiot and an arsehole for accepting it: FWS-73 (T 3205); FWS-216 (T 3458). Arsenije Krnojelac denied making any of these statements (T 6926-T 6927, T 6934-T 6935) and the Trial Chamber does not rely upon it.

accepted the position of warden after turning down a different work assignment on the front, and that he claimed<sup>288</sup> that he was able to resign from his position in June 1993 without any adverse consequences.<sup>289</sup> The Trial Chamber concludes that the Accused could have refused the original work assignment, was always in a position to leave the KP Dom and that it was unlikely that he would have been punished had he done so.

100. The Trial Chamber is also satisfied that the Accused voluntarily accepted the positions in full awareness that Muslim civilians were being illegally detained at the KP Dom because of their ethnicity. Upon his first arrival at the KP Dom, he asked who was being detained and for what reason. He was told that the prisoners were Muslims and that they were being detained because they were Muslims.<sup>290</sup> He also knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.<sup>291</sup>

101. The Trial Chamber accepts that part of the KP Dom was leased to the military for its own use, in a lease agreement signed by the Accused as warden.<sup>292</sup> The Defence argued that, as a result of the lease, the KP Dom was divided into civilian and military sections and the warden's authority was limited to matters arising in the civilian section of the prison, involving the convicted Serb detainees and the Drina Economic Unit.<sup>293</sup> The Defence

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<sup>288</sup> The Accused's gave evidence that he filed a request with Radojica Mladenovic in June 1993 requesting that he be relieved of his duty in the KP Dom and was subsequently dismissed (T 7708); Ex P 46A, OTP interview, 6 June 2000, pp 2-3. He submitted his resignation because he did not want the responsibility of determining which persons assigned to work duty at the KP Dom would go to the front line and which persons would remain working at the KP Dom (T 7859-7865).

<sup>289</sup> RJ gave evidence that he found out from Z that the Accused had first been offered the position of army commander which he had rejected. Because of this, when he was offered the position of warden he could not refuse it. RJ claimed that people in mixed marriages like the Accused whose wife was Croatian did not enjoy a favourable position (T 3832-3834). This was not followed up in the evidence of the Accused.

<sup>290</sup> T 7604, 7844; Bozidar Krnojelac (T 7419, 7605).

<sup>291</sup> T 7846.

<sup>292</sup> Ex D 85A; Ex D 38A; Ex D 38-1-A; Ex P 4; Ex P 5; Vitimir Drakul (T 5687); Zoran Vukovic (T 5769-5770); Risto Ivanovic (T 6083-6084); Zoran Mijovic (T 6274); Miladin Matovic (T 6440-6441); Milosav Krsmanovic (T 6614-6616). To the contrary, a number of Prosecution witnesses testified that the KP Dom was not divided into military and civilian parts and that it was one institution under one command: FWS-139 (T 389); FWS-66 (T 1129); FWS-215 (T 917); FWS-65 (T 482-483); FWS-86 (T 1565); FWS-198 (T 962). The Accused gave evidence that Mladenovic negotiated the terms of the lease and that he merely signed the lease agreement on behalf of the KP Dom. He claimed that the Ministry of Justice was informed that he had leased part of the KP Dom to the army command and that he did not have to report to the Ministry of Justice about Muslim detainees held in the KP Dom (T 8215, 7639).

<sup>293</sup> With respect to which matters he reported to the Ministry of Justice: the Accused (T 7639). Ex D 80A is a letter dated 7 May 1992 addressed to the Executive Committee of the Serbian Municipality of Foca and signed by the Accused as the acting warden, requesting the supply of metal sheeting to repair roofs damaged by the conflict. Ex D 81A is a letter dated 7 May 1992 addressed to the Serbian Police Station in Foca and signed by the Accused as acting warden, reporting vehicles that had been stolen from the KP Dom. Ex D 82A is a request dated 7 May 1992 to the Serbian Police signed by the Accused as acting warden requesting that a vehicle be given to the KP Dom. Slobodan Javancevic (T 5617-5618); Milomir Mihajlovic (T 5628); Zoran Vukovic (T 5772); Krsto Krnojelac (T 5918); Risto Ivanovic (T 6086-6087); Lazar Divljan (T 5979-5780); Zoran Mujovic (T 6236); Milovan Dubrilovic (T 6373); Miladin Matovic (T 6438-6439); Zarko Vukovic (T 6754,

claimed that the U`ice army members initially responsible for the non-Serb detainees were succeeded by a platoon of the Livade Company, who continued governing the military part of the KP Dom.<sup>294</sup> The Defence claimed that all matters relating to the military part of the prison, including non-Serb detainees, were strictly the responsibility of the Military Command, which was assisted by the Chief of the Guards, Mitar Rasevic, and the Deputy Warden, Savo Todovic. The Accused said that he knew the name of the person who was the actual warden of the non-Serb detainees, but that he was too fearful to identify this person in open court.<sup>295</sup> In support of this argument, the Defence called as witnesses a number of former KP Dom guards who confirmed the Accused's limited role.<sup>296</sup> Many of these witnesses identified Savo Todovic as the person in charge of the military section of the KP Dom.<sup>297</sup>

102. The Trial Chamber is satisfied that, on the contrary, the lease did not affect the single hierarchy within the KP Dom, and that there was no significant division between military and civilian personnel. Prison guards under the authority of the warden looked

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6756); Milan Pavlovic (T 6877); Arsenije Krnojelac (T 6951); Slavica Krnojelac (T 7502). The Drina Economic Unit is described at par 362 *infra*.

<sup>294</sup> The Accused (T 8217-8128). Ex P 2 dated 28 October 1998 to the Ministry of Justice from Warden of the KP Dom, Zoran Sekulovic in response to a request for a list of employees who worked between 18 April 1992 until 31 October 1994, states that "A unit was set up in Foca Penal and Correctional Facility that spent part of the time on the front lines and a part of the time on work obligation in the period from 30 September 1992 until 2 September 1993. The members of the unit were issued certificates concerning their service in the VRS in the said period."

<sup>295</sup> T 7688-7690 (Private Session).

<sup>296</sup> Defence witnesses Lazar Divljan, Radomir Dolas, Miladin Matovic and Miloslav Krsmanovic all gave evidence that Savo Todovic was in charge of the military section of the KP Dom (T 5982, 5819, 6440, 6616). Lazar Stojanovic gave evidence that the guards were under military command (T 5716). Risto Ivanovic and Zoran Mijovic gave evidence that they received orders from Mitar Rasevic who would assign them their working hours (T 6114, T 6274). Zoran Mijovic and Miladin Matovic both claimed that the Accused never gave orders to the guards as his authority was limited to matters concerning convicts who were already in the KP Dom before the outbreak of the conflict (T 6274, T 6388, T 6443); Ex D 115A, statement of Blagojevic Dragomir, Ex D 116A statement of Raševic Cedo, Ex D 121A, statement of Zoran Vukovic, all stating that the Accused was not responsible for the military section of the KP Dom.

<sup>297</sup> Lazar Divljan (T 5982); Radomir Dolas (T 5817, T 5862); Milenko Dundjer (T 5496); Miladin Matovic (T 6439-6441); Miloslav Krsmanovic (T 6616); Ex D 114A statement of Risto Ivanovic.

after both Serb and non-Serb detainees,<sup>298</sup> with no regard to any civilian/military split.<sup>299</sup> Both the commander of the guards, Mitar Rasevic,<sup>300</sup> and the deputy warden, Savo Todovic,<sup>301</sup> remained responsible to the warden. The warden retained and sometimes exercised the power to instigate and take disciplinary measures against subordinates who

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<sup>298</sup> During the first 2-4 weeks after the start of the conflict, the KP Dom was "policed" by military units, apparently from the Ulice Battalion: FWS-86 (T 1463). Muslim detainees were rounded up, arrested and taken to the KP Dom by paramilitary units: FWS-85 (T 585). Inside the KP Dom it was mainly members of the military who supervised the Muslim detainees during their first weeks of captivity: FWS-182 (T 1587); FWS-210 (T 4840); Risto Ivanovic (T 6082). From about 18 or 19 April 1992 onwards, at around the same time that the Accused was appointed warden, former Serb guards from the KP Dom returned to carry out their work assignments: FWS-66 (T 1081); FWS-111 (T 1212-1213); FWS-86 (T 1463); FWS-182 (T 1649); FWS-71 (T 2916); FWS-214 (T 3965); FWS-210 (T 4841). Ex P 2 list of employees who carried out their work obligation at the KP Dom. Lazar Diviljan gave evidence that the guards addressed the Accused as "upravnik" which means warden (T 6033); Milosav Krsmanovic gave evidence that at the KP Dom the Accused was addressed as warden (T 6664).

<sup>299</sup> The Accused admitted that there was no separate guard or security service with regard to the Drina Economic Unit (T 7956). Miladin Matovic gave evidence that the rehabilitation officer of the KP Dom was in charge of both Serb convicts and Muslim detainees (T 6492-6493). Ex D 29A Official Gazette of the Serbian People in BH, 12-17 May 1992 Decision on establishment of penal and correctional institutions in the territory of the Serbian Republic of BH; Article 2: "Penal and correctional institutions in the territory of the Serbian Republic of BH shall be taken over and shall continue to operate as organs of the state administration of the Republic; Article 4: The internal organisation of the KPO/penal and correctional institutions/shall be determined by the rules on internal organisations issued by the warden with the agreement of the Minister of Justice; Article 5: The security of the KPO shall be provided by the employees working in those institutions up to now and, if necessary, employees of the MUP/Ministry of the Interior/police shall help them; Article 11: Penal and correctional institutions shall be managed by the warden and deputy warden appointed by the Minister of Justice." Ex D 30A letter dated 25 July 1992 from Minister Momcilo Mandic to the Warden of the KP Dom: "Subject: Answer to your question concerning the status of Foca KPD. Foca KPD was established in July 1992 pursuant to a Decision of the Presidency of the Serbian Republic of BH/Bosnia and Herzegovina/ which will be published in one of the forthcoming issues of the Official Gazette of the Serbian People in BH. The Decision envisaged Foca KPD as a general closed prison with separate sections for detainees, convicted minors, young adults and women. Work units will be formed in the KPD when necessary and registered with the competent Lower Court in Trebinje. Finance is provided by the budget of the Serbian Republic of BH. Please send this Ministry a list of employees so that salaries can be ensured. We also hereby inform you that Milorad Krnojelac is appointed warden of the prison. Please find enclosed the decision on his appointment". FWS-214 (T 3965) and FWS-139 (T 396) gave evidence that Mitar Rasevic made it clear to them that only the warden could improve the situation of the detainees after they made complaints to him about the living conditions and beating of detainees.

<sup>300</sup> FWS-139 (T 395); FWS-66 (T 1132); FWS-111 (T 1281); FWS-198 (T 961); FWS-54 (T 749); FWS-85 (T 619); FWS-86 (T 1484); FWS-182 (T 1649); FWS-138 (T 2102); FWS-03 (T 2263-2264); FWS-71 (T 2915); Dzevad S Lojo (T 2619); Dr Amir Berberkic (T 3962); FWS-69 (T 4143); FWS-172 (T 4591); FWS-137 (T 4769); Muhamed Lisica (T 4983); Lazar Stojanovic (T 5753); Radomir Dolas (T 5815); Miladin Matovic (T 6443). Zoran Miljovic and Risto Ivanovic both gave evidence that the Accused never issued orders to the guards (T 6274-6276, T 6089-6090). However there was evidence that the Accused did on occasion instruct the guards to do certain things: FWS-86 (T 1466).

<sup>301</sup> A number of Prosecution witnesses gave evidence that Savo Todovic was the deputy warden of the KP Dom and second in command to the Accused: FWS-139 (T 393, T401); FWS-65 (T 475); FWS-82 (T 1703); FWS-119 (T 1982); FWS-71 (T 2912); FWS-109 (T 2410); FWS-113 (T 2619); FWS-73 (T 3296); FWS-111 (T 1280); FWS-85 (T 630); FWS-144 (T 2317); FWS-66 (T 1132); Todovic was responsible for assigning work duties to the Muslim detainees: FWS-198 (T 969); FWS-86 (T 1499); FWS-14 (T 2316); FWS-71 (T 2912); FWS-113 (T 2619); FWS-109 (T 2410); FWS-113 (T 2619); FWS-214 (T 3959); FWS-73 (T 3297); FWS-216 (T 3491); FWS-249 (T 4500). As a result of Todovic's direct authority over the Muslim detainees in the KP Dom, many saw him more often than the Accused and this led some of them to conclude that he had more authority than the Accused: FWS-54 (T 812); FWS-82 (T 1703); FWS-08 (T 1800); FWS-249 (T 4503). To other detainees however he was clearly subordinate to the Accused: FWS-198 (T 1027); FWS-85 (T 700); FWS-73 (T 3324). The Accused gave evidence that, on at least one occasion, Todovic prepared a document for his signature (T 8177-8180).

acted inappropriately towards detainees.<sup>302</sup> The warden also retained jurisdiction over all detainees in the KP Dom. When any of the detainees had matters of concern they were always taken to see the Accused,<sup>303</sup> and it was made clear to them by the guards of the KP Dom that the Accused as warden was the person ultimately responsible for their welfare.<sup>304</sup> Further, the Accused represented the KP Dom in discussions with visiting representatives of the International Committee of the Red Cross ("ICRC") with respect to the detention of all detainees at the KP Dom.<sup>305</sup> At no time during these discussions did the

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<sup>302</sup> There was no evidence to suggest that the pre-conflict reporting system that operated in the KP Dom ceased when the Accused took up the position as warden of the KP Dom. The system functioned as follows: each position held within the KP Dom had a logbook that was maintained by the employees. All new facts relevant to that position would be recorded by the employees in the log book: FWS-138 (T 2030). The heads of the various guard units would give both verbal and written reports to the chief of the section. The written report would then be given to the chief of the guards, chief of the rehabilitation unit and the warden: FWS-138 (T 2030). If an unusual event took place during a guard's shift he would inform the officer on duty who was under an obligation to report to the warden. The warden would in turn call the police who would attend with an investigative judge: FWS-138 (T 2030). Where complaints were made by inmates about a guard, the inmate would write a report to the rehabilitation officer. The complaint would be passed on to the chief of the guards or the warden. The chief of the rehabilitation unit would deal with less serious complaints. There was no evidence that any person was appointed to this position during the Accused's time as warden at the KP Dom. Ex P 2 which lists employees at the KP Dom during the relevant period does not identify any of those employees as holding this position. Where a guard had acted incorrectly, disciplinary action would follow: FWS-138 (T 2032). The warden had an obligation to report serious incidents, such as the beating of an inmate by a guard, to the Ministry of Justice: FWS-138 (T 2030-2034). Inmates could apply to see the warden through the guards. The warden would see the inmates about certain complaints: FWS-138 (T 2032). The Accused claimed that he did not have the rules and procedure to punish (T 7964-7965).

<sup>303</sup> FWS-138 requested that the Accused allow him to leave the KP Dom to see if his old uncle was still alive. The Accused allowed it but the permission of the U'ice Battalion units had to be secured. This was given and he was escorted by a soldier and the Accused's son (T 1473-1475); FWS-66 gave evidence that the Accused permitted him to make various visits to his mother under the escort of his son Bozidar, dressed in military uniform (T 1112-1113); FWS-111 was permitted by the Accused to make a telephone call to his wife after sending a request via a guard (T 1271-1272); FWS-85 gave evidence that at his brother's request they were taken to see the Accused and tried to discuss whether it would be possible for them to leave the KP Dom and go to Montenegro (T 621-625). Later, a failed exchange and the issue of food were discussed (T 627-628); FWS-65 gave evidence that he asked the guards if the warden would receive him and was taken that day. He asked to have the food improved and the Accused said he would see what he could do (T 479); FWS-182 asked the guards to take him to see the warden where he asked the Accused for medical help. The Accused said that he would see what he could do (T 1599); RJ was taken to see the Accused on a number of occasions and made various complaints to him (T 3846-3880); When he told the Accused about mistreatment of the detainees, the Accused said that he had no power to prevent it (T 3917); Ekrem Zekovic gave evidence of soldiers mistreating him and the Accused intervening to stop them (T 3450); Muhamed Lisica gave evidence that he complained to the Accused about the food and was told that the Accused could do nothing about it (T 4895, 4889-4896). He also asked the Accused why all the civilians were locked up and the Accused told him that it was not for him to decide such things, but for the command (T 4889); FWS-119 gave evidence of Cankusic going to the Accused to find out the fate of his sons. He was told by the Accused that they had been sentenced and gone to serve their time in Bileca and that it was necessary for them to be beaten to have them confess (T 1980).

<sup>304</sup> FWS-214 (T 3965); FWS-139 (T 396); FWS-215 (T 863); FWS-54 (T 777-779); FWS-85 (T 628); FWS-182 (T 1596); FWS-82 (T 1704); FWS-08 (T 1769-1771); FWS-142 (T 1821); FWS-104 (T 2189); FWS-109 (T 2410); Ekrem Zekovic (T 3947); FWS-73 (T 3200-3206); FWS-111 (T 1323); Dr Amir Berberkic (T 3965).

<sup>305</sup> FWS-73 (T 3236); Ex P 48A, pp 13-15; Ex D 64; (T 7707).

accused state that he was not the person ultimately responsible for the non-Serb detainees held at the KP Dom.<sup>306</sup>

103. The Trial Chamber is satisfied that the lease agreement signed by the Accused related only to the use by the military of the property of the KP Dom, and that the Accused retained all powers associated with the pre-conflict position of warden at the KP Dom.<sup>307</sup> This is also shown by the fact that it was the Accused who exercised responsibility for ensuring that detainees did not escape from the KP Dom, without regard to ethnicity. To this end, he requested increased security from the Herzegovina Corps and the Foca Territorial Defence, more oil for lighting from the Ministry of Economy<sup>308</sup> and the placing of land mines inside the KP Dom compound from the War Presidency.<sup>309</sup> It was also the Accused who exercised responsibility for supervising the provision of food and other provisions to both Serb and non-Serb detainees.<sup>310</sup> He wrote to various institutions trying to obtain additional food for everyone in the KP Dom.<sup>311</sup> In response to complaints made by non-Serb detainees regarding the amount and quality of food, instead of denying that their welfare fell under his jurisdiction, the Accused usually indicated that he was concerned with the matter and would try to do something about it.<sup>312</sup> Similarly, when a non-Serb detainee raised the question of medical assistance, the Accused indicated that he would see what he could do.<sup>313</sup> Finally, it was the Accused who exercised final control over the work of detainees in and for the KP Dom, although it is clear that the deputy warden, Savo Todovic,

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<sup>306</sup> The Accused gave unsubstantiated evidence to the contrary in private session (T 7690) which the Chamber does not accept as giving rise to any reasonable possibility that his evidence was true.

<sup>307</sup> Ex P 4A is the request of Miro Stanic, Commander, Srpska Territorial Defence Headquarters, dated 8 May 1992 to the KP Dom: "We request utilisation of your premises for accommodation of prisoners of war. The premises will be used on a temporary basis and after the premises are no longer needed we will hand them over in a proper condition". Ex P 5A is the Decision issued by the Accused as temporary warden on 10 May 1992 following the request of the Foca Tactical Group/Command (Ex D 38A). It states: "The premises of the Foca Penal and Correctional Facility are temporarily allocated for the accommodation of prisoners-of-war and detained persons. The user of the premises is obliged to maintain them and return them in good condition".

<sup>308</sup> Ex D 83A is a letter to the Ministry of Economy of Republika Srpska dated 7 December 1992, signed by the Accused as warden of the KP Dom, in which he asks for approval of an allocation of 20 tons of oil. The reasons given are the necessity of light for the farm animals and for security.

<sup>309</sup> Ex D 39A is a report dated 6 May 1993, signed by the Accused as Warden, in which he requests the provision of additional personnel to carry out security and the necessary funds for the accommodation, food, hygiene and other needs of the inmates and a special vehicle for the transport of inmates.

<sup>310</sup> Ex D 107A is a request from the Accused as warden to the Military Post 7141 Foca Garrison, dated 3 March 1993, in which he requests quantities of food: "Pursuant to the agreement on making KPD premises available for the accommodation of detained persons, the Foca KPD/ Correctional Facility/holds Muslim detainees and Serbian offenders from the ranks of the Republika Srpska Army. For the purpose of feeding them please approve allocation of the following food supplies".

<sup>311</sup> The Accused (T 7630); Ex D 105A; Ex D 106A; Ex D 107A.

<sup>312</sup> FWS-85 (T 627); FWS-65 (T 479); RJ (T 3859); FWS-119 (T 1981); FWS-250 (T 5062); Safet Avdic (T 478-479); Muhammed Lisica (T 4889).

<sup>313</sup> FWS-182 (T 1599).

looked after this on a daily basis. The Accused had regular meetings with the heads of the factory, metal workshop, and farm, where detainees worked.<sup>314</sup> In a report to the Ministry of Justice, the Accused referred to the fact that Muslim detainees were used for labour in the KP Dom in work units for which he was ultimately responsible.<sup>315</sup>

104. Although the Trial Chamber is satisfied that the lease agreement with the military did not impact upon the Accused's powers as warden of the KP Dom, it accepts that the powers of a warden within a prison system are not unlimited. As both temporary warden and warden, the Accused was responsible to the Ministry of Justice,<sup>316</sup> and to a certain extent to the Military Command. The Trial Chamber is also satisfied that, with respect to the convicted Serb detainees, the Accused did have responsibilities which he did not have with respect to the non-Serb detainees (and which were in any event irrelevant to them). The Accused was required to report to the Ministry of Justice with respect to these detainees and, based on the behaviour of these prisoners within the KP Dom, he could make recommendations to the Ministry that sentences be reduced or parole be granted.<sup>317</sup> The Accused could also inform the Foca Tactical Group of convicted Serbs who wished to be released from the KP Dom to allow them to join fighting units and make recommendations as to whom should be released for this purpose.<sup>318</sup> One important ramification of the lease agreement with the military was that it was the Military Command and, in particular, Commander Kovac and not the Ministry of Justice who had power to make decisions concerning which non-Serb detainees would be detained in and released from the KP Dom.<sup>319</sup> In this respect, the Accused was obliged to forward requests for release of these detainees to the Crisis Staff or the Foca Tactical Group.<sup>320</sup> The military did, however, have an obligation to ensure that the Accused was kept informed about who it decided was

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<sup>314</sup> The Accused (T 7692-7693). Ekrem Zekovic and FWS-210 both gave evidence that the Accused would sometimes give instructions to detainees working in the metal workshop (T 3445-3446, 4872).

<sup>315</sup> Ex D 85A.

<sup>316</sup> Ex D 29A Official Gazette of the Serbian People in BH.

<sup>317</sup> Ex D 85A Report dated 24 Nov 1992 to the Ministry of Justice of Republika Srpska, signed by the Accused as Manager, on the convicted persons at the KP Dom, the business units and the property damage due to the conflict.

<sup>318</sup> Ex D 88A letter dated 27 July 1992 to the Foca Tactical group advising of Serb convicts who wished to be released from the KP Dom to enable them to voluntarily join fighting units and recommending that only two are suitable candidates, signed by the Accused as Temporary Administrator.

<sup>319</sup> Ex D 42A; Ex D 43A; Ex D 45A; Ex D 46A; Ex D 48A; Ex D 54A. Witness FWS-86 gave evidence of being taken to the Accused's office and speaking to his brother on the telephone. His brother said he would like him to be exchanged and the Accused insisted that his brother should try and find someone to swap him for (T 1478).

<sup>320</sup> Ex D 66A; Ex D 67A; Ex D 66-1-A; Ex D 66-2-A; Ex D 67A; Ex D 67-1-A.

to be detained and who was to be released,<sup>321</sup> and the Accused did exercise some powers in this regard such as his proposal that detainees held at Bileca prison be transferred to the KP Dom.<sup>322</sup> The Military Command could also make decisions about which persons would be permitted to enter the KP Dom,<sup>323</sup> and it had some power over the appointment of persons to work assignments at the KP Dom and the type of work to be completed by persons assigned to work at the KP Dom.<sup>324</sup> 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.<sup>325</sup> This factor, however, did not impinge upon the Accused's authority over these guards while performing duties at the KP Dom.

105. There were also certain groups who entered the KP Dom over whom the Accused could exercise only limited control. These included the investigators and the paramilitaries. Members of the military would enter the KP Dom, although they needed the prior permission of the military authorities.<sup>326</sup> The Accused was able to ensure that such persons did not remove detainees from the KP Dom without the appropriate authority from the Military Command.<sup>327</sup> With respect to the investigators, it is also clear that the Accused

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<sup>321</sup> Ex D 54A is a document dated 7 September 1992 in which Commander Colonel Marko Kovac orders that certain authorities be permitted to arrest persons, orders that the VP Company Commander and the Chief of Security be permitted to release persons from custody, and orders that the warden of the KP Dom be informed of the Order.

<sup>322</sup> Ex D 39A.

<sup>323</sup> Ex D 50A; Ex D 51A. These documents, dated 2 July 1992 and 11 July 1992 respectively, record permissions granted by Colonel Marko Kovac for the wife and daughter of Lazar Stojanovic to visit him at the KP Dom.

<sup>324</sup> Ex D 55A is an Order of Commander Kovac dated 27 May 1993 in which he orders that Captain Kovac be removed from the military payroll and transferred to work detail at the KP Dom. Ex D 71A dated 8 May 1993 is an Order to the Foca Tactical Group Command from Commander Kovac ordering that a vehicle of the KP Dom be taken and handed to the Foca Hospital and that Arsenije Krnojelac and Miroslav Krsmanovic, who had been assigned to the KP Dom for compulsory work service, shall be the drivers.

<sup>325</sup> Miladin Matovic (T 6432, 6573, 6577); Risto Ivanovic (T 6089); Miladin Matovic (T 6431); Ex D 34A; Decision of Executive Committee of the Serbian Municipality of Foca, dated 26 April 1992 and signed by Radojica Mladenovic, stating that the KP Dom is granted permission to impose a work obligation on persons fit for work who are not engaged in Yugoslav Army Units, that a work obligation should be imposed on workers according to the list submitted by the Foca KPD which had been approved by the Crisis Staff of the Serbian Municipality of Foca, and that, if necessary, the Crisis Staff of the Serbian Municipality of Foca and the Command of the Yugoslav's Peoples Army Unit shall engage workers mentioned in the previous item depending on the circumstances. Ex P 2 dated 28 October 1998 to the Ministry of Justice from Warden of the KP Dom, Zoran Sekulovic, in response to a request for a list of employees from 18 April 1992 until 31 October 1994: "A unit was set up in Foca Penal and Correctional Facility that spent part of the time on the front lines and a part of the time on work obligation in the period from 30 September 1992 until 2 September 1993. The members of the unit were issued certificates concerning their service in the VRS in the said period."

<sup>326</sup> Zoran Mijovic (T 6221, 6400-6401).

<sup>327</sup> In one instance a commander of the Ulice Battalion tried to remove two persons from the KP Dom. The Accused refused to allow the commander to take anyone unless he received a document to that effect. It was only after some documents were presented that the Accused allowed the commander to remove the detainees: FWS-86 (T 1486). In another incident, members of the White Eagles were provoking a Muslim detainee. The Accused intervened, told the soldiers to go away and they obeyed his command: Ekrem Zekovic (T 3450). In a

exercised influence over them and had power to instruct them to interview detainees favoured by him with a view to recommending their exchange or release.<sup>328</sup>

106. The Trial Chamber is not satisfied that, in his position as temporary warden and then warden, the Accused could unilaterally order or grant the release of any detainees.<sup>329</sup> The release of non-Serb detainees was a matter for the military and Crisis Staff. The Trial Chamber notes, however, that this fact does not signify any real limit on the warden's powers.<sup>330</sup> A warden does not generally have a unilateral power of release, and at the KP Dom it was the Ministry of Justice who had the power over the continued detention of convicted Serb detainees, and not the Accused. The Military Command, however, had the power to release Serb soldiers imprisoned for military offences during the conflict.<sup>331</sup>

107. In conclusion, the Trial Chamber is satisfied that the Prosecution has established that the Accused held the position of warden, as that term is generally understood, at the KP Dom, that the lease agreement by which the Accused leased part of the KP Dom to the military had little impact upon the single hierarchy within the KP Dom or the Accused's position as warden within that hierarchy, and that the Accused exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom.

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further incident, a busload of women and children arrived at the KP Dom. Members of the White Eagles were threatening to kill the women and children if they were not paid the same day. The Accused intervened and told them to call their superior to resolve the situation: FWS-120 (T 3129-3142, 3166-3167).

<sup>328</sup> The Accused told RJ that he would instruct the investigators to conduct an interview with him so that the Accused could then take the documents to the Crisis Staff and ask them to permit the release of RJ. RJ was subsequently interviewed and the Accused told him that he had taken the documents to the Crisis Staff: RJ (T 3848-T 3850).

<sup>329</sup> FWS-86 (T 1473); FWS-111 (T 1277); Muhamed Lisica (T 4889).

<sup>330</sup> See Imprisonment par 126, *infra*.

<sup>331</sup> Ex D 54A.

## VI. CRIMES UNDER ARTICLE 3 AND ARTICLE 5 OF THE STATUTE

### A. Imprisonment

108. Count 11 of the Indictment charges imprisonment as a crime against humanity pursuant to Article 5(e) of the Statute for the acts alleged in par 5.35 to 5.38 of the Indictment. It is claimed that the KP Dom was used as a detention facility for male non-Serb civilians by Serb civilian and military authorities from April 1992 until October 1994 and that the Accused participated in implementing that imprisonment as the warden of the KP Dom from April 1992 until August 1993.

#### 1. The law

109. The Charters of the Nuremberg and Tokyo Tribunals did not specify imprisonment as a crime, but it was defined as a crime against humanity in Article II(c) of Control Council Law No 10. The right of an individual not to be deprived of his or her liberty arbitrarily is also enshrined in a number of human rights instruments, both international<sup>332</sup> and regional.<sup>333</sup> However, as these instruments show, this right does not constitute an “absolute right”, and it can be restricted by procedures established by law.

110. In the jurisprudence of the Tribunal, imprisonment as a crime against humanity has been considered on one occasion only.<sup>334</sup> The Trial Chamber in the *Kordic and Cerkez* Judgment held that the elements of the crime of imprisonment under Article 5 of the Statute and those of the crime of unlawful confinement under Article 2 of the Statute are identical.<sup>335</sup> It concluded that imprisonment should be understood as arbitrary imprisonment and defined this as “deprivation of liberty of the individual without due

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<sup>332</sup> Article 9 of the Universal Declaration of Human Rights (1948) states that nobody shall be subjected to arbitrary arrest, detention or exile. Article 9 of the ICCPR (1966) requires that no one shall be subjected to arbitrary arrest or detention. Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) defines the “arbitrary arrest and illegal imprisonment of the members of a racial group or groups” as an act constituting the crime of apartheid. The Convention on the Rights of the Child (1989) enshrines in Article 37(b) that no child shall be deprived of his or her liberty unlawfully or arbitrarily.

<sup>333</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) enshrines in Article 5 the right to liberty and security and states that no one shall be deprived of his liberty except in particular cases, as enumerated in the Convention. The American Convention on Human Rights (1969) provides in Article 7 that “no one shall be deprived of his physical liberty” except in certain cases and that “no one shall be subject to arbitrary arrest or imprisonment”.

<sup>334</sup> *Kordic and Cerkez* Trial Judgment, pars 292-303.

<sup>335</sup> *Kordic and Cerkez* Trial Judgment, pars 301-302.

process of law".<sup>336</sup> Consequently, the Trial Chamber held that the imprisonment of civilians is unlawful where (1) civilians have been detained in contravention of Article 42 of Geneva Convention IV, that is, they are detained in the absence of reasonable grounds that the security of the detaining power makes it absolutely necessary; (2) the procedural safeguards required by Article 43 of the Geneva Convention IV are not complied with in respect of detained civilians, even where the initial detention may have been justified; and (3) they occur as part of a widespread or systematic attack directed against a civilian population.<sup>337</sup>

111. This Trial Chamber shares the view of the Trial Chamber in *Kordić and Cerkez* that imprisonment as a crime against humanity pursuant to Article 5 may be established when the criteria set out above are met. However, the Trial Chamber considers that, as a crime against humanity, the definition of imprisonment is not restricted by the grave breaches provisions of the Geneva Conventions. The Trial Chamber is thus not satisfied that imprisonment as a crime against humanity can *only* be established if the requirements of unlawful confinement pursuant to Article 2 are met.

112. The Trial Chamber is of the view that any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5(e) as long as the other requirements of the crime are fulfilled.<sup>338</sup> In the instant case, it is alleged that the victims were deprived of their liberty by being locked in cells at the KP Dom for substantial periods of time.<sup>339</sup>

113. For the purpose of Article 5(e), the deprivation of an individual's liberty is arbitrary if it is imposed without due process of law. Relevant international instruments do not adopt

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<sup>336</sup> *Kordić and Cerkez* Trial Judgment, par 302. Unlike the instant case, imprisonment under Article 5 was charged in connection with unlawful confinement under Article 2, both charges referring to the same act, the alleged illegal detention of Bosnian Muslims, par 273.

<sup>337</sup> *Kordić and Cerkez* Trial Judgment, par 303.

<sup>338</sup> International instruments use various terms to refer to deprivation of liberty, including *inter alia* "arrest," "detention" and "imprisonment". The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as adopted by the General Assembly resolution 43/173 of 9 December 1988, defines these terms in its preamble while declaring that the principles enshrined shall apply "for the protection of all persons under any form of detention or imprisonment". The Working Group on Arbitrary Detention (1991) also points out that deprivation of liberty is referred to by different names, including, "apprehension, incarceration, prison, reclusion, custody and remand", United Nations High Commissioner for Human Rights, Fact Sheet No 26, Working Group on Arbitrary Detention, p 4. The Commission on Human Rights adopted in its resolution 1997/50 the definition "deprivation of liberty imposed arbitrarily", E/CN.4/RES/1997/50, 15 April 1997, par 15.

<sup>339</sup> FWS-109 (T 2355); FWS-66 (T 1068); FWS-198 (T 957); FWS-139 (T 319); FWS-73 (T 3194); FWS-210 (T 4833); FWS-250 (T 5021).

a common approach to the issue of when a deprivation of liberty is or becomes arbitrary.<sup>340</sup> The Universal Declaration of Human Rights states that “no one shall be subjected to arbitrary arrest, detention or exile”. There are no exceptions to this prohibition, although by definition any deprivation which is not arbitrary would be permissible.<sup>341</sup> The ICCPR allows a deprivation of one’s liberty only “on such grounds and in accordance with such procedure as are established by law”.<sup>342</sup> The Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child shall be “in conformity with the law”.<sup>343</sup> The American Convention on Human Rights provides that a person shall only be deprived of his or her physical liberty “for the reasons and under conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto”.<sup>344</sup> The European Convention on Human Rights identifies an exhaustive list of cases in which the deprivation of liberty “in accordance with a procedure prescribed by law” does not constitute a violation of the Convention.<sup>345</sup>

114. Having considered these instruments, the Trial Chamber is of the view that, under Article 5(e) of the Tribunal’s Statute, a deprivation of an individual’s liberty will be arbitrary and, therefore, unlawful if no legal basis can be called upon to justify the initial deprivation of liberty. If national law is relied upon as justification, the relevant provisions must not violate international law.<sup>346</sup> In addition, the legal basis for the initial deprivation

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<sup>340</sup> The United Nations High Commissioner for Human Rights’ Working Group on Arbitrary Detention arrived at the same conclusion by stating that the question of when detention is or becomes arbitrary is not definitely answered by the international instruments, Fact Sheet No. 26, p 4.

<sup>341</sup> Article 9.

<sup>342</sup> Article 9 (1).

<sup>343</sup> Article 37 (b).

<sup>344</sup> Article 7 (2).

<sup>345</sup> Article 5(1) (a)-(f). Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalised draft text of the Elements of Crimes, PCNICC/2000/INF/3/Ad.2, p 11. It must be noted, however, that the Statute of the International Criminal Court (“ICC Statute” or “Rome Statute”) has not entered into force, nor have the Draft Elements of Crime been formally adopted. The UN Working Group on Arbitrary Detention, in contrast, identifies three categories under which a deprivation of liberty will be regarded as being imposed arbitrarily. According to the Working Group’s report, the deprivation of liberty is arbitrary when (a) it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (category I), when (b) the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as State parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (category II), when (c) the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III); Commission on Human Rights, Question of the Human rights of all persons subjected to any form of detention or imprisonment, Report of the Working Group on Arbitrary Detention, E/CN.4/1998/44, 19 December 1997, Annex I, par 8. The Draft Elements of Crimes for the ICC Statute define imprisonment as constituting a crime against humanity where the conduct of the principal offender carrying out the imprisonment “was in violation of fundamental rules of international law”.

<sup>346</sup> In particular, the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily.

of liberty must apply throughout the period of imprisonment. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment.

115. To establish the crime of imprisonment as a crime against humanity under Article 5(e) of the Tribunal's Statute, the Trial Chamber accordingly finds that the following elements must be established in the circumstances of the present case:

1. An individual is deprived of his or her liberty.
2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.<sup>347</sup>
3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.

2. Findings: the imprisonment of non-Serb men at the KP Dom

116. The Trial Chamber is satisfied that, between 10 April 1992 and the beginning of June 1992, large-scale arrests of non-Serb civilian men, mostly of Muslim ethnicity, were carried out throughout Foca and its environs. Subsequent to their arrest, the men were transferred to the KP Dom.<sup>348</sup>

117. The Defence claimed that all Muslim men detained at the KP Dom were prisoners of war and that their detention was on that basis lawful.<sup>349</sup> It supported this claim by

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<sup>347</sup> The Trial Chamber notes that arbitrariness of imprisonment pursuant to Article 5(e) may further result from an otherwise justified deprivation of physical liberty if the deprivation is being administered under serious disregard of fundamental procedural rights of the person deprived of his or her liberty as provided for under international law. Basic procedural guarantees are, for instance, provided for in Article 9 and 14 of the ICCPR. In addition, Article 43 of Geneva Convention IV, enshrines basic procedural rights of civilians who are detained on the legal basis of Article 42 of the same Convention. Article 43 entitles interned protected persons to have, inter alia, the internment reconsidered as soon as possible by an appropriate court or administrative board, and, in case that the internment is maintained, to have it periodically, considered. With regard to the case before it, however, the Trial Chamber sees no need to elaborate on this aspect, since the Prosecution and the Defence case focused on the allegation of the initial unlawfulness of the imprisonment of the non-Serbs.

<sup>348</sup> See pars 34-41, *supra*.

<sup>349</sup> When asked during the Pre-Defence Conference, "You mean it is your case [...] that those people who were detained in the KP Dom were prisoners of war and not merely civilians?" counsel for the Accused replied "Yes, Your Honour." (T 5142).

emphasising that some of those detained were in possession of weapons at the time of their arrest.<sup>350</sup> The Trial Chamber does not accept that this evidence creates a reasonable doubt as to the civilian status of most of the Muslim detainees held at the KP Dom. There was no suggestion that any except a small number of detainees had been combatants, with or without weapons. The type of weapons these persons were found in possession of, coupled with the explanations they gave as to why they were armed and the context in which they were arrested, clearly shows that they were not taken prisoner as combatants.<sup>351</sup> The Trial Chamber accepts, however, that, in 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.<sup>352</sup>

118. The Trial Chamber is satisfied that non-Serb males from Foca and its environs were imprisoned indiscriminately. The only personal characteristic which featured in the decision to detain these men was their non-Serb ethnicity,<sup>353</sup> the overwhelming majority of those detained being Muslim.<sup>354</sup> The evidence establishes that no consideration was given to age, state of health or civilian status. The detainees ranged in age from 15 years to almost 80 years.<sup>355</sup> There were many elderly persons among the detained, and there was a

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<sup>350</sup> FWS-198 had a firearm, a pistol, in his apartment. He denied, though, that he ever possessed any explosive device (T 992); FWS-109 owned a rifle (T 2376); FWS-182 had a Beretta pistol that had belonged to his wife's father (T 1581); Dr Amir Berberkic was provided with a pistol by his neighbour (T 3724).

<sup>351</sup> FWS-198 kept a pistol as a souvenir. It was an heirloom from his grandfather (T 992). He was arrested in his apartment when he went back to retrieve some clothes for his children (T 943); FWS-109 was arrested in Igalo when all Bosniaks present were asked to show their ID (T 2352); FWS-182 took the Beretta to his sister's home at Zubovici, where he hid with women and children before he was arrested, because he felt safer with it. The weapon was in the house when he was arrested (T 1688); Dr Berberkic had the pistol as a weapon to protect himself or to kill himself. It was not, he said, a weapon with which one can kill others in times of war. It was the first time he had ever held a pistol, and he handed it over to his brother-in-law when he was wounded (T 3980, 3988).

<sup>352</sup> Persons who had been soldiers in the army of Bosnia-Herzegovina were brought into the KP Dom wounded, but they were kept separated from the other detainees: Dževad S Lojo (T 2539); FWS-139 (T 372-373); FWS-159 was caught by the Bosnian Serb army as a member of the Bosnian Muslim army near a place called Kacelj on 28 January 1993, and he was kept in an isolation cell at the KP Dom for three months (T 2441, 2442, 2457).

<sup>353</sup> See par 438, *infra*. One witness described the systematic and collective nature of the detention of the Muslim male population in his own words by testifying that "everybody was brought there, even if all they had with Islam was their name." This was well borne out by the evidence.

<sup>354</sup> There were only a handful of Croats, Albanians and Roma: Safet Avdic (T 681); FWS-66 (T 1076); FWS-111 (T 1217-1218); FWS-139 (T 327-329); FWS-198 (T 952); FWS-182 (T 1594); Rasim Taranin (T 3015, 3018); FWS-08 (T 1763, 1768); FWS-71 (T 2792); FWS-138 (T 2050); FWS-104 (T 2193); Dževad S. Lojo (T 2537, 2539); Dr Amir Berberkic (T 3735); Muhamed Lisica (4851).

<sup>355</sup> The uncle of the son-in-law of FWS-75 was 75 years old (T 731). Regarding the age range of detainees, see: FWS-66 (T 1076); FWS-111 (T 1218); FWS-139 (T 437); FWS-182 (T 1593); Dževad S Lojo (T 2537); FWS-49, who was already 72 years old in 1992, was kept in a room where "everyone was old, worn out and weak" (T 4692). A little girl, about seven years old was in the room where FWS-182 was kept (T 1595).

substantial group of ill, wounded, physically handicapped and mentally disturbed persons among the detained men.<sup>356</sup>

119. The Trial Chamber is satisfied that none of the non-Serb men was arrested on the basis of a valid arrest warrant. None of the detainees was shown an arrest warrant at the time of their initial detention or informed orally of the reason for their arrest.<sup>357</sup> If they were told anything it was that they were required to accompany those carrying out the arrests for the purpose of giving a short statement and that, once that statement had been given, they would be free to go.<sup>358</sup> After the initial arrest, however, they were detained at the KP Dom for periods ranging from four months<sup>359</sup> to two and a half years.<sup>360</sup> There they were kept incarcerated in rooms or in solitary confinement cells.

120. The Trial Chamber is satisfied that, once detained at the KP Dom, none of the detainees was informed of the reason for his detention, the term of his detention or of any possibility of release. Upon entry into the KP Dom, some of the detainees were searched and registered,<sup>361</sup> while others were not.<sup>362</sup> Similarly, interrogations of those detained were

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<sup>356</sup> FWS-111 (T 1218); FWS-139 (T 329); Dževad Lojo (T 581); FWS-69 suffered from angina pectoris (T 4062). FWS-182, who himself was suffering from an ulcer on the *duodendum* and who was depending on a certain diet, saw persons with tuberculosis, asthma and heart problems (T 1595). Two men suffered from tuberculosis. A man called Glusac: FWS-109 (T 2366) and a man called Hamdzija Mandzo: FWS-71 (2797). There were a lot of sick people in room 16. FWS-182 had problems with his stomach. FWS-172 and FWS-104 were quite sick persons, Muradif Konjo had high blood pressure and Abid Sahovic had liver bleeding problems: Dr Amir Berberkic (T 3736). Ramiz D'amo was brought in from the hospital with serious facial injuries which prevented him from eating: Dr Amir Berberkic (T 3737). Two old men of at least 75 years, Ejub Durmisevic and Adil, were brought to the isolation cell occupied by Ramiz D'amo. Ejub's ear was severely cut: FWS-159 (T 2470). An old blind man and another man who had been released from the military as a disabled person shared a cell with FWS-49 (T 4692). Ahmet Hadzimusic was a disabled person who had to use crutches ever since he contracted polio in 1947 and never underwent compulsory military training (T 1928). In Room 16 there was a man with a serious heart condition, Hasan Hadzimuratovic, who was 80 years old, and there were also some young men who had bullet wounds and wounds from an accident and who had been brought in from the hospital: Dževad Lojo (T 2549, 2539). A mental patient injured himself severely twice: Dževad Lojo (T 1218-1219). A mental patient named Mujo Murguz was very tense and aggressive, and another person had psychological problems which caused him to eat a cake of soap: FWS-71 (T 2794).

<sup>357</sup> Several detainees gave evidence that they had not been shown any arrest warrant before being taken away: FWS-139 (T 318); Dževad S Lojo (T 2533). Zoran Vukovic told RJ that he was sorry to have to take him to the police station without a warrant: RJ (T 3842). Some witnesses managed, however, to cast a glance at "name lists" with which the arresting persons were equipped, and on which they could identify their own names: Safet Avdic (Ex P 123, T 676); Ahmet Hadzimusic (T 1936, 1939); FWS-139 (T 318-319).

<sup>358</sup> FWS-66 (T 1068); FWS-111 (T 1199); FWS-198 (T 943); FWS-215 (T 858-859); FWS-54 (T 731); FWS-86 (T 1454); FWS-142 (T 1819); FWS-138 (T 2043); Dževad S. Lojo (T 2533); Ekrem Zekovic (T 3341); FWS-69 (T 4051); FWS-172 (T 4554); FWS-137 (T 4733).

<sup>359</sup> FWS-109 (T 2355).

<sup>360</sup> FWS-66 (T 1068); FWS-198 (T 957); FWS-139 (T 319); FWS-73 (T 3194); FWS-210 (T 4833); FWS-250 (T 5021).

<sup>361</sup> FWS-86 (T 1460); Muhamed Lisica (T 4833).

<sup>362</sup> FWS-109 (T 2355); Dževad S Lojo (T 2535); FWS-104 (T 2161); FWS-139 (T 320); Dr Amir Berberkic (T 3733).

conducted sometimes within a few days or weeks,<sup>363</sup> sometimes only after months<sup>364</sup> and, in some cases, never.<sup>365</sup> In the course of these interrogations, some of the detainees were asked about weapons, about their membership in the SDA and about their whereabouts before and during the outbreak of the conflict in the area.<sup>366</sup> A number of detainees were threatened in the course of the interrogations, and others heard fellow detainees being mistreated in neighbouring rooms.<sup>367</sup> Many of the detainees were forced to sign written statements.<sup>368</sup> None of the detainees was released from the KP Dom following interrogation, notwithstanding the individual outcome of the interview.<sup>369</sup>

121. The Trial Chamber is satisfied that none of the detainees was ever actually charged, tried or convicted for any crime before being detained or while detained at the KP Dom.<sup>370</sup> It is also satisfied that none of the detainees was ever advised of their procedural rights before or during their detention.<sup>371</sup>

122. The Trial Chamber finds that the Muslims and other non-Serbs detained at the KP Dom were deprived of their liberty arbitrarily. The evidence has clearly established that there was no legal basis which could be relied upon to justify their deprivation of liberty under national or international law. Those detained were not criminals under suspicion of having committed a crime or ever accused of having committed a crime under national

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<sup>363</sup> FWS-111 (T 1260); FWS-215 (T 862); FWS-54 (T 751); Dževad Lojo (T 634); FWS-139 (T 346); Ahmet Hadzimusic (T 1940); FWS-144 (T 2308); FWS-109 (T 2372); Dr Amir Berberkic (T 3768); Ekrem Zekovic (T 3468).

<sup>364</sup> FWS-137 was interrogated only 55 days after his arrest, after he had asked Risto Ivanovic to be interviewed, hoping to be released thereafter (T 4735). Rasim Taranin attempted to be interviewed for a long time before he finally succeeded. He also thought that he would then be released but was not. He was taken out of the KP Dom and detained at Rudo for approximately 9 months and then transferred to Kula Prison Camp. He was released from Kula after a couple of months, on 6 or 7 October 1994 (T 1721-1742). FWS-138 spent 10 months at the KP Dom before he was interrogated (T 2045).

<sup>365</sup> FWS-08 (T 1769); Dževad S Lojo (T 2533).

<sup>366</sup> FWS-111 (T 1261); FWS-198 (T 990); FWS-215 (T 865); FWS-54 (T 752); Dževad Lojo (T 635); FWS-139 (T 350); FWS-86 (T 1464); Rasim Taranin (T 1721-22); FWS-138 (T 2045); FWS-104 (T 2191); FWS-144 (T 2309); FWS-109 (T 2375); FWS-120 (T 3148); Dr Amir Berberkic (T 3769); FWS-73 (T 3250); Ekrem Zekovic (T 3468); Muhamed Lisica (T 4935); FWS-250 (T 5021); Juso Taranin (T 3019).

<sup>367</sup> See par 143, *infra*; FWS-111 (T 1264); FWS-198 (T 990); FWS-54 (T 752); FWS-104 (T 2193); FWS-109 (T 2376); FWS-109 (T 2375); Dr Amir Berberkic (T 3771); Ekrem Zekovic (T 3472); FWS-69 (T 4072, 4074); FWS-137 (T 4738); FWS-66 (T 1116).

<sup>368</sup> FWS-69 (T 4073); FWS-210 (T 4935); FWS-73 (T 3250); Dr Amir Berberkic (T 3771); Rasim Taranin (T 1722).

<sup>369</sup> This applies equally for Muslim detainees who were taken for interrogations several times, as, for instance, FWS-198 (T 988); Ahmet Hadzimusic (T 1951, 2003); FWS-104 (T 2190); FWS-159 (T 2459); FWS-120 (T 3148); Dr Amir Berberkic (T 3768, 3749); Ekrem Zekovic (T 3468).

<sup>370</sup> FWS-250 (T 5022); FWS-159 (T 2459); FWS-104 (T 2193); FWS-86 (T 1464); Dževad Lojo (T 635); FWS-215 (T 865); FWS-111 (T 1199); FWS-119 (T 1939, 1994); FWS-73 (T 3194); FWS-137 (T 4733).

<sup>371</sup> FWS-104 (T 2194); FWS-66 (T 1068); FWS-198 (T 957); FWS-54 (T 731); FWS-139 (T 318); FWS-142 (T 1832); FWS-03 (T 2265); FWS-144 (T 2326); FWS-71 (T 2780); FWS-89 (T 4707); Safet Avdic (Ex P 123, p 679).

and/or international law. They were, *inter alia*, doctors and medical health workers, journalists, former KP Dom employees, managers, police officers and other persons of civilian status.

123. Although it may strictly be unnecessary in the circumstances of this case, the Trial Chamber is satisfied that there was no basis under Article 42 of the Geneva Convention IV which could be called upon to justify the deprivation of liberty of the non-Serb detainees as claimed by the Defence. A party seeking to rely upon Article 42 of the Geneva Convention IV must show with respect to each individual who has been deprived of his liberty reasonable grounds for concluding that that individual constituted a threat to the security of the depriving party. There was no consideration given to the individual circumstances of any of the non-Serb detainees by those carrying out the detentions.<sup>372</sup>

124. In conclusion, the Trial Chamber is satisfied that the deprivation of liberty of the non-Serb detainees at the KP Dom constituted imprisonment pursuant to Article 5(e) of the Statute. The Trial Chamber is also satisfied that the Accused, by virtue of his position as warden of the KP Dom, knew that the non-Serb detainees were being unlawfully detained.<sup>373</sup> As already found by the Trial Chamber, the Accused admitted that he knew that the non-Serb detainees were detained because they were Muslim and that he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.<sup>374</sup>

### 3. The responsibility of the Accused

125. The Prosecutor submitted that the Accused should be held responsible for "committing" the crime of imprisonment under Article 7(1) of the Tribunal's Statute

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<sup>372</sup> The Trial Chamber notes that, after the initial arrest of the non-Serb detainees, there was no lawful mechanism in place by which the lawfulness of their detention could be reviewed. "Interrogations" were carried out in an atmosphere of terror and fear of mistreatment, and they did not constitute a process of review. However, as the initial detention was itself unlawful, the Trial Chamber does not need to consider the fact that no lawful process of review took place at the KP Dom. See pars 34-42, *supra*; pars 237-306, *infra*.

<sup>373</sup> The Accused gave evidence that at some point he asked why the men were detained at the KP Dom and received the answer "They are Muslims". He disputed, however, that this answer was to be interpreted to mean that the men were brought in *because* they were Muslims. He claimed that he was only told that the detained persons *were* Muslims (T 7844). The Trial Chamber finds this explanation not credible. Further, the Accused clearly admitted that he knew that none of the procedures in place for legally detaining persons were ever followed at the KP Dom, by stressing that this very fact was the reason why he asked not to continue at the KP Dom (T 7845, 7846).

<sup>374</sup> See Warden par 100, *supra*; The Accused (T 7845-7846, 7887-7889, 7895, 7936, 7945); Ex P 46A, dated 6 June 1992, p 33; Ex P 48A, dated 13 July 1992, p 30-31; FWS-66 (T 1044, 1113-1114); FWS-111 (T 1269-

pursuant to a joint criminal enterprise to effect the illegal imprisonment of the non-Serb detainees. In the *Delalić* Appeals Judgment, the Appeals Chamber discussed the meaning of the term “committed” with respect to the crime of unlawful confinement of civilians under Article 2 of the Statute. The Appeals Chamber held that, to establish that an individual has *committed* the offence of unlawful confinement, something more must be proved than mere knowing “participation” in a general system or operation pursuant to which civilians are confined. It held that:

Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable ground for their detention exist, or that any such reasons have ceased to exist. [...] It is not necessary for present purposes for the Appeals Chamber to attempt an exhaustive definition of the circumstances which will establish that the offence is committed, but it suffices to observe that such liability is reserved for persons responsible in a more direct or complete sense for the civilian’s unlawful detention.<sup>375</sup>

126. There is no evidence that the Accused in this case played any role in actually securing the detention of any of the non-Serb detainees in the KP Dom. It has also been accepted by the Trial Chamber that the Accused, as warden of the KP Dom, had no power unilaterally to release detainees.<sup>376</sup> It is clear, however, that the Accused did hold the most senior position within the KP Dom and that he did allow civilians to be detained at the KP Dom knowing that their detention was unlawful. There is no evidence that the Accused ever refused to accept any of the civilian detainees brought to the KP Dom, nor on the other hand is there any evidence of what powers, if any, the Accused had to refuse acceptance of detainees at the KP Dom.<sup>377</sup> Although the Trial Chamber has found that the Accused accepted the position of warden voluntarily, and that he could have refused or resigned from the position and chose not to do so, in all the circumstances, the Trial Chamber is not satisfied that the Prosecution has established that the Accused incurred criminal

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1271); R.J (T 3828, 3829, 3835, 3847, 3851); Ex D 66-1-A, dated 30 July 1992; Ex D 66-2-A, dated 30 July 1992; Slobodan Jovancevic (T 5619, 5605); Miladin Matovic (T 6501, 6506).

<sup>375</sup> *Delalic* Appeal Judgment, par 342.

<sup>376</sup> See par 106, *supra*.

<sup>377</sup> See pars 104-106, *supra*; *Delalic* Appeal Judgment, par 331-369.

responsibility as a principal offender for the offence of imprisonment, as is required for a finding that the Accused "committed" the offence of imprisonment under Article 7(1).<sup>378</sup>

127. The Trial Chamber is also not satisfied that the Prosecution has established that the Accused shared the intent of the joint criminal enterprise to illegally imprison the non-Serb detainees. The Trial Chamber has already determined that the Accused knew the imprisonment of the non-Serb detainees was unlawful and it is also satisfied that he knew that his acts and omissions were contributing to the maintenance of that unlawful system by the principal offenders. However, the Trial Chamber is not satisfied that the only reasonable inference which can be drawn from these facts is that the Accused shared the intent of that joint criminal enterprise. In particular, the Trial Chamber does not consider that the Prosecution has excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent. In these circumstances, the Trial Chamber is of the view that the criminal conduct of the Accused is most appropriately characterised as that of an aider and abettor to the principal offenders of the joint criminal enterprise to illegally imprison the non-Serb detainees pursuant to Article 7(1) of the Statute. As to the Accused's superior responsibility for illegal imprisonment of non-Serb detainees pursuant to Article 7(3), the most which could have been done by the Accused as a superior would have been to report the illegal conduct to the very persons who had ordered it.<sup>379</sup> Accordingly, the Trial Chamber considers that it would not be appropriate to find him responsible as a superior.

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<sup>378</sup> *Tadic* Appeal Judgment, par 188; *Kunarac* Trial Judgment, par 390; In the *Krstic* Trial Judgment, it was held that "committing" covers personally perpetrating a crime (ie, the principal offender) or engendering a culpable omission in violation of criminal law, par 601.

<sup>379</sup> See par 173, *infra*.

## B. Inhumane acts and cruel treatment

128. The Accused is charged under Counts 13 and 15 with inhumane acts as a crime against humanity pursuant to Article 5(i), and with cruel treatment as a violation of the laws or customs of war pursuant to Article 3. These charges refer to the alleged participation of the Accused in the implementation of brutal living conditions at the KP Dom while he was warden. The Prosecution claims that, as a result of these living conditions, many detainees identified in par 5.37 and Schedule D of the Indictment suffered serious physical and psychological consequences.

### 1. The law

129. As already stated, the general requirements with respect to Articles 3 and 5 of the Statute have been met.<sup>380</sup>

130. It is apparent from the jurisprudence of the Tribunal that cruel treatment, inhuman treatment and inhumane acts basically require proof of the same elements. Each offence functions as a residual category for serious charges under Articles 2, 3 and 5 respectively which are not otherwise enumerated under those Articles. The definitions adopted for each offence in the decisions of the Tribunal vary only by the expressions used.<sup>381</sup> The Trial Chamber therefore adopts the following definition for the offences of cruel treatment and inhumane acts as charged under Articles 3 and 5. The elements to be proved are: the occurrence of an act or omission of similar seriousness to the other enumerated crimes under the Article concerned;

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<sup>380</sup> See pars 60-64, *supra*.

<sup>381</sup> In the *Tadic* Trial Judgment, it was acknowledged that cruel treatment is treatment that is inhumane, par 723. In the *Delalic* Trial Judgment, it was held that cruel treatment carries an equivalent meaning for the purposes of Article 3 of the Statute, as inhuman treatment does in relation to grave breaches, par 552. The *Kordic and Cerkez* Trial Judgment followed this finding, par 265. The *Delalic* Trial Judgment further integrated the concept of inhumane acts pursuant to Article 5 into the context of the definition of inhuman treatment by stating that the elaborate analysis and discussion conducted in the judgment "with regard to inhuman treatment is also consistent with the concept of "inhumane acts", in the context of crimes against humanity", pars 533-534. Recently, the Appeals Chamber analysed in the context of multiple convictions whether inhuman treatment under Article 2 and cruel treatment under Article 3 contained additional elements *vis-à-vis* each other. The Appeals Chamber, in both the majority decision and the separate and dissenting opinion, came to the conclusion that the "sole distinguishing element stems from the protected person requirement under Article 2", and, respectively, that "the requirement that each offence have a unique element is therefore not satisfied", par 426 of the *Delalic* Appeals Judgment and par 51 of the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna. The offence of inhumane acts under Article 5 was not subject to the discussion of the Appeals Chamber.

1. the act or omission causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity; and
2. the act or omission is performed deliberately by the accused or a person or persons for whose acts or omissions he bears criminal responsibility.<sup>382</sup>

131. The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be taken into account, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.<sup>383</sup> The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious.<sup>384</sup>

132. The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.<sup>385</sup>

## 2. Findings

133. The Trial Chamber is satisfied that the brutal and deplorable living conditions imposed upon the non-Serb detainees at the KP Dom in the period from April 1992 to July 1993 (discussed below) constituted acts and omissions of a seriousness comparable to the other crimes enumerated under Article 5 and Article 3 of the Tribunal's Statute, and thus

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<sup>382</sup> The Appeals Chamber in *Delalic* confirmed the definition of cruel treatment as constituting "an intentional act or omission... which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity", par 424. By comparison, inhumane acts were defined to comprise "acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity" and which must be of "similar gravity and seriousness to the other enumerated crimes"; *Kayishema and Ruzindana* Trial Judgment, pars 151,154. The Trial Chamber in *Jelusic* appears to have confused the terms "cruel treatment", "inhumane acts" and "inhuman treatment" several times in its analysis (par 41 and finding in pars 45, 52 and the reference to "inhumane treatment" as to be that set out in Article 5) but explicitly put forward that the notions of cruel treatment within the meaning of Article 3 and of "inhumane treatment set out in Article 5" (thereby obviously referring to "inhumane acts" under Article 5) "have the same legal meaning": *Jelusic* Trial Judgment, par 52.

<sup>383</sup> *Delalic* Trial Judgment, par 536; *Jelusic* Trial Judgment, par 57 (referring to outrages upon personal dignity).

<sup>384</sup> This was recently held by the Trial Chamber with regard to the offence of outrages upon personal dignity in *Kunarac* Trial Judgment, par 501.

<sup>385</sup> *Kayishema and Ruzindana* Trial Judgment, par 153; *Aleksovski* Trial Judgment, par 56.

warrants a finding that those acts and omissions constitute inhumane acts and cruel treatment under those Articles.

134. The Trial Chamber is satisfied that there was a deliberate policy of isolating detainees within the KP Dom. Many of the detainees spent their entire detention locked in their rooms,<sup>386</sup> and were only taken out to the canteen for meals while others kept in solitary confinement cells were not taken out at all, receiving their meals in their cells.<sup>387</sup> Only those detainees given work assignments were permitted to spend prolonged periods outside of their rooms.<sup>388</sup> Visits from family members were prohibited after May 1992.<sup>389</sup> Television sets and radios which had been left at the KP Dom by former convicts were taken away, and rooms were searched for personal transistor radios which were seized.<sup>390</sup> Access to recent newspapers or other press was prohibited.<sup>391</sup> Any form of information exchange and communication between detainees in different rooms and between detainees and guards was prohibited.<sup>392</sup> Detainees were not allowed to look out of the windows, although some did so.<sup>393</sup> Detainees who were taken to work assignments outside of the KP Dom were kept isolated in a separate room to prevent news about the "outside world" spreading among the other detainees.<sup>394</sup> To ensure compliance with these unwritten "rules" on communication, violations were punished with solitary confinement and/or mistreatment, such as beatings.<sup>395</sup>

135. The Trial Chamber is satisfied that the non-Serb detainees were deliberately housed in cramped conditions. The KP Dom had the capacity to house more than the maximum 500-700 non-Serbs detained, but the detainees were crowded into a small number of rooms.<sup>396</sup> Solitary confinement cells designed to hold one person were packed with up to

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<sup>386</sup> FWS-08 (T 1762); FWS-66 (T 1088); FWS-54 (T 751); FWS-65 (T 546); FWS-139 (T 345).

<sup>387</sup> FWS-159 (T 2457, 2460, 2463, 2467); Ekrem Tulek FWS-182 T 1611).

<sup>388</sup> *Ibid.*

<sup>389</sup> FWS-66 (T 1090); FWS-215 (T 873); FWS-54 (T 751); FWS-65 (T 473); FWS-139 (345).

<sup>390</sup> Ekrem Zekovic (T 3543); FWS-215 (T 875).

<sup>391</sup> FWS-65 (T 467); FWS-159 (T 2463).

<sup>392</sup> FWS-65 (T 460, 535); FWS-172 (T 4605).

<sup>393</sup> FWS-65 (T 535); FWS-250 (T 5068); FWS-172 (T 690).

<sup>394</sup> FWS-172 (T 4605); Ekrem Zekovic (T 3442).

<sup>395</sup> Dževad S Lojo (T 2553); FWS-182 (T 1611); Ekrem Zekovic (T 3543-3544); FWS-215 (T 875); FWS-182 (T 1612-1613); FWS-65 (T 460); FWS-172 (T 690); Lazaro Stojanovic (T 5726 T 5750 T 5757); Zoran Vukovic (T 5769, T 5800, 5794); Risto Ivanovic (T 6166); Milan Pavlovic T 6891); Zoran Mijovic (T 6235). This was disputed by guards Risto Ivanovic (T 6106); Miladin Matovic (T 6446, 6450) and the KP Dom Clerk Divljan Lazar (T 6047) who claimed that the detainees could talk freely with the guards. Risto Ivanovic conceded however that the non-Serb detainees were afraid of the guards (T 6194).

<sup>396</sup> FWS-138 (T 2021); FWS-12 (T 241); Miladin Matovic (T 6460); FWS-162 (T 1359); FWS-198 (T 952, 954); FWS-139 (T 327); FWS-182 (T 1590); FWS-86 (T 1461); FWS-104 (T 2162); FWS-73 (T 3212).

18 people at a time,<sup>397</sup> making it impossible for the detainees to move around the cell,<sup>398</sup> or to sleep lying down.<sup>399</sup>

136. The Trial Chamber is satisfied that the policy of overcrowding the detainees was aggravated by the poor hygienic conditions. Bedding was insufficient or non-existent.<sup>400</sup> The only bed linen provided was that left over from former convicts, and these items were never washed or changed throughout 1992.<sup>401</sup> While there were toilets and wash basins in the rooms, only cold water was available.<sup>402</sup> Regular baths or showers were not provided, nor were hygienic products or toiletries supplied.<sup>403</sup> Changes of clothes or facilities for washing clothes were not supplied.<sup>404</sup> As a result of these conditions, chicken lice spread from the prison farm to the rooms of the detainees.<sup>405</sup>

137. The Trial Chamber is satisfied that detainees were denied the most basic protection against freezing temperatures during the winter of 1992-1993.<sup>406</sup> Most of the non-Serb detainees had been arrested in the early summer of 1992. Due to the information given to them in the course of arrest, namely, that they would be taken for an interview and returned to their homes the same day, they left in what they happened to be wearing at the time.<sup>407</sup> As a result, they were inadequately clothed for winter conditions. The Trial Chamber accepts that the heating system at the KP Dom was broken and that there were some attempts made by the administration to repair it,<sup>408</sup> but it is equally satisfied that no other

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<sup>397</sup> FWS-198 (T 950); FWS-119 (T 1941-1942); FWS-159 (T 1078); FWS-12 (T 243).

<sup>398</sup> FWS-104 (T 2162); FWS-54 (T 741); FWS-73 (T 3212).

<sup>399</sup> Safet Avdic (Ex P 121, p 685).

<sup>400</sup> FWS-85 (T 664); Safet Avdic (T 456); Ex P 123, p 685; FWS-159 (T 2450).

<sup>401</sup> FWS-250 (T 5117-5118); FWS-182 (T 1615); Dževad S Lojo (T 2562).

<sup>402</sup> FWS-139 (T 341); FWS-182 (T 1615); FWS-73 (T 3422). A couple of detainees who worked had access to hot water. FWS-250 could heat water and wash because he worked where there were heating facilities: (T 5117). FWS-89 also had access to hot water because he worked in the kitchen (T 4661).

<sup>403</sup> FWS-172 (T 4607); FWS-69 (T 4066); FWS-139 (T 341); FWS-182 (T 1615).

<sup>404</sup> FWS-73 (T 3424); FWS-159 (T 2466); FWS-250 (T 5118); (Ex P 123, p 686); FWS-73 (T 3424). There were some items of clothing which had been left behind by former regular convicts.

<sup>405</sup> FWS-111 (T 1227); FWS-182 (T 1615); Dževad S Lojo (T 2564); FWS-73 (T 3422).

<sup>406</sup> FWS-111 (T 1226); Dževad S Lojo (T 2562); FWS-139 (T 339). It was so cold in one of the isolation cells that the tap water was frozen for about seven days: FWS-159 (T 2465).

<sup>407</sup> FWS-198 (T 943); FWS-86 (T 1454).

<sup>408</sup> Milan Pavlovic (T 6837). The central heating system in the KP Dom broke down in 1992. Muhamed Lisica was ordered to make furnaces for the offices in the administration building (T 4906). FWS-89 worked on the heating in May 1992. He conceded that the breakdown in the heating system and the existing shortage of electricity and resources may have been the reason for the absence of heating in the KP Dom (T 4724-4725). Because the central boiler was out of order meals were prepared outside in wood fuelled caldrons (Safet Avdic T 547). There were frequent power failures in Foca throughout the war and for periods there was no electricity for the prisoners' quarters: FWS-03 (T 2272). There was no power at the KP Dom until September 1992: FWS-71 (T 2968). On many occasions there was no power supply in Foca and surrounding villages: FWS-109 (T 2426); FWS-35 (T 2750); Ekrem Zekovic (T 3547). See also Ex D 85A, pp 2-3. The Trial Chamber rejects

available measures were taken to protect the non-Serb detainees from the cold.<sup>409</sup> Stoves and furnaces had been produced to heat the offices in the administration building,<sup>410</sup> and there was sufficient raw material for such furnaces to have been produced for the non-Serb detainees.<sup>411</sup> However, it was not until October 1993 that furnaces were finally provided to the non-Serb detainees, and then it was by the ICRC.<sup>412</sup>

138. The Trial Chamber is further satisfied that the suffering of the non-Serb detainees during the winter of 1992 was the result of a deliberate policy on the part of those in charge of the KP Dom. There were available stocks of additional blankets,<sup>413</sup> but they were not provided to all detainees.<sup>414</sup> Broken window panes in the detainees cells were not repaired or covered,<sup>415</sup> and open windows out of the reach of detainees were not closed.<sup>416</sup> Attempts made by some of the non-Serb detainees to make winter clothes out of blankets were punished.<sup>417</sup> The blankets were removed and those involved were sent to solitary confinement, where temperatures were lower.<sup>418</sup>

139. The Trial Chamber accepts that there may have been a general shortage of food in the Foca region during the conflict,<sup>419</sup> but it is satisfied that there was a deliberate policy to feed the non-Serb detainees barely enough for their survival.<sup>420</sup> All non-Serb detainees suffered considerable weight loss ranging from 20 to 40 kilograms during their detention at the KP Dom.<sup>421</sup> Their diet consisted of a cup of soup which was "little more than water",<sup>422</sup>

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the evidence of defence witness Miladin Matovic that there was not a single room at the KP Dom that was not heated during the winter for a single second (T 6488).

<sup>409</sup> FWS-66 (T 1146); FWS-111 (T 1226); Dževad S Lojo (T 663); FWS-139 (T 339); FWS-71 (T 2948); Muhamed Lisica (T 4906).

<sup>410</sup> Muhamed Lisica (T 4906); FWS-89 (T 4724); Rasim Taranin (T 1719-1720).

<sup>411</sup> Muhamed Lisica (T 4906); Ekrem Zekovic (T 3691); (Safet Avdic T 686).

<sup>412</sup> Dževad Lojo (T 663); FWS-71 (T 2948); FWS-73 (T 3357, 3421); FWS-249 (T 4532); FWS-89 (T 4725); Muhamed Lisica made some furnaces for the detainees' rooms in October 1993 (T 4906).

<sup>413</sup> Divljan Lazar (T 5980).

<sup>414</sup> FWS-66 (T 1084); Ekrem Zekovic (T 3621). Some of the detainees were given additional blankets during the winter: Dževad Lojo (T 663); FWS-139 (T 339); FWS-89 (T 4725).

<sup>415</sup> FWS-66 (T 1084); Ekrem Zekovic (T 3621).

<sup>416</sup> FWS-159 (T 2465).

<sup>417</sup> Dr Amir Berberkic (T 3746); FWS-66 (T 1084); Dževad S Lojo (T 2563)

<sup>418</sup> Dr Amir Berberkic (T 3746 T 3764); Dževad S Lojo (T 2562); FWS-66 (T 1084); FWS-71 (T 2807).

<sup>419</sup> Slobodan Solaja (T 5498, 5500); Witness A (T 5522); Milimir Mihajlovic (T 5629); Radimir Dolas (T 5820); Miloslav Krsmanovic (T 6623); Witness B (T 6713); Zarko Vukovic (T 6759); Svetozar Bogdanovic (T 7084); Arsenije Krnojelac (T 7122-7124); Bozo Drakul (T 7191); Vitomir Drakul (T 5669); Dr Drago Vladicic (T 6307); Dr Milovan Dobrilovic (T 6366).

<sup>420</sup> Dr Amir Berberkic (T 3755, 3756); FWS-49 (T 4698); Dževad Lojo (T 666); FWS-139 (T 343); FWS-86 (T 1507); FWS-49 (T 4698).

<sup>421</sup> FWS-66 (T 1084); FWS-111 (T 1312); FWS-162 (T 1361); FWS-198 (T 956); FWS-215 (T 874); FWS-54 (T 750); Dževad Lojo (T 664); Safet Avdic (T 536); FWS-139 (T 343); FWS-86 (T 1506); FWS-182 (T 1618); Rasim Taranin (T 1729); FWS-08 (T 1772); FWS-71 (T 2805); FWS-109 (T 2371); FWS-159

rice or macaroni and a piece of “really thin” bread three times a day.<sup>423</sup> On occasion, they received a tin of pâté to be shared by two persons or eggs for breakfast.<sup>424</sup> In contrast, Serb convicts and detainees received “regular army food”, not very appetising but nutritious enough to prevent serious weight loss.<sup>425</sup> The contrast between the weight loss of non-Serb detainees and the Serb prisoners makes it apparent that non-Serb detainees were fed much less than the Serb detainees. The Trial Chamber is satisfied that the food for all detainees at the KP Dom was cooked in the same cauldron, but that nutritious ingredients, like meat, beans, vegetables and spices, were added to enrich only the meals of Serb detainees and convicts and KP Dom staff, who ate after the non-Serb detainees had received their meals from the cauldron.<sup>426</sup> In making these findings, the Trial Chamber rejects the Defence evidence that all the detainees received the same quality and quantity of food while detained at the KP Dom.<sup>427</sup>

140. The Trial Chamber accepts that a basic medical service was provided to the non-Serb detainees. Gojko Jokanovic, a male nurse, was at the KP Dom on a daily basis and did whatever he could to help the non-Serb detainees.<sup>428</sup> Doctors from Foca hospital also visited the KP Dom on a regular basis.<sup>429</sup> The Trial Chamber also accepts that medicines may have been in short supply throughout Foca due to the war and therefore does not find

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(T 2464); Dr Amir Berberkic (T 3755); Safet Avdic (Ex P 123, p 686); FWS-78 (T 2113); FWS-96 (Ex P 186, p 2539).

<sup>422</sup> Rasim Taranin (T 1712-1715).

<sup>423</sup> FWS-162 (T 1361); FWS-198 (T 955); FWS-111 (T 1380); Dževad Lojo (T 665); FWS-139 (T 341); Dr Amir Berberkic (T 4007); FWS-71 (T 2947); Juso Taranin (T 3027).

<sup>424</sup> FWS-172 (T 4607); FWS-250 (T 5116); FWS-89 (T 4725, 4674). At a later stage of their detention, and only for a period of 15 days, the detainees were given eggs, beans, rice, potatoes or pasta for breakfast: Rasim Taranin (T 1750).

<sup>425</sup> Lazar Stojanovic (T 5717, 5749); Vitomir Drakul (T 5673); Zoran Vukovic (T 5771, 5784-5785).

<sup>426</sup> FWS-08 (T 1804); FWS-138 (T 2063); FWS-71 (T 2952-2953); Rasim Taranin (T 1715); FWS-66 (T 1083); FWS-111 (T 1228-1229); FWS-162 (T 1360).

<sup>427</sup> Krsto Krnojelac (T 5903, 5914, 5916-5917, 5927, 5930); Risto Ivanovic (T 6092, 6094, 6193); Divljan Lazar (T 6043-6044); Miladin Matovic (T 6451-6452); Bozo Drakul (T 7189); The Accused (T 7665); Zoran Vukovic (T 5784-5785); Lazar Stojanovic (T 5717);

<sup>428</sup> Lazar Stojanovic (T 5718); Risto Ivanovic (T 6097); Miladin Matovic (T 6457); The Accused (T 7666); FWS-86 (T 1551); Gojko Jokanovic (T 1146); FWS-71 (T 2950); FWS-109 (T 2422); Dževad S Lojo (T 2511); (Dr Amir Berberkic (T 3738).

<sup>429</sup> Dr Drago Vladicic (T 6311); Dr Milovan Dobrilovic (T 6369-T 6299, 6297); Miladin Matovic (T 6457-6458); Lazar Stojanovic (T 5718); Risto Ivanovic (T 6097); Miladin Matovic (T 6457-6458); Dr Vladicic (T 6339-6340); Dr Milovan Dobrilovic (T 6343); The Accused (T 7666); FWS-182 (T 1840). Cedo Dragovic would give medicines to those with heart conditions: FWS-03 (T 2273); FWS-71 (T 2949); Dževad S Lojo (T 2550). Dr Amir Berberkic (T 3741); FWS-69 (T 4063); FWS-172 (T 4595).

that there was a deliberate policy of withholding available medical supplies from non-Serb detainees.<sup>430</sup>

141. The Trial Chamber is satisfied, however, that some of the non-Serb detainees were not provided with medical help which was available, and in particular that emergency cases were not handled with proper care.<sup>431</sup> Non-Serb detainees who arrived at the KP Dom with injuries sustained prior to or in the course of their arrest were not given access to medical treatment,<sup>432</sup> nor were non-Serb detainees who were severely beaten during interrogations at the KP Dom. The injuries inflicted upon these non-Serb detainees were obviously in need of medical treatment.<sup>433</sup> The Trial Chamber is further satisfied that detainees who were kept in isolation cells and solitary confinement were denied all access to medical care.<sup>434</sup>

142. The Trial Chamber is satisfied that, in addition to the physically taxing conditions of detention, the non-Serb detainees were also subject to a psychologically exhausting regime while detained at the KP Dom. Any attempts made by non-Serb detainees to improve their living conditions in the camp were punished with solitary confinement.<sup>435</sup> Acts which resulted in beatings or periods in the isolation cells<sup>436</sup> included efforts to get additional food,<sup>437</sup> or access to warm water,<sup>438</sup> and attempts to communicate with each other,<sup>439</sup> the guards,<sup>440</sup> or the outside world.<sup>441</sup>

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<sup>430</sup> FWS-71 (T 2949); FWS-69 (T 4063); FWS-172 (T 4595). In other cases, however, detainees did receive sophisticated treatment, as, for instance, infusions or antibiotic injections: FWS-86 (T 1551); FWS-66 (T 1146); FWS-182 (T 1688); FWS-03 (T 2273); FWS-71 (T 2949-2950). Dr Drago Vladicic and Dr Milovan Dobrilovic both claimed that the infirmary was sufficiently equipped and that they could procure lacking medicine from Foca hospital. (T 6304-6306, 6344).

<sup>431</sup> See the case of Enes Had'ic par 145, *infra*.

<sup>432</sup> FWS-86 (T 1532-1533); FWS-182 (T 1586); FWS-159 (T 2442, 2448); Dževad S Lojo (T 2539, 2350); Dr Amir Berberkic (T 3737). Dr Drago Vladicic never treated any injuries caused by maltreatment and never came across combat injuries such as wounds from firearms at the KP Dom (T 6324). Likewise, Dr Milovan Dobrilovic testified that he never noticed any traces of mistreatment on any Muslim patient (T 6345).

<sup>433</sup> As to the numerous victims of beatings and torture and the injuries observed by detainees, see pars 190-306 *infra*; FWS-109 (T 2167-2168); FWS-03 (T 2248); FWS-73 (T 3261); Dževad S Lojo (T 2572); FWS-198 (T 1010); Dr Amir Berberkic (T 3782).

<sup>434</sup> FWS-159 (T 2470, 2507); Ekrem Zekovic (T 3588, 3595). The visiting doctors claimed that all detainees who were in need could receive medical help. However they never visited any detainee in his room and never went to the isolation cells: Dr Milovan Dobrilovic (T 6353); Dr Drago Vladicic (T 6328). Only those detainees who were brought to the infirmary received treatment: Dr Milovan Dobrilovic (T 653-654); Dr Drago Vladicic (T 6316, 6328).

<sup>435</sup> FWS-182 (T 1611); Safet Avdic (T 460); Dževad Lojo (T 660, 703).

<sup>436</sup> FWS-138 (T 2067).

<sup>437</sup> FWS-250 (T 5031-5032); FWS-172 (T 4571); FWS-249 (T 4412); FWS-115 (T 746-747).

<sup>438</sup> FWS-71 (T 2807); FWS-111 (T 1224-1225); FWS-215 (T 875-877)

<sup>439</sup> Safet Avdic (Ex P 123, p 690).

<sup>440</sup> FWS-182 (T 1613-1614).

<sup>441</sup> FWS-182 (T 1613); Ekrem Zekovic (T 3447-3448); FWS-215 (T 877-878); FWS-250 (T 5023).

143. The Trial Chamber is also satisfied that the non-Serb detainees were subjected to harrowing psychological abuse during their period of detention at the KP Dom.<sup>442</sup> The detainees were exposed to the sounds of torture and beatings over a period of months, in particular in June and July 1992.<sup>443</sup> They became nervous and panicky as a result of these sounds,<sup>444</sup> and they could not sleep at night.<sup>445</sup> They could not identify the criteria for the selection for beatings, and they constantly feared that they would be the next to be selected.<sup>446</sup> Some wrote farewell letters to their family fearing they would not survive.<sup>447</sup> Some witnessed family members being taken out and heard them being subjected to severe beatings.<sup>448</sup>

144. The Trial Chamber is satisfied that the physical and psychological health of many non-Serb detainees deteriorated or was destroyed as a result of the living conditions accepted as having existed at the KP Dom, and as charged under par 5.37 and described in Schedule D to the Indictment. In making this finding, the Trial Chamber notes that there is no legal requirement that the suffering of a victim be lasting for the offences of cruel treatment or inhumane acts to be established. However, the Trial Chamber is satisfied that many of the non-Serb detainees continue to suffer lasting physical and psychological effects of their period of detention at the KP Dom. This factor supports the Trial Chamber's finding that the acts and omissions found below were of a serious nature.

145. The Trial Chamber is satisfied that the substantial cause of the death of Enes Had'ic in Spring 1992, charged under **par 5.37** of the Indictment, was the failure to provide access to medical care. Enes Had'ic suffered from a stomach ulcer, and his health deteriorated after he ran out of medicine while detained at the KP Dom.<sup>449</sup> In June 1992, he started to bleed internally and began vomiting blood. The guards were unwilling to react. Instead of

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<sup>442</sup> Safet Avdic (T 537).

<sup>443</sup> FWS-66 (T 1111); FWS-111 (T 1259); FWS-162 (T 1392); FWS-215 (T 901); FWS-54 (T 773); Safet Avdic (T 489); FWS-139 (T 367); FWS-86 (T 1530); Rasim Taranin (T 1724); FWS-138 (T 2090); FWS-104 (T 2182); FWS-03 (T 2261); FWS-144 (T 2301); FWS-71 (T 2889); FWS-109 (T 2377); Dževad S Lojo (T 2587); Dr Amir Berberkic (T 3931); Safet Avdic (T 494); FWS-86 (T 1520); FWS-144 (T 2301); FWS-71 (T 2889); FWS-198 (T 1013); FWS-215 (T 902).

<sup>444</sup> FWS-111 (T 1259); FWS-162 (T 1392); FWS-54 (T 773); FWS-109 (T 2377).

<sup>445</sup> Rasim Taranin (T 1724); FWS-104 (T 2182); Safet Avdic (T 537).

<sup>446</sup> FWS-66 (T 1111); FWS-198 (T 1023); FWS-215 (T 902); Rasim Taranin (T 1724); FWS-03 (T 2261); Dževad S Lojo (T 2587-2588).

<sup>447</sup> Dr Amir Berberkic (T 3931-3932); FWS-159 (T 2508); FWS-215 (T 902); FWS-65 (T 537).

<sup>448</sup> FWS-71 (T 865); Safet Avdic (T 537). Muharem ^au{evi} was taken out and beating during the time his daughter was detained with him: FWS-215 (T 895); FWS-62 (T 1092).

<sup>449</sup> FWS-111 (T 1230); FWS-162 (T 1395); Dževad Lojo (T 646, 668); FWS-182 (T 1619); FWS-08 (T 1782-1783).

calling a doctor or immediately taking Enes Had'ic to hospital, they threatened the detainees and remained inactive.<sup>450</sup> Enes Had'ic was not taken to the hospital until the next day, when he died.<sup>451</sup>

146. The Trial Chamber is satisfied that the following victims identified in Schedule D to the Indictment suffered serious physical and psychological consequences as a result of the living conditions at the KP Dom:

147. Dr Amir Berberkic (**D 1**) was brought into the KP Dom on crutches from the hospital, while he was still undergoing treatment after having been wounded in the legs. His physical therapy was interrupted by his transfer to the KP Dom.<sup>452</sup> During his detention, he suffered various symptoms of malnutrition after his weight dropped from 87 kilograms on his arrival to 62 kilograms. His bones ached so much that he had difficulty sleeping, he suffered from vomiting spells and he found standing tiring. His eyesight weakened.<sup>453</sup> When he was released from the KP Dom, he began to see a psychiatrist and was prescribed medication for post traumatic stress syndrome.<sup>454</sup> Dr Berberkic still suffers from mental blocks and has anxiety attacks. He continues to experience flashbacks from the traumatic events experienced at the KP Dom.<sup>455</sup>

148. Edhem Bunda (**D 2**) was a mentally disturbed person with a habit of harming himself.<sup>456</sup> One night, he found a razor which was used by some detainees to shave, and he used it to cut off part of his ear. He was taken to the male nurse and bandaged.<sup>457</sup> The next evening, he got hold of the razor again and cut off all his fingernails.<sup>458</sup> He was so hungry that one morning he ate a hardboiled egg including the shell, and he would eat insects if he could catch them. Before he was detained, he used to wander in the forest around Tjentiste to ease his mind, but he could no longer control his actions at the KP Dom because of the

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<sup>450</sup> FWS-71 (T 2790); FWS-109 (T 2366); FWS-08 (T 1782); Dr Amir Berberkic (T 3758); Dr Drago Vladicic (T 6325, 6331); Risto Ivanovic (T 6199); Dr Milovan Dobrilovic treated Enes Had'ic at the infirmary but was never called to the detainees rooms (T 6346, 6353).

<sup>451</sup> FWS-08 (T 1782-1783); Dr Amir Berberkic (T 3758); FWS-109 (T 2366-2367, 2374); FWS-71 (T 2791-2792).

<sup>452</sup> FWS-111 (T 1222); Dr Amir Berberkic (T 3730-3731).

<sup>453</sup> Dr Amir Berberkic (T 3755).

<sup>454</sup> T 4020.

<sup>455</sup> T 3972.

<sup>456</sup> FWS-111 (T 1218).

<sup>457</sup> FWS-111 (T 1219).

<sup>458</sup> *Ibid.*

strict detention and the severe hunger he suffered.<sup>459</sup> The guards were aware of the group of mentally handicapped detainees, but they did not take any positive action.<sup>460</sup>

149. FWS-66 (**D 3**) lost 31 kilograms while detained at the KP Dom. He could no longer stand on his feet, and he fainted several times.<sup>461</sup> After he had fainted three times, he received an infusion from the nurse Gojko Jovanovic.<sup>462</sup> He was a healthy man before he was detained at the KP Dom, but he now suffers from diabetes and has to consult doctors and hospitals often.<sup>463</sup> He suffers from frequent nightmares and often awakes screaming.<sup>464</sup>

150. FWS-109 (**D 5**) lost 30 kilograms within a period of three months during his detention at the KP Dom.<sup>465</sup> He now suffers from high blood pressure, and requires medical treatment. He suffers from frequent nightmares, and he is haunted by his experiences at the KP Dom.<sup>466</sup>

151. FWS-71 (**D 6**) lost between 24 to 28 kilograms while detained at the KP Dom.<sup>467</sup> In November 1992, he contracted pneumonia due to his exposure to the freezing temperatures. In December 1992, his condition worsened when he was sent to an isolation cell as punishment for having made a heater to heat water.<sup>468</sup> He was given medical treatment and received two injections of antibiotics and some paracetamol pills.<sup>469</sup> He suffers from various health problems as a result of his detention. During periods of cold weather, his lungs ache and he suffers from rheumatism.<sup>470</sup> He has frequent headaches, he cannot stand still for more than 15 minutes and he has difficulty walking for any length of time.<sup>471</sup> Upon his release from the KP Dom, he required constant psychiatric supervision for approximately one year. He still requires some psychiatric care,<sup>472</sup> and he continues to take medication.<sup>473</sup>

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<sup>459</sup> FWS-111 (T 1219).

<sup>460</sup> T 1220.

<sup>461</sup> T 1084.

<sup>462</sup> T 1146.

<sup>463</sup> T 1086.

<sup>464</sup> T 1137.

<sup>465</sup> T 2371.

<sup>466</sup> T 2372.

<sup>467</sup> T 2805.

<sup>468</sup> T 2805-2807.

<sup>469</sup> T 2949-2950.

<sup>470</sup> T 2806.

<sup>471</sup> T 2919.

<sup>472</sup> T 2919.

<sup>473</sup> T 2931-2932.

152. Ejub Durmisevic (**D 8**) was approximately 75 years of age when he was detained in the KP Dom. He was frequently sent to a solitary confinement cell, which he shared with two other detainees.<sup>474</sup> The cell was so small that the three of them had to sleep side by side. It was not possible for them to sleep on their backs.<sup>475</sup> Durmisevic's ear was badly injured and a blood vessel was exposed. He requested medical assistance, but it was denied while he was held in solitary confinement.

153. FWS-249 (**D 9**) suffered from extreme hunger and contracted pneumonia from his exposure to the cold while detained at the KP Dom.<sup>476</sup> He still suffers from bad dreams and nightmares. He also suffers from chronic back problems. However, the Trial Chamber is not satisfied that his back problems are a direct consequence of the labour he performed while at the KP Dom or a result of the general living conditions. He had been engaged in exacting physical work as a mechanic for most of his life, and the reasonable possibility that his back problems were caused by his former work has not been excluded by the Prosecution to the satisfaction of the Trial Chamber.<sup>477</sup>

154. FWS-139 (**D 11**) lost 20 kilograms during his first three months of detention at the KP Dom.<sup>478</sup> He suffered numerous health problems as a result of his exposure to the cold. His hands and ears became swollen, his skin cracked and bled and he suffered from chilblains. His mental health was also affected.<sup>479</sup> Previously, he had worked as a guard at the KP Dom, and he found it particularly humiliating to find himself a prisoner.<sup>480</sup>

155. FWS-162 (**D 12**) lost 26 kilograms while detained at the KP Dom.<sup>481</sup> He continues to suffer from a nervous condition, and he is ill constantly.<sup>482</sup>

156. FWS-182 (**D 13**) suffered from an ulcer on the duodenum prior to his detention at the KP Dom. He had been on a restricted diet, which was not catered for during his detention. He was also denied the mental and psychological rest required for his condition.

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<sup>474</sup> FWS-159 (T 2469).

<sup>475</sup> T 2470.

<sup>476</sup> T 4431.

<sup>477</sup> T 4432-4433.

<sup>478</sup> T 343.

<sup>479</sup> T 340.

<sup>480</sup> T 439.

<sup>481</sup> T 1361.

<sup>482</sup> *Ibid.*

Within one month of his initial arrest and detention he was in a serious condition.<sup>483</sup> In July 1992, he received medical assistance and was given an infusion and some pills.<sup>484</sup> Nevertheless, his physical health continued to deteriorate and this impacted upon his mental well being. He was convinced that he was dying, and he became suicidal.<sup>485</sup>

157. RJ (**D 14**) had undergone a double bypass operation after a heart attack before he was brought to the KP Dom. He did not receive the necessary post-operative therapy, and his condition worsened during his detention.<sup>486</sup> He suffered from constant hunger. On one occasion, he begged the Accused for food and was permitted to take some bread leftovers and some salt.<sup>487</sup>

158. FWS-111 (**D 15**) lost 20 kilograms during his detention. His eyesight deteriorated,<sup>488</sup> and he believes that his constant exposure to the cold caused a slowing of his blood circulation.<sup>489</sup> He has never recovered from his period in detention, his eyesight remains weak, and he becomes tired quickly.<sup>490</sup> Prior to his detention he was able to work 12 to 16 hours a day, today he can only manage half of that time.<sup>491</sup> He suffers from chronic sleeplessness and is unable to sleep at all without medication.<sup>492</sup>

159. Omer Kunovac (**D 17**)<sup>493</sup> was a deaf-mute person from Ustikolina who died after being subjected to beatings at the KP Dom.<sup>494</sup> Kunovac suffered from terrible stomach pains and internal bleeding after a beating.<sup>495</sup> Medically qualified non-Serb detainees discussed his condition with the guards and nurse Gojko Jokanovic. They recommended that he be urgently transferred to the hospital. They were told that this was out of the question,<sup>496</sup> and Kunovac was forced to join the other detainees in the canteen. It was only

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<sup>483</sup> T 1595-1596.

<sup>484</sup> T 1686, 1688.

<sup>485</sup> T 1618.

<sup>486</sup> FWS-111 (T 1220-1221).

<sup>487</sup> T 3876.

<sup>488</sup> T 1312.

<sup>489</sup> T 1226.

<sup>490</sup> T 1287.

<sup>491</sup> T 1287.

<sup>492</sup> T 1288.

<sup>493</sup> The Prosecution claimed that his name was misspelled under Schedule D 17 and that he is the same person referred to under Schedule B 35 (T 3763).

<sup>494</sup> FWS-66 (T 1088); FWS-111 (T 1230); FWS-162 (T 1395); Dr Amir Berberkic (T 3760).

<sup>495</sup> Dr Torlak, who was an experienced surgeon, examined Kunovac and said that it appeared to be an injury to the internal organs of the abdomen: Dr Amir Berberkic (T 3760-3763); FWS-111 (T 1231).

<sup>496</sup> Dr Amir Berberkic (T 3760); FWS-111 (T 1231); FWS-162 (T 1393); Risto Ivanovic accompanied Gojko Jokanovic and Dr Karovic to the KP Dom pharmacy to get medicine for Kunovac (T 6168).

after he collapsed in the canteen that he was permitted to have his meals brought to him in his room.<sup>497</sup> He suffered chronic pain for three weeks until he died on 21 June 1993.<sup>498</sup>

160. FWS-144 (**D 18**) suffered from fear and hunger while detained at the KP Dom. He felt starved.<sup>499</sup> He feared daily that he would be killed, and he was mentally tormented by hearing the screams of other detainees.<sup>500</sup>

161. D'evad Lojo (**D 19**) lost more than 40 kilograms during his detention. At one point, he weighed a mere 48 kilograms.<sup>501</sup> Even after the food improved in the middle of 1993, he found it difficult to regain weight.<sup>502</sup> His constant exposure to the cold caused swelling of his joints, hands, wrists and ankles, and he suffered from regular bleeding.<sup>503</sup>

162. FWS-104 (**D 20**) lost approximately 40 kilograms while detained at the KP Dom.<sup>504</sup> He was released in October 1992, and was then detained for a further ten days at Kalinovik police station. The food he received during that detention was of the same quality as that received at the KP Dom. He was finally exchanged on 9 November 1992.<sup>505</sup> He then spent two and a half months in hospital.<sup>506</sup> This hospital stay assisted his recovery from the substantial weight loss caused by his detention at the KP Dom.<sup>507</sup> FWS-104 nevertheless continues to suffer psychological disturbances from his period of detention.<sup>508</sup>

163. FWS-215 (**D 21**) lost 33 kilograms in his first two months at the KP Dom.<sup>509</sup> He became very sick when, in the winter of December 1992, he was placed in solitary confinement for a night for trying to procure hot water from the kitchen. He was ill for seven to eight days, and he managed to recuperate only with the help of two medically

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<sup>497</sup> FWS-111 (T 1231).

<sup>498</sup> FWS-111 (T 1231); Dr Amir Berberkic (T 3760); FWS-162 (T 1393); Risto Ivanovic (T 6169).

<sup>499</sup> T 2327.

<sup>500</sup> *Ibid.* T 2377.

<sup>501</sup> T 664.

<sup>502</sup> T 665.

<sup>503</sup> T 663.

<sup>504</sup> T 2197.

<sup>505</sup> FWS-104 (T 2194-2195, 2197).

<sup>506</sup> T 2198.

<sup>507</sup> *Ibid.*

<sup>508</sup> T 2120.

<sup>509</sup> T 874.

qualified detainees in his room.<sup>510</sup> He suffered emotional stress from his feelings of uncertainty, isolation and worry about the fate of his family.<sup>511</sup>

164. FWS-86 (D 22) lost approximately 30 kilograms during his detention at the KP Dom. He was so hungry that he still feels he will die of hunger for bread.<sup>512</sup> One of the U'ice reservists beat him upon his arrival at the KP Dom. As a result, his entire right side went stiff, and this condition deteriorated during his detention.<sup>513</sup> He was in good health prior to his detention, but he suffered a heart attack while at the KP Dom.<sup>514</sup> A few days after his heart attack, he was permitted to see the doctor. The delay was caused by the requirement that detainees make an application for a medical consultation.<sup>515</sup> The doctor confirmed that he had survived a heart attack and prescribed him Aspirin because nothing else was available. He was not taken to the hospital.<sup>516</sup> He also suffered from inflammation of the left jaw and from testicular inflammation.<sup>517</sup> FWS-86 still suffers from heart problems. He cannot walk much, gets tired easily and cannot bend forward. The poor diet caused some of his teeth to fall out. He has problems with his urinary tract.<sup>518</sup> He has received frequent treatment from a physiotherapist for his right side and, although there has been some improvement, he still has difficulty doing certain things.<sup>519</sup> After his release, he spent several months at the hospital and has returned several times since.<sup>520</sup>

165. Rasim Taranin (D 23) lost 18 to 19 kilograms while detained at the KP Dom.<sup>521</sup> His physical suffering was so severe that he found difficulty in describing it. He was often suicidal in the early days after his release, and he has received treatment for many years. He has since suffered a stroke but, in the absence of any medical evidence (even of a reliable hearsay nature), the Trial Chamber is not satisfied that the stroke was a result of the living conditions at the KP Dom.<sup>522</sup>

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<sup>510</sup> T 876-877.

<sup>511</sup> T 920.

<sup>512</sup> T 1506.

<sup>513</sup> T 1495, 1505.

<sup>514</sup> T 1499.

<sup>515</sup> T 1502.

<sup>516</sup> T 1502-1504.

<sup>517</sup> T 1499.

<sup>518</sup> T 1504.

<sup>519</sup> *Ibid.*

<sup>520</sup> T 1499.

<sup>521</sup> T 1729.

<sup>522</sup> Rasim Taranin (T 1742-1743).

166. The Trial Chamber is not satisfied that the Prosecution has established that the detainees listed under **D 4**, **D 7**, **D 10** and **D 24** suffered the physical and/or psychological consequences alleged. The Prosecution conceded that no evidence had been adduced in proof of these incidents.<sup>523</sup>

167. The Trial Chamber is also not satisfied that the Prosecution has established that a substantial cause of the death of Sefko Kubat (**D 16**) was the living conditions at the KP Dom, nor that the events leading to his death occurred during the time when the Accused was the warden. Sefko Kubat suffered from an ulcer prior to his detention at the KP Dom. Once at the KP Dom he received medical assistance. He underwent surgery and remained at the hospital for a period of seven days following the surgery. He appeared to recover well and was healthy for eight months after the surgery, and then he collapsed. A doctor was called to assist and was told that Sefko Kubat was bleeding from the mouth. By the time the doctor arrived, Sefko Kubat was dead.

168. The Trial Chamber also heard evidence from many detainees who were not identified in Schedule D and who spoke of the effects upon them of their period of detention.<sup>524</sup> The Prosecution did not give notice to the Accused that it was relying upon detainees not identified in Schedule D (or in the text of the Indictment) in support of these counts, and the Trial Chamber has not considered them in support of the charges.

### 3. The responsibility of the Accused

169. There is no evidence that the Accused personally initiated the living conditions imposed upon the non-Serb detainees, and no evidence that he issued any orders to the guards of the KP Dom with respect to the imposition of these living conditions. The Trial Chamber is nevertheless satisfied that the Accused had knowledge of the conditions under which the non-Serb detainees were being held and of the effects these conditions were having on the physical and psychological health of the non-Serb detainees.<sup>525</sup> A number of

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<sup>523</sup> This has been conceded by the Prosecution, see Prosecution Final Trial Brief, Schedule D, pp 2, 3, 4 and 9.

<sup>524</sup> Safet Avdic (T 534-538, 461, 469); FWS-142 (T 1832-1833); Ahmet Had' imusic (T 1985, 1941); FWS-138 (2120); FWS-144 (T 2326-2327); FWS-162 (T 1411); FWS-54 (T 750, 786); FWS-86 (T 1540, 1542); FWS-08 (T 1772, 1799); Dževad S Lojo (T 2627-2628); FWS-58 (T 2706-2707); Ekrem Zekovic (T 2706-2707); FWS-98 (T 951-952, 956, 1025); FWS-250 (T 5069); FWS-69 (T 4068); FWS-172 (T 4599); FWS-73 (T 3297-3298, 3312); FWS-159 (T 2442-2443, 2448-2449, 2463-2466, 2467, 2469-2470, 2478-2479, 2484, 2493, 2495, 2506); FWS-159 (2493, 2497, 2499, 2508).

<sup>525</sup> Muhamed Lisica once approached the Accused and told him that it was hard to work and that he was going to faint. He told the Accused that the food was not sufficient and that he was hungry (T 4889, 4895); FWS-182 approached the Accused twice for medical help and expressed his fear of dying (T 1599, 1604). Safet Avdic

detainees gave evidence that they met with the Accused and told him about their suffering.<sup>526</sup> The Accused admitted that he habitually met with detainees, and he confirmed that, during these conversations, the detainees discussed the living conditions at the KP Dom.<sup>527</sup>

170. The Prosecution alleges that the Accused incurred criminal responsibility for the inhumane conditions as inhumane acts and cruel treatment imposed on the non-Serb detainees at the KP Dom as a participant in a joint criminal enterprise pursuant to Article 7(1) of the Statute. To establish the Accused's responsibility on this basis, the Prosecution must establish that the Accused entered into an agreement with the guards of the KP Dom and the military authorities to subject the non-Serb detainees to the inhumane conditions which constituted inhumane acts and cruel treatment, and that each of the participants, including the Accused, shared the intent of this crime. The Trial Chamber is not satisfied that the Prosecution has established either that the Accused entered into such an agreement or that he had the intent to subject the non-Serb detainees to inhumane living conditions constituting inhumane acts and cruel treatment while he was warden of the KP Dom.

171. The Prosecution also alleges that the Accused incurred criminal responsibility for aiding and abetting the imposition of the inhumane conditions constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom pursuant to Article 7(1) of the Statute.<sup>528</sup> To establish the Accused's responsibility on this basis, the Prosecution must establish that he was aware of the intent of the principal offenders, guards and military authorities, and that he carried out acts which rendered a substantial contribution to the commission of the intended crime by the principal offenders. The Trial Chamber is

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asked the warden for soap and toiletries (T 479); RJ, a close friend of the Accused from before the war, was asked by the Accused at least twice during his detention to inform him about the treatment of the detainees. RJ told the Accused about the problems of the detainees, not only about the insufficient food, but also about the hygienic problems and the need to improve the medical care. RJ stressed that he was "honest" with the Accused and that he told him about the "bad things" that were happening to the detainees (T 3867, 3859-3860). He specifically told the Accused about the mistreatment of a disabled detainee in the yard and his subsequent internment in solitary confinement (T 3865).

<sup>526</sup> Safet Avdic (T 479, 482); FWS-182 (T 1599, 1602, 1604); RJ (T 3859, 3865); Muhamed Lisica (T 4889, 4895).

<sup>527</sup> T 8091-8092.

<sup>528</sup> See pars 88-90, *supra*.

satisfied that the Accused was aware of the intent of the principal offenders and that he was aware that his failure to take any action as warden in relation to this knowledge contributed in a substantial way to the continued maintenance of these conditions constituting inhumane acts and cruel treatment by the principal offenders by giving encouragement to the principal offenders to maintain these living conditions. The Trial Chamber thus finds that the Accused incurred individual criminal responsibility pursuant to Article 7(1) of the Tribunal's Statute by aiding and abetting the maintenance of living conditions at the KP Dom constituting inhumane acts and cruel treatment during the period in which he was warden.

172. The Trial Chamber is also satisfied that the Accused incurred criminal responsibility in his position as warden of the KP Dom for the acts and omissions of his subordinates, pursuant to Article 7(3) of the Tribunal's Statute. The Trial Chamber is satisfied that the Accused was aware of the participation of his subordinates in the creation of living conditions at the KP Dom which constituted inhumane acts and cruel treatment, that he omitted to take any action to prevent his subordinates from maintaining these living conditions and that he failed to punish his subordinates for the implementation of these living conditions.

173. The Trial Chamber has established the criminal responsibility of the Accused pursuant to both Article 7(1) and Article 7(3). However, the Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility for the same count based on the same acts. Where the Prosecutor alleges both heads of responsibility within the one count, and the facts support a finding of responsibility under both heads of responsibility, the Trial Chamber has a discretion to choose which is the most appropriate head of responsibility under which to attach criminal responsibility to the Accused. This discretion has not been affected by the law as to cumulative convictions as stated by the majority of the Appeals Chamber in *Delalic*.<sup>529</sup> In the circumstances before it, the Trial Chamber considers that the criminality of the Accused is better characterised as that of an aider and abettor to the principal offenders who imposed and maintained the inhumane living conditions constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom. Accordingly, the Trial Chamber will enter a conviction under Article 7(1) only, but it will take the Accused's position as a superior into account as having aggravated

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<sup>529</sup> *Delalic* Appeal Judgment pars 400-413.

his omission to take any action to prevent the continued maintenance of those conditions and that treatment.

### C. Cruel treatment, inhumane acts and torture

174. The Accused is charged under Counts 5 and 7 of the Indictment with inhumane acts pursuant to Article 5(i) of the Statute, and with cruel treatment pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions, in respect of several incidents of arbitrary beatings set out under par 5.4 to 5.29 of the Indictment. Pursuant to par 5.14 of the Indictment, additional incidents described in Schedule A are included in these charges. The Accused is further charged under Counts 2 and 4 with torture pursuant to both Article 3 and Article 5 of the Statute in respect of incidents of torture and beatings set out in par 5.17 to 5.29 of the Indictment.

#### 1. The law

175. The general requirements under Article 3, as well as the requirements specific to the basis of the torture charge under Article 3, namely, common Article 3, are set out above.<sup>530</sup> The Trial Chamber is satisfied that all those requirements have been met.<sup>531</sup> Likewise, the general requirements under Article 5 have been met in respect of both torture and inhumane acts.<sup>532</sup>

#### (a) Cruel treatment and inhumane acts

176. The law with regard to inhumane acts under Article 5(i) and cruel treatment under Article 3 of the Statute has already been stated in relation to Counts 13 and 15 of the Indictment (living conditions at the KP Dom).<sup>533</sup> It is important to emphasize that the mere description of the assaults as “beatings” does not *by itself* establish that the assaults constituted “cruel treatment” or “inhumane acts” pursuant to those Articles.

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<sup>530</sup> See pars 51-59, *supra*.

<sup>531</sup> See pars 60-64, *supra*.

<sup>532</sup> See pars 53-59, 60-64, *supra*.

<sup>533</sup> See pars 130-132, *supra*.

(b) Torture

177. The general requirements with respect to Articles 3 and 5 of the Statute have been met.<sup>534</sup>

178. The definition of the offence of torture is the same regardless of the Article of the Statute under which the acts of the Accused have been charged.<sup>535</sup>

179. The definition of the crime of torture charged pursuant to the Tribunal's Statute comprises the following elements:<sup>536</sup>

1. the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
2. the act or omission must be deliberate.
3. the act or omission must have occurred in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.

180. "Torture" constitutes one of the most serious attacks upon a person's mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment.<sup>537</sup> Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5 of the Tribunal's Statute.

181. The expression "severe pain or suffering" conveys the idea that only acts of substantial gravity may be considered to be torture.<sup>538</sup> Neither interrogation by itself, nor minor contempt for the physical integrity of the victim, satisfies this requirement.

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<sup>534</sup> See pars 51-64, *supra*.

<sup>535</sup> This is necessarily implicit in the following cases: *Delalic* Trial Judgment, pars 468-469; *Furundžija* Trial Judgment, pars 139, 153-154; *Kunarac* Trial Judgment, par 497; *Kvočka* Trial Judgment, par 158.

<sup>536</sup> *Kunarac* Trial Judgment, par 497.

<sup>537</sup> See, for example, Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

Mistreatment which does not rise to the threshold level of severity necessary to be characterised as torture may nevertheless constitute another less serious offence.<sup>539</sup> In attempting to define an offence or to determine whether any of the elements of that definition has been met, the Trial Chamber is mindful of the specificity of international humanitarian law.<sup>540</sup> Care must be taken to ensure that this specificity is not lost by broadening each of the crimes over which the Tribunal has jurisdiction to the extent that the same facts come to constitute all or most of those crimes. In particular, when relying upon human rights law relating to torture, the Trial Chamber must take into account the structural differences which exist between that body of law and international humanitarian law, in particular the distinct role and function attributed to states and individuals in each regime.<sup>541</sup> However, this does not preclude recourse to human rights law in respect of those aspects which are common to both regimes. In that respect, the Trial Chamber regards the general reasoning and criteria used by the European Court of Human Rights in order to assess the gravity of the act of torture, as well as its relationship with other less serious offences, as sufficiently compelling as to warrant adopting it in the present case.

182. The prohibition against torture applies at all times.<sup>542</sup> When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, 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

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<sup>538</sup> *Delalic* Trial Judgment, pars 468-469. The European Court of Human Rights held that "torture" involves "suffering of a particular intensity or cruelty" which accounts for the "special stigma" attached to this offence (*Ireland v United Kingdom*, 18 Jan 1978, Series A No 25, par 167).

<sup>539</sup> *Delalic* Trial Judgment, par 468.

<sup>540</sup> See *Kunarac* Trial Judgment, pars 470-471.

<sup>541</sup> *Kunarac* Trial Judgment, pars 470-496.

<sup>542</sup> *Furundžija* Trial Judgment, par 139; *Delalic* Trial Judgment, par 454 and sources quoted therein. See also Articles 32 and 147 of Geneva Convention IV, Articles 12 and 50 of Geneva Convention I, Article 12 and 51 of Geneva Convention II, Article 13, 14, 17 and 130 of Geneva Convention III, Common Article 3 to the four Geneva Conventions, Article 4 of Additional Protocol II and Article 75 of Additional Protocol I. See also, Principle 6 of the *Body of Principles for the Protection of All Persons under Any Form Detention or Imprisonment*, 9 December 1988, provides that "no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." Those principles apply for the protection of *all persons* under any forms of detention or imprisonment.

lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.<sup>543</sup>

183. Solitary confinement is not, in and of itself, a form of torture. However, in view of its strictness, its duration, and the object pursued, solitary confinement could cause great physical or mental suffering of the sort envisaged by this offence.<sup>544</sup> To the extent that the confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture. The same is true of the deliberate deprivation of sufficient food.<sup>545</sup>

184. The act of torture must have been committed deliberately,<sup>546</sup> and for one of the prohibited purposes mentioned in the above definition. This does not necessarily mean that the purpose in question must be illegitimate. Several listed purposes, in particular obtaining information or a confession, may be perfectly legitimate on condition that appropriate methods are used to achieve them. Nor does the act need to have been committed exclusively for one of the prohibited purposes. It must simply be part of the motivation behind the conduct, and it need not be the predominant or sole purpose.<sup>547</sup>

185. The Trial Chamber is satisfied that the following relevant purposes have become part of customary international law: obtaining information or a confession; punishing,

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<sup>543</sup> See *Kvočka* Trial Judgment, pars 143, 149, 151 and sources quoted therein. See also, *Keenan v UK*, Judgment, 3 April 2001, Application No 27229/95, par 112; *Selmouni v France*, Judgment, Application No 25803/94, 28 July 1999, par 104; *Ireland v United Kingdom*, Judgment, 18 Jan 1978, Series A No. 25, pars 167 and 174; Greek case, Report of 5 Nov 1969, (1969) 12 Yearbook, Vol II, pars 12, 18 of the Opinion of the Commission; *Aydin v Turkey*, Judgment, 25 Sept 1997, Application No. 23178/94, 25 Sept 1997, par 84. On the effect of time on the court's assessment of the severity of the abuse, see for example *Soering v United Kingdom*, Judgment, 7 July 1989, Series A No. 161, pars 106, 111. See for example the allegations contained under pars 5.7, 5.11, 5.24, 5.26 and 5.29 of the Indictment, as well as the incidents 1, 2, 4 and 13 listed under Schedule A and 38, 40, 49 and 56 under Schedule B.

<sup>544</sup> See *General Comment 20/44* of 3 April 1992 "Prohibition of Torture" point 6, where the Committee for Human Rights notes that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7 of the ICCPR – *Prohibition of Torture*" See also, before the European Commission of Human Rights, *Bonzi* (Switzerland), 7854/77, 12 D.R. 85 and *Kröcher and Möller* (Switzerland), 84463/78, 26 D.R. 24.

<sup>545</sup> See, for example, Article 55 of Geneva Convention IV and Article 26 of Geneva Convention III. See also Article 20 of the *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955; *Setelich v Uruguay*, (28/1978) Report of the Human Rights Committee, GAOR, 14<sup>th</sup> Session, par 16.2; the 1986 *Report of the Special Rapporteur on torture* which lists "prolonged denial of food" as one specific form of torture (E/CN.4/1986/15); and the *Greek case*, where the European Commission of Human Rights considered Greece's breaches of Article 3 of the ECHR in light of its failure to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners (Report of 5 Nov 1969, (1969) 12 Yearbook, Vol II).

<sup>546</sup> *Furundžija* Trial Judgment, par 162; *Akayesu* Trial Judgment, par 594; *Kunarac* Trial Judgment, par 497.

<sup>547</sup> *Delalic* Trial Judgment, par 470; *Kunarac* Trial Judgment, par 486.

intimidating or coercing the victim or a third person; or discriminating, on any ground, against the victim or a third person.<sup>548</sup>

186. The Trial Chamber is of the opinion that, although other purposes may come to be regarded as prohibited under the torture provision in due course, they have not as yet reached customary status. In particular, the purpose to “humiliate” the victim, mentioned in *Furundžija* and more recently in *Kvočka*,<sup>549</sup> is not expressly mentioned in any of the principal international instruments prohibiting torture.<sup>550</sup> Nor is there a clear jurisprudential disposition towards its recognition as an illegitimate purpose. There may be a tendency, particularly in the field of human rights, towards the enlargement of the list of prohibited purposes, but the Trial Chamber must apply customary international humanitarian law as it finds it to have been *at the time when the crimes charged were alleged to have been committed*. In light of the principle of legality, the proposition that “the primary purpose of humanitarian law is to safeguard human dignity”<sup>551</sup> is not sufficient to permit the court to introduce, as part of the *mens rea*, a new and additional prohibited purpose, which would in effect enlarge the scope of the criminal prohibition against torture beyond what it was at the time relevant to the indictment under consideration.

187. Under international humanitarian law in general, and under Articles 3 and 5 of the Statute in particular, the presence or involvement of a state official or of any other

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<sup>548</sup> See *Kunarac* Trial Judgment, par 485; *Delalic* Trial Judgment, pars 470-472; *Akayesu* Trial Judgment, par 594.

<sup>549</sup> *Furundžija* Trial Judgment, par 162; *Kvočka* Trial Judgment, pars 141, 152, 157.

<sup>550</sup> Article 50 of Geneva Convention I, Articles 51 of Geneva Convention II, Article 130 of Geneva Convention III and Article 147 of Geneva Convention IV prohibit, *inter alia*, “torture” as a grave breach of the Geneva Conventions. The *Commentary* states that the word “torture” must be given a “legal meaning”, ie that “torture” consists of “the infliction of suffering on a person *to obtain from that person, or from another person, confessions or information*” (emphasis added); in Pictet (ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 598. See also Article 1 of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by UN General Assembly resolution 3452 of 9 Dec 1975; Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by UN General Assembly resolution 39/46 of 10 Dec 1984, entered into force on 26 June 1987; Article 2 of the *Inter-American Convention to Prevent and Punish Torture of 9 December 1985*, signed on 9 Dec 1985 and entered into force on 28 Feb 1987 (OAS Treaty Series No 67, OEA/Ser.A/42 (SEPF)); the Inter-American Convention prohibits the infliction of “physical or mental pain or suffering (...) on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, *or for any other purpose*” (emphasis added); See also jurisprudence of the European Courts of Human Rights on Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, for example, *Greek case*, 1969, YB Eur Conv on H R 12, p 186.

<sup>551</sup> See *Furundžija* Trial Judgment, par 162.

authority-wielding person in the process of torture is not necessary for the offence to be regarded as "torture".<sup>552</sup>

188. The infliction of severe pain in pursuance of a given prohibited purpose must be established beyond reasonable doubt and cannot be presumed.

## 2. Findings

### (a) Cruel treatment and inhumane acts (par 5.4 to 5.16)

#### (i) Beatings upon arrival in the prison yard (par 5.4 to 5.6)

189. The Trial Chamber is not satisfied that the incidents charged respectively in **par 5.4** and **5.6** of the indictment have been established. The Prosecution conceded that this is so.<sup>553</sup>

190. The Prosecutor has alleged in **par 5.5** that FWS-71 was beaten, kicked and hit with rifle butts by soldiers when he arrived at the KP Dom in a group of 21 detainees on 25 May 1992.

191. The Trial Chamber is satisfied that, on that date, FWS-71 was transported from the police station in Herceg-Novi to the KP Dom in a group of 21 detainees.<sup>554</sup> On arrival, these men were met by a group of about ten individuals in uniforms.<sup>555</sup> These soldiers started beating the Muslim detainees one by one as they were getting off the bus. The soldiers lined them up against the wall of the KP Dom and struck each one with a rifle butt.<sup>556</sup> During the beatings, the soldiers used expletives and offensive language.<sup>557</sup> FWS-71 was kicked and hit a number of times by several soldiers during this incident. His mistreatment resulted in a bruise on his right shoulder which was clearly visible for between five and ten days. He also had pain around the rib cage and in the shoulder area.<sup>558</sup> Slavko Koroman, Zoran Mijovic and Milenko Elecic of the regular KP Dom prison guard staff were present at the entrance to the KP Dom building, right next to where the detainees were

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<sup>552</sup> *Kunarac* Trial Judgment, pars 488-496.

<sup>553</sup> Prosecution Final Trial Brief, par 80.

<sup>554</sup> FWS-71 (T 2780-2781, 2774).

<sup>555</sup> *Ibid.*

<sup>556</sup> FWS-71 (T 2784).

<sup>557</sup> FWS-71 (T 2785).

<sup>558</sup> FWS-71 (T 2784).

lined up, when the incident occurred.<sup>559</sup> These guards did not react at all while the detainees were being beaten.<sup>560</sup>

192. The Trial Chamber has been unable to determine, in respect of this incident, whether the beating took place inside the KP Dom or just outside the entrance of the prison.<sup>561</sup> The Prosecution did not seek to make a case that the Accused bore any responsibility for beatings which took place outside of the KP Dom, nor is there any evidence to that effect.<sup>562</sup> The benefit of this doubt must favour the Accused, and the Trial Chamber accordingly is not satisfied that this incident may be taken into account in the present case.

(ii) Beatings associated with the canteen (par 5.7 to 5.16)

193. **Par 5.7** of the Indictment alleges that detainees at the KP Dom were assaulted on their way to or from the canteen by guards of the KP Dom and soldiers from outside the KP Dom between May and December 1992.

194. The Trial Chamber is satisfied that individuals or groups of armed soldiers were allowed into the KP Dom compound during the first months of the non-Serb civilians' detention. It was not unusual for detainees to be beaten by guards of the KP Dom or soldiers from outside the KP Dom while lining up for lunch in the compound or while being taken back and forth through the compound.<sup>563</sup> However, the Trial Chamber is not satisfied that the incidents referred to in the evidence are different from those which are expressly identified in the paragraphs of the Indictment which follow par 5.7. There also remains some uncertainty as to the gravity of the acts described in the evidence, and there is also some confusion as to whether these acts took place at the time when the Accused was the warden.<sup>564</sup> The Trial Chamber is therefore not satisfied that these incidents have been established as separate incidents of sufficient gravity.

195. **Par 5.8** of the Indictment alleges that, on an unknown date in August 1992, a group of seven or eight unidentified military policemen entered the KP Dom, approached

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<sup>559</sup> FWS-71 (T 2785-2786).

<sup>560</sup> FWS-71 (T 2788).

<sup>561</sup> FWS-71 (T 2786, 2788).

<sup>562</sup> See par 4.9 of the Indictment.

<sup>563</sup> See FWS-73 (T 3286-3288, 3289); FWS-139 (T 368); FWS-111 (T 1264); FWS-54 (T 774); FWS-182 (T 1621).

<sup>564</sup> FWS-54 testified that beatings in passing in the compound were a daily occurrence during the first days after the camp was set up in late May or early June before the regular guards took over from the soldiers (T 743-744). See, however, FWS-215 (T 913-916).

detainees who were coming back from the mess and started beating them in the presence of several unidentified KP Dom guards, who stood by passively. The Prosecution conceded during the trial, and in its final submissions, that par 5.8 and par 5.13 of the Indictment refer to the same incident twice.<sup>565</sup> The Trial Chamber therefore considers these two paragraphs as a single allegation, and makes one set of findings with respect thereto.

196. The Trial Chamber is satisfied that, sometime in October 1992,<sup>566</sup> and while lining up, FWS-71 and fellow detainees were approached by five armed policemen who began to beat them for about half an hour before ordering them to lie down on the ground.<sup>567</sup> Mitar Rasevic, the Commander of the Guards of the KP Dom, as well as the guards who had escorted them, stood by and watched without interfering. Defence witness Krsto Krnojelac, the cook at the KP Dom, testified that this incident had not even involved "real slapping" on their part.<sup>568</sup> Even if the Trial Chamber disregards Krsto Krnojelac's evidence on that point,<sup>569</sup> there is no indication of the level of gravity of the treatment inflicted upon FWS-71 and the other detainees, and there is no other evidence from which a conclusion as to the level of gravity involved could be drawn. The Trial Chamber is therefore not satisfied that this allegation has been established as charged.

197. **Par 5.9** alleges that the disabled detainee Edhem Gradisic, who also suffered from epilepsy, complained about the small food rations and, as a result, was beaten and kicked by three unidentified KP Dom guards.

198. The Trial Chamber is satisfied that this incident has been established. The incident took place sometime during the summer of 1992,<sup>570</sup> while detainees were lining up for food. One of the KP Dom guards, Dragomir Obrenovic, beat Gradisic so hard that he fell across the canteen. While he was lying there on his stomach, two other KP Dom guards named Perisic and Kunarac took him by his feet and dragged him out of the canteen, down the

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<sup>565</sup> See T 2893; Prosecution Final Trial Brief, par 82 and fn 285.

<sup>566</sup> FWS-71 (T 2891, 2892-2893).

<sup>567</sup> FWS-71 (T 2891-2892).

<sup>568</sup> T 5957-5958.

<sup>569</sup> Defence witness Krsto Krnojelac who worked in the canteen and who testified that he never witnessed such an incident and claimed that he would have if this had indeed taken place (T 5954-5955). The Trial Chamber does not accept that, due to his work in the canteen, he would have been able to see at all times every such incident which would have taken place in or nearby the canteen. The Trial Chamber does not accept the evidence of this witness on that point; nor does his evidence cause the Trial Chamber to have a reasonable doubt that the Prosecution witnesses were telling the truth.

<sup>570</sup> FWS-69 (T 4088-4092, 4061). FWS-69 stated that the incident took place between 1 ½ -2 months prior to July-August 1992, that is, while the Accused was still the warden: FWS-69 (T 4092). FWS-69 left the KP Dom on 8 December 1992 (T 4144). See, however, Krsto Krnojelac (T 5954-5955) and remark in the previous footnote.

rickety stairs into the yard, and then to an isolation cell.<sup>571</sup> The Trial Chamber is satisfied that the treatment meted out to Gradisic amounted to cruel treatment pursuant to Article 3 and inhumane acts pursuant to Article 5(i) of the Statute.

199. **Par 5.10** alleges that in July 1992 a detainee with the nickname "Pace" was beaten by KP Dom guard Pedrag Stevanovic while he was lining up in front of the canteen.

200. The Trial Chamber is satisfied that, sometime in August 1992,<sup>572</sup> KP Dom guard Predrag Stefanovic told detainee Nihad Pasovic, nicknamed "Pace" and "Paco", not to carry his tray in only one hand while lining up for lunch in the canteen.<sup>573</sup> He then ordered him to step out of line and started slapping him and kicked his ankles.<sup>574</sup> A group of other KP Dom guards was sitting close by but did not intervene.<sup>575</sup> The Trial Chamber is not satisfied that this mistreatment is serious enough to amount to cruel treatment pursuant to Article 3 or inhumane acts pursuant to Article 5(i).

201. **Par 5.11** alleges that unidentified soldiers from outside the KP Dom approached FWS-137 on several occasions between April and December 1992 while on his way to or from the canteen in a group, and assaulted him and other detainees while KP Dom guards watched without interfering.

202. The Trial Chamber is satisfied that, on one occasion in April 1992, FWS-137 received one or two blows from soldiers in the compound when he was coming back from breakfast.<sup>576</sup> The guards of the KP Dom intervened and attempted to separate the detainees and soldiers.<sup>577</sup> The treatment of FWS-137, although no doubt painful, does not reach the level of severity required by either offence charged under that paragraph of the Indictment.

203. **Par 5.12** alleges that, sometime at the end of October or beginning of November 1992, Dr Amir Berberkic and D'evad S Lojo were assaulted on their way from the canteen by unidentified soldiers from Nevisenje in the presence of KP Dom guards.

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<sup>571</sup> *Ibid.*

<sup>572</sup> FWS-71 (T 2889).

<sup>573</sup> FWS-69 (T 4093); FWS-71 (T 2889).

<sup>574</sup> FWS-69 (T 4094); FWS-71 (T 2990).

<sup>575</sup> FWS-69 (T 4094).

<sup>576</sup> FWS-137 (T 4742-4744).

<sup>577</sup> FWS-137 (T 4745).

204. The Trial Chamber is satisfied that, on or around 30 October 1992, soldiers with automatic rifles assaulted detainees in the kitchen and forced them to bend their heads. Those who did not bend their head low enough or quickly enough were hit.<sup>578</sup> Berberkic received several blows which did not lead to any serious injuries but which resulted in pain above his right ear and which was later accompanied by swelling and bruises.<sup>579</sup> Lojo was hit as well, but there is no indication of the nature and severity of the beating.<sup>580</sup> The KP Dom guards who were present appeared to be frightened and did not intervene.<sup>581</sup> The treatment of both Berberkic and Lojo does not reach the required level of severity implicit in the offence of cruel treatment pursuant to Article 3 or inhumane acts pursuant to Article 5(i).

205. **Par 5.14** alleges that, during their confinement, detainees were subjected to sudden arbitrary beatings by guards of the KP Dom or soldiers from outside the KP Dom. This usually took place during the evenings. KP Dom guards are alleged to have led soldiers to various cells to select detainees for beatings, as described in par 5.15, 5.16 and in Schedule A to the indictment. These are dealt with separately below.

206. **Par 5.15** alleges that Džemo Balic (Z.B.) was beaten severely by a Serb soldier from outside the KP Dom on 10 June 1992 and that he was thereafter locked up in solitary confinement for about a month. It is further alleged that Balic became deaf as a result of the beatings.

207. The Trial Chamber is satisfied that par 5.15 has been established.<sup>582</sup> Džemo Balic was called out once in June or July 1992, while the detainees were lining up for lunch, and taken to the administration building gate.<sup>583</sup> After the detainees returned to room 18, they heard Balic's screams and the sounds of beating from the area of the gate.<sup>584</sup> The sounds came from the former visitor's room in the administration building.<sup>585</sup> When Balic was brought back into his room a month later, he looked badly beaten and his face was

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<sup>578</sup> Dr Amir Berberkic (T 3763); Dževad S Lojo (T 2565).

<sup>579</sup> Dr Amir Berberkic (T 3763-3764).

<sup>580</sup> Dževad S Lojo (T 2565).

<sup>581</sup> Dr Amir Berberkic (T 3765); Dževad S Lojo (T 2556).

<sup>582</sup> The Trial Chamber is satisfied that this incident is different to that pleaded under B4. The allegation made under B4 relates to beatings inflicted upon Džemo Balic while he was detained in the isolation cell, see par 262, *infra*.  
Džemo Balic

<sup>583</sup> FWS-69 (T 4081).

<sup>584</sup> *Ibid*.

<sup>585</sup> FWS-69 (T 4083).

yellow.<sup>586</sup> Balic told his roommates that he had been beaten badly by KP Dom guard Cicmil in the administration building before being taken to a solitary confinement cell; as a result, he said, he was deaf in one ear and he had pain in his ribs.<sup>587</sup> KP Dom guard Milenko Burilo was present when the beating took place, but he did not participate.<sup>588</sup> The Trial Chamber is satisfied that the treatment of Džemo Balic amounted to cruel treatment pursuant to Article 3 and inhumane acts pursuant to Article 5(i) of the Statute.

208. **Par 5.16** alleges that, on 11 July 1992, two KP Dom guards took FWS-71 to the solitary confinement cells and beat him with various objects for about 20 minutes until he fainted. FWS-71 allegedly suffered bruises all over his body.

209. The Trial Chamber is satisfied that this incident has been established. On 11 July 1992, FWS-71 was taken out of room 11 and was beaten for about 15 minutes by KP Dom guards Dragan Obrenovic and Zoran Matovic in the corridor in front of room 11.<sup>589</sup> He was kicked in the chest, around the kidneys, and once slapped in the face. The guards were armed with semi-automatic rifles at the time, but it has not been established that they used them or any other object to beat FWS-71. Nor has it been established that FWS-71 fainted in the course of the beating. He started feeling pain in his lungs and above the right kidney from the beatings after a couple of days, which he said then lasted for about 10 to 15 days.<sup>590</sup> The Trial Chamber is satisfied that the treatment of FWS-71 is serious enough as to amount to cruel treatment pursuant to Article 3 as well as inhumane acts pursuant to Article 5(i) of the Statute.

(iii) Beatings in Schedule A

210. In addition to the beatings dealt with above, the Prosecution also charged the Accused with a number of incidents described in Schedule A.<sup>591</sup> The Trial Chamber notes that incidents **A 3**, **A 5**, **A 6** and **A 9** have also been charged under specific paragraphs of the Indictment, namely under par 5.23 (**A 3** and **A 6**) and par 5.20 (**A 5** and **A 9**). These incidents will therefore be considered below when these specific paragraphs of the Indictment are addressed.

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<sup>586</sup> FWS-69 (T 4082).

<sup>587</sup> FWS-69 (T 4082-4083).

<sup>588</sup> FWS-69 (T 4084).

<sup>589</sup> FWS-71 (T 2807).

<sup>590</sup> FWS-71 (T 2808-2809).

<sup>591</sup> See par 5.14 of the Indictment.

211. The Trial Chamber either considers that there is insufficient evidence as to the level of pain inflicted upon several of the victims listed in Schedule A, or is not satisfied that the mistreatment in question established was serious enough to conclude that inhumane acts pursuant to Article 5(i) or cruel treatment pursuant to Article 3 have been committed against those individuals. This is true of the following incidents: **A 1**<sup>592</sup>, **A 4**,<sup>593</sup> and **A 11**.<sup>594</sup>

212. It has not been established that the incidents **A 8** and **A 13** occurred while the Accused was the warden of the KP Dom.<sup>595</sup>

213. The Trial Chamber is satisfied that incident **A 2** has been established. On two or three occasions in May 1992,<sup>596</sup> Muharem ^au{evi} was taken out of room 15 and beaten.<sup>597</sup> One witness observed the marks of blows and bruises which he bore on various parts of his body as he returned from the beatings.<sup>598</sup> In view of the repetition of the mistreatment and its consequences upon the victim, the Trial Chamber is satisfied that the mistreatment is serious enough to be regarded as cruel treatment pursuant to Article 3 and inhumane acts pursuant to Article 5(i).

214. The allegations contained under **A 7** have been established. Ahmet Duri} was kept with fifteen other persons in an isolation cell for three or four days after they had been brought to the KP Dom.<sup>599</sup> At night, around 22 or 23 April 1992, persons in uniforms and army trousers came to the cell with torches.<sup>600</sup> The detainees were told to look straight into the torches which the soldiers aimed directly into their eyes. Those who could not keep their eyes open or who averted their eyes from the light were hit. Duri} was kicked so hard in the head that a fellow detainee testified that his face was all blue and a huge blister had formed by the following morning.<sup>601</sup> The Trial Chamber is satisfied that the treatment inflicted upon Duric is sufficiently serious as to amount to cruel treatment pursuant to Article 3 and inhumane acts pursuant to Article 5(i).

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<sup>592</sup> FWS-66 (T 1091).

<sup>593</sup> FWS-66 (T 1091-1092).

<sup>594</sup> FWS-111 testified that he was hit with a baton and fists and that he was slapped (T 1209-1211). There is no indication, however, as to the duration, the effect or the severity of the beating inflicted upon him on that occasion.

<sup>595</sup> In respect of incident A 8, see FWS-198 (T 1001-1002). In respect of incident A 13, see Rasim Taranin (T 1717).

<sup>596</sup> FWS-215 (T 895); FWS-66 (T 1092).

<sup>597</sup> FWS-66 (T 1093); FWS-215 (T 894); Dževad Lojo (T 641).

<sup>598</sup> FWS-215 (T 895).

<sup>599</sup> Ahmet Hadžimusic (T 1941).

<sup>600</sup> Ahmet Hadžimusic (T 1942, 1943).

<sup>601</sup> Ahmet Hadžimusic (T 1942).

215. The Trial Chamber is satisfied that the allegations involving Kemo Kajgana (A 10) and Fikret Kova-evi} (A 12) have been established. Fikret Kova-evi} was taken out of the isolation cell, where he was being held together with Ahmet Duri} (A 7), Ahmet Hadžimusic and Kemo Kajgana, and was beaten. Hadžimusic was in the room adjacent to where the beatings occurred and did not see but could hear the beatings taking place.<sup>602</sup> At some point, the persons administering the beatings took the detainee Kajgana out of the cell and told him that his neighbour Kova-evi} was asking for him. They instructed Kajgana to beat Kova-evi} with the baton. Since Kajgana beat his fellow detainee only very gently, the baton was taken away from him and he was beaten himself to demonstrate how to administer real blows. Next, the baton was handed to Kova-evi} who was also forced to beat Kajgana.<sup>603</sup> The Trial Chamber is satisfied that the mistreatment inflicted upon both victims, Kajgana and Kova-evi}, is sufficiently serious as to amount to cruel treatment pursuant to Article 3 and inhumane acts pursuant to Article 5(i).

(b) Torture, cruel treatment and inhumane acts (par 5.17 to 5.29)

(i) Torture and beatings as punishment (par 5.17 to 5.21)

216. As a preliminary matter, the Trial Chamber notes that not every incident pleaded in the Indictment amounts to a serious violation of international humanitarian law, and that, whilst surrounding circumstances must be taken into account, not every alleged incident of torture in the instant case has been established. In this first section, it is alleged that severe pain was inflicted for the prohibited purpose of punishing the victims.

217. **Par 5.17** of the Indictment alleges that the Accused, in concert with other high-level prison staff, ordered guards of the KP Dom to beat detainees for even minor violations of the prison rules, as described in the following paragraphs of the Indictment. There is no evidence before the Trial Chamber that the Accused *ordered* guards to beat detainees. There is a great deal of evidence, however, that detainees were in fact systematically beaten and mistreated while detained at the KP Dom.<sup>604</sup>

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<sup>602</sup> Ahmet Hadžimusic (T 1947, 1950).

<sup>603</sup> Ahmet Hadžimusic (T 1948-1949).

<sup>604</sup> See par 46, *supra*.

218. **Par 5.18** of the Indictment alleges that, on 8 August 1992, FWS-54, a Muslim detainee, was beaten and kicked as punishment for giving an additional slice of bread to a fellow detainee contrary to orders and was subsequently kept in solitary confinement for four days.

219. The Trial Chamber is satisfied that, on 8 August 1992, FWS-54 was beaten by a KP Dom guard named Pilica Blagojevic as punishment for giving a fellow detainee an extra slice of bread contrary to orders. As a result of the beating, FWS-54 was seriously bruised and lost a few teeth.<sup>605</sup> After the beating, he was locked up in solitary confinement for three or four days.<sup>606</sup> Despite the degree of seriousness of the physical abuse, the condition of the victim prior to his beating and isolation, the consequences of the beating upon the victim and the fact that punishment was meted out for a minor breach of the prison regulations, the Trial Chamber is not satisfied that the acts in question should be regarded as torture pursuant to the definition given above. Although the losing of teeth and the bruising of the body constitute a serious infringement upon the victim's well-being, they do not, in the circumstances of this case, reach the degree of severity implicit in the definition of torture. Torture is among the most serious abuses upon physical or mental integrity.<sup>607</sup> Further, and crucially, in case of doubt as to whether or not the act is serious enough to amount to torture, the Accused should have the benefit of that doubt, and the acts for which he is charged should be considered under the heading of the less serious offence, namely cruel treatment under Article 3 or inhumane acts under Article 5(i).

220. In the present instance, the Trial Chamber is satisfied that the allegations contained in par 5.18 have been established and that they amount to cruel treatment pursuant to Article 3 of the Statute as well as inhumane acts pursuant to Article 5(i) of the Statute.

221. **Par 5.19** of the Indictment alleges that, on an unknown date during the summer of 1992, detainees Avdo Muratovic, Fahrudin Malkic, HT and Sacic were beaten by a KP Dom guard named Dragomir Obrenovic as punishment for passing messages to one another.

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<sup>605</sup> FWS-54 (T 747); Rasim Taranin (T 1716).

<sup>606</sup> FWS-54 (T 749).

<sup>607</sup> See par 180, *supra*.

222. The Trial Chamber is satisfied that the factual allegations contained in par 5.19 of the Indictment have been established, but in respect of three of the mentioned detainees only. Sometime in June of 1992, three detainees – Sacic, Avdo Muratovic and Fahrudin Malkic – were taken away and slapped as a punishment by two KP Dom guards named Obrenovic and Elcic for passing messages to one another contrary to orders.<sup>608</sup> The Trial Chamber is not satisfied that the mistreatment inflicted upon them should be regarded as torture pursuant to the definition of this crime, which requires that “severe pain or suffering” be inflicted.<sup>609</sup> Nor is the mistreatment serious enough to amount to cruel treatment pursuant to Article 3 or inhumane acts pursuant to Article 5. With respect to HT there is no evidence that he was taken and mistreated in the manner and for the reason described in the Indictment. This was conceded by the Prosecution.<sup>610</sup>

223. **Par 5.20** alleges that, on an unknown date in April or May 1993, at approximately 6.00 am, KP Dom guards Dragomir Obrenovic and Zoran Matovic called out four detainees – FWS-71, Dževad Cošovic, II<sup>611</sup> and DC – from their rooms and led them to the solitary confinement cells. In the corridor, the guards beat the detainees as punishment for stealing bread from the canteen the previous day.

224. The Trial Chamber is satisfied that the factual allegations contained in par 5.20 of the Indictment have been established. Sometime in October 1992, four detainees were taken, two by two, to the isolation cells and beaten on their way by two KP Dom guards, Zoran Matovic and Dragan Obrenovic, as punishment for stealing food.<sup>612</sup> FWS-71 and Dževad Cošovic were seen stealing two loaves of bread from the bakery. The next day, Zoran Matovic and Dragan Obrenovic came to look for them in their room and took them to the isolation cells. On the way, they kicked and punched them for more than half an hour.<sup>613</sup> They were then put in isolation cells where they stayed for 11 to 12 days. Two other detainees, II and DC, were treated in a similar manner, taken out of their room for stealing food, beaten and then put in isolation cells.<sup>614</sup> There is no indication as to the severity of their mistreatment other than the duration of the beating and the fact that they

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<sup>608</sup> FWS-69 (T 4096-4098, 4181-4184).

<sup>609</sup> FWS-69 said that they were slapped and that, as a result, their faces were all red (T 4096).

<sup>610</sup> Prosecution Final Trial Brief, p 36, fn 303.

<sup>611</sup> II is also referred to as FWS-08.

<sup>612</sup> FWS-71 (T 2809-2813); FWS-08 (T 1773).

<sup>613</sup> FWS-71 (T 2812-2813).

<sup>614</sup> FWS-71 (T 2812).

were bruised and FWS-71 had difficulty breathing afterwards. Nor is there evidence that the beating and subsequent isolation were to be regarded as particularly serious for any other reason. Additionally, whereas FWS-71 and Dževad Cošovic spent about 11-12 days in isolation, it appears that II and DC were released from the isolation cells on the very day they had been put there.<sup>615</sup> Accordingly, in light of all the circumstances and because the Accused must be given the benefit of the doubt, the Trial Chamber concludes that the treatment and pain inflicted upon each of the four detainees, including their confinement in isolation cells, although serious, was not severe enough to amount to torture pursuant to the definition of that offence.

225. The Trial Chamber is satisfied, however, that the mistreatment inflicted upon FWS-71, Dževad Cošovic, II and DC does amount to inhumane acts under Article 5(i) as well as cruel treatment under Article 3 of the Statute.

226. **Par 5.21** of the Indictment alleges that, in June, July or August 1993, following the unsuccessful escape of Ekrem Zekovic, the Accused and his subordinates subjected detainees to collective punishment by cutting food rations by half for at least 10 days. In addition, FWS-73, FWS-110, FWS-144, Muhamed Lisica and approximately 10 other detainees, all work companions of Ekrem Zekovic at the time when he tried to escape, were beaten by about 10 members of the KP Dom prison staff in the presence of the Accused. As further punishment, FWS-73, FWS-110, FWS-144, Muhamed Lisica and other unidentified detainees were locked in solitary confinement for various periods lasting up to 15 days.

227. The Trial Chamber notes that the Indictment does not allege, even in general terms, that Ekrem Zekovic was beaten in the course of that incident. As mentioned above, par 5.17 of the Indictment generally alleges that the Accused, in concert with other high-level prison staff, ordered KP Dom guards to beat detainees even for minor violations of the prison rules.<sup>616</sup> This general allegation is, however, expressly limited to the allegations

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<sup>615</sup> FWS-08 (T 1776).

<sup>616</sup> Par 5.17 reads as follows: "Milorad Krnojelac in concert with other high-level prison staff, ordered the guards to beat detainees even for minor violations of the prison rules, *as described in paragraphs 5.18 through 5.21.*" (emphasis added)

made in par 5.18 through 5.21, and these paragraphs make no reference to Ekrem Zekovic himself being beaten.<sup>617</sup>

228. The Appeals Chamber recently stated that, where an indictment which does not plead with sufficient detail the essential aspect of the Prosecution case, the defect could, in some instances, be cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her".<sup>618</sup> In that case, there was an allegation of extreme generality in the indictment under which the case ultimately put by the Prosecution could have been particularised, but was not.<sup>619</sup> Indeed, it is clear that the case ultimately put had not been within the contemplation of the Prosecution at the time the indictment was filed.<sup>620</sup> The Prosecution did not reveal to the Defence the nature of the case it ultimately presented until a very short time before the relevant evidence was led.<sup>621</sup> The Appeals Chamber held that the right of the Accused in that case to prepare their defence had been infringed, and allowed their appeal against conviction on that ground.<sup>622</sup>

229. The Trial Chamber interprets the Judgment of the Appeals Chamber as requiring there to be at least a general allegation in the indictment under which a specific incident subsequently established in the evidence could have been particularised, plus sufficient warning that such a specific case is to be put to enable the accused to prepare a defence. In the course of the present trial, for example, a great deal of evidence was led by the Prosecution relating to what is alleged to have been deportation, as an incident of the persecution charged in Count 1. The Defence accepted that they had been sufficiently forewarned that such a case was to be put, in part by the Prosecution Pre-Trial Brief but mainly by the witness statements which had been served. There was, however, no allegation in the Indictment which covered such a case, even in general terms. When this was pointed out to the Prosecution, an application to include such an allegation in the

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<sup>617</sup> Par 5.21 speaks of the collective punishment imposed upon *other* detainees as a result of Ekrem Zekovic's attempt to escape, but there is no reference to any beating or other punishment of Ekrem Zekovic himself.

<sup>618</sup> *Kupreškic* Appeal Judgment, par 114.

<sup>619</sup> *Ibid*, par 83.

<sup>620</sup> *Ibid*, pars 93, 100.

<sup>621</sup> The Prosecution Pre-Trial Brief expanded the very general statement in the Indictment, but still failed to notify the Defence of the real case (*Ibid*, par 116). The statements of the relevant witnesses were provided less than a month before the first of them gave evidence, during most of which period the trial was proceeding, and still without any forewarning of the nature of the case which was to be put (*Ibid*, par 120).

<sup>622</sup> *Ibid*, par 124; *see also* par 113.

Indictment was granted by consent.<sup>623</sup> No such application was made in relation to the beating of Ekrem Zekovic.

230. Accordingly, and notwithstanding that there was no objection to the evidence of the beating of Ekrem Zekovic, the Trial Chamber does not take that incident into account in relation to Counts 2, 4, 5 and 7 of the Indictment, although the evidence remains in the case as material from which inferences may legitimately be drawn by the Trial Chamber in relation to issues arising out of other incidents which *are* the subject of charges in the Indictment.

231. Because of the significance of this event generally to other issues in the case, however, the Trial Chamber exceptionally records that it is satisfied that, on 8 July 1993, Ekrem Zekovic, a Muslim detainee, tried to escape from the KP Dom, but was re-captured the same day.<sup>624</sup> As soon as he was brought back to the KP Dom, Zekovic was severely beaten by Milenko Burilo, a guard of the KP Dom.<sup>625</sup> While he was being beaten, the Accused intervened to stop it.<sup>626</sup> As they were walking away from the scene, Burilo continued to assault Zekovic in the presence of the Accused.<sup>627</sup> The Accused denied that he saw Zekovic being beaten.<sup>628</sup> The Trial Chamber does not accept the denial of the Accused on that point, nor does his evidence cause the Trial Chamber to have any reasonable doubt that the Zekovic was telling the truth. Zekovic was subsequently put in an isolation cell and then taken out at some point and beaten again with bare hands and with a chain by deputy warden Savo Todovic, in the presence of Boro Ivanovic.<sup>629</sup> The Accused met with him and they had a conversation about his attempted escape.<sup>630</sup> Zekovic was then returned to the cell and his hands and legs were tied to the floor with a metal ring. The next day, barely able to walk,<sup>631</sup> he was taken to the courtyard where detainees had been assembled. He was then returned to the isolation cell where he spent 28 days. Seven days of that time were

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<sup>623</sup> This was done in respect of par 5.2 of the Indictment. The Accused was required to re-plead to the Indictment as amended.

<sup>624</sup> Ekrem Zekovic (T 3555-3565).

<sup>625</sup> Ekrem Zekovic (T 3567-3569).

<sup>626</sup> Ekrem Zekovic (T 3569-3570).

<sup>627</sup> Ekrem Zekovic (T 3567-3569, 3573-3575); *see also* Miladin Matovic (T 6587).

<sup>628</sup> T 8121.

<sup>629</sup> Ekrem Zekovic (T 3570, 3579-3580).

<sup>630</sup> Ekrem Zekovic (T 3574-3575); *see also* The Accused (T 7681, 8121).

<sup>631</sup> Ekrem Zekovic (T 3588).

spent on the concrete cell floor, handcuffed at all times except for two occasions when he was taken out to be beaten again by the KP Dom guards on duty.<sup>632</sup>

232. The Trial Chamber is satisfied that the treatment meted out to Zekovic amounted to torture pursuant to Article 5(f) and Article 3 of the Statute, but (as already stated) will not take the evidence into account in relation to counts 2, 4, 5 and 7 of the Indictment.<sup>633</sup>

233. The Trial Chamber is satisfied that, in the presence of the Accused,<sup>634</sup> detainees were told by Todovic that, because of Zekovic's escape, all food rations would be halved,<sup>635</sup> and that work and medical treatment would be forbidden.<sup>636</sup> This punishment actually lasted for at least ten days.<sup>637</sup> All rooms were searched and medicines were seized. In addition, following the escape, several detainees, all work companions of Zekovic, were severely beaten by KP Dom guards as punishment for Zekovic's escape or in order to obtain information about his whereabouts.<sup>638</sup> The Accused denied having been aware of any punishment inflicted as a result of Zekovic's escape.<sup>639</sup> The Trial Chamber does not accept his evidence; nor did his evidence cause the Trial Chamber to have any reasonable doubt as to the truth of the Prosecution witnesses on this issue. FWS-73 was beaten and kicked with boots on the head and on his lower back so brutally that he continues to the present day to suffer from the consequences of his mistreatment.<sup>640</sup> Furthermore, a group of detainees, including some of those who had been beaten, were locked in solitary confinement for varying periods of time.<sup>641</sup> FWS-73 stayed in an isolation cell for 12 days.<sup>642</sup>

234. The Trial Chamber is satisfied that those various instances of mistreatment were aimed at either obtaining information from those detainees who might know something

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<sup>632</sup> Ekrem Zekovic (T 3591-3595). The second time, he was taken away but not beaten (Ekrem Zekovic, T 3593-3594).

<sup>633</sup> See pars 227-230, *supra*.

<sup>634</sup> See for example Ekrem Zekovic (T 3587-3588); FWS-250 (T 5066). The Accused himself conceded that he was present during Todovic's speech (T 7684-7686).

<sup>635</sup> FWS-216 (T 3587).

<sup>636</sup> Ekrem Zekovic (T 3587-3588); Safet Avdic (Ex P 123, pp 694-695); FWS-250 (T 5065-5066).

<sup>637</sup> FWS-250 (T 5066).

<sup>638</sup> FWS-73 (T 3240-3245); FWS-182 (T 1614); FWS-249 (T 4460-4470); Muhamed Lisica (T 4921-4924).  
<sup>639</sup> T 7686.

<sup>640</sup> FWS-73 (T 3240).

<sup>641</sup> FWS-73 (T 3240); FWS-249 (T 4471); Muhamed Lisica (T 4926).

<sup>642</sup> FWS-73 (T 3240).

about Zekovic's escape plan or whereabouts following his escape, or punishing them for his failed attempt, or because they were suspected of having played a part in his escape.

235. In view of the seriousness of the treatment inflicted upon FWS-73, the Trial Chamber is satisfied that this treatment amounted to torture within the meaning of the definition given above. The Trial Chamber has also taken into account the fact that, following those beatings, FWS-73 was not given any medical treatment but was instead returned to the isolation cells where he was left lying on the floor with just one blanket to be shared between two detainees. Food rations, which were already largely insufficient, were halved.

236. In respect of FWS-110, FWS-144, Muhamed Lisica and the other unidentified detainees referred to in paragraph 5.21 of the Indictment, the Trial Chamber is not satisfied that the beating and other mistreatment which they suffered demonstrates a sufficient degree of gravity as to amount to torture.<sup>643</sup> However, the combined effect of solitary confinement for a short period of time, the intentional deprivation of necessary food for several days, resulting from the halving of already minimal quantities of food, and the beatings which were meted out to some of them were in combination sufficient to reach the level of suffering required by the definition of inhumane acts under Article 5(i) as well as cruel treatment under Article 3 of the Statute.

(ii) Torture and beatings during interrogations (par 5.22 to 5.29)

237. **Par 5.22** of the Indictment alleges that local and military police, in concert with the prison authorities, interrogated the detainees after their arrival at the KP Dom. It is further alleged that the Accused, in concert with other high-level prison staff, established a pattern whereby guards of the KP Dom would take the detainees out of their cells and bring them to the interrogation rooms where they would be beaten by guards or the police, as described in par 5.23 through 5.25 of the Indictment. It is alleged that the interrogations focused on whether the detainee was an SDA member, possessed weapons, or had fought against the Serb forces. It is also alleged that the Accused aided and abetted these beatings by granting

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<sup>643</sup> Rasim Taranin (T 1731-1734); FWS-08 (T 1781-1782); Ahmet Hadžimusic (T 1982); FWS-138 (T 2095); FWS-73 (T 3242-3246); FWS-249 (T 4414, 4445, 4471); Muhamed Lisica (T 4926-4927).

local and military police access to the detainees and encouraging and approving the actions of his guards.

238. The Trial Chamber is satisfied that detainees were regularly taken out of their rooms or from the isolation cells by guards of the KP Dom, soldiers or policemen for the purpose of interrogations. On several occasions, many detainees who had been taken out in that manner were in fact beaten or otherwise mistreated during the interviews for the purpose of obtaining information or a confession or in order to punish them for some minor violation of prison regulations.<sup>644</sup>

239. **Par 5.23** of the Indictment alleges that, on 24 May 1992, military police arrested FWS-03 and Halim Dedovic, both members of the SDA, and their neighbor Hajro Sabanovic and took them to the KP Dom. On that same day, the Indictment alleges, they were interrogated by five or six military policemen who beat all three of them in order to force them to make confessions.

240. The Trial Chamber is satisfied that, on 24 May 1992, the day of his arrival at the KP Dom, FWS-03 heard the screams and laments of Halim Dedovic, a fellow Muslim detainee.<sup>645</sup> Shortly thereafter, military policemen brought Hajro Sabanovic down the same hallway from where Dedovic's screams had been coming.<sup>646</sup> FWS-03 could then hear Sabanovic's screams and moans. FWS-03 himself was then taken out. When he entered the room down the hallway, Sabanovic was lying on the floor covered in his own blood, unable to speak.<sup>647</sup> The policemen put FWS-03 against the wall and spread his legs and arms apart. They started questioning him about military activity and the SDA and began to beat him when he denied having taken part in any military activities. FWS-03 was hit on the back, around the kidneys, halfway down his back, and on his arms with an unidentified object.<sup>648</sup> The policemen brought in Dedovic, who bore the marks of beatings and who confirmed that FWS-03 was an SDA activist. The policemen turned to beat Dedovic again all over his body, and threw water over Sabanovic who regained consciousness only to be

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<sup>644</sup> See pars 239-306, *infra*.

<sup>645</sup> FWS-03 (T 2234-2235, 2238-2239); see also FWS-69 (T 4106).

<sup>646</sup> FWS-03 (T 2236).

<sup>647</sup> FWS-03 (T 2236); see also FWS-172 (T 4569) who describes Hajro Sabanovic's injuries when returned to his room.

<sup>648</sup> FWS-03 (T 2237-2238).

beaten again until he lost consciousness.<sup>649</sup> FWS-03 and Halim Dedovic were then locked up together and denied medical treatment. FWS-03 described Dedovic's face as bloody and swollen, with his eyes so swollen that he could barely see. He also had lacerations on the right side of his face.<sup>650</sup> FWS-03's body was also swollen and bruised from heavy blows. For approximately seven to ten days, he continued to feel strong pain in the areas where he had been beaten.<sup>651</sup> When FWS-03 was taken out of the cell the next morning, the KP Dom guard Burilo struck two severe blows on his neck.<sup>652</sup> Dedovic was brought back to his room, extremely frightened and bruised, after having spent seven days in the basement of the administrative building where he had been beaten repeatedly.<sup>653</sup>

241. The Trial Chamber is satisfied that, when beating FWS-03 and Dedovic, the military police were trying to obtain information or confessions from them concerning SDA activities and membership, and that they were also punishing them for such activities or membership. To constitute the offence of torture, the prohibited purpose for which the acts of mistreatment are committed need not be the exclusive purpose or the predominant or sole purpose.<sup>654</sup> It is sufficient that the prohibited purpose is one of the results sought to be achieved. Accordingly, the Trial Chamber is satisfied that the prohibited purpose has been established in this case. The Trial Chamber is also satisfied that the treatment meted out to FWS-03 and Halim Dedovic satisfies the severity threshold required by the offence of torture.

242. In respect of Harjo Sabanovic, there is no direct evidence that the military police were trying to attain one of the prohibited purposes listed in the definition of torture. FWS-03 specifically said that he had not heard any questioning going on or discussion between Sabanovic and the men beating him when he entered the room.<sup>655</sup> The Trial Chamber, however, infers from the almost identical treatment inflicted upon the other two individuals taken with him to be interrogated at the same time that he too was beaten in order to obtain information or a confession from him. The Trial Chamber is satisfied that this is the only reasonable inference to be drawn. Further, the Trial Chamber is satisfied that the abuse of

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<sup>649</sup> FWS-03 (T 2238-2239).

<sup>650</sup> FWS-03 (T 2240); Dr Amir Berberkic (T 3816).

<sup>651</sup> FWS-03 (T 2240-2241).

<sup>652</sup> FWS-03 (T 2241-2242).

<sup>653</sup> Dr Amir Berberkic (T 3816-3817); FWS-104 (T 2175); FWS-113 (T 2556).

<sup>654</sup> See par 184, *supra*.

<sup>655</sup> FWS-03 (T 2239).

Sabanovic reached the level of severity required by the definition of torture. The Trial Chamber is therefore satisfied that the elements of torture pursuant to Article 5(f) and Article 3 of the Statute have been established in respect of Harjo Sabanovic, Halim Dedovic and FWS-03.

243. **Par 5.24** of the Indictment alleges that, on several unknown dates between April and August 1992, unidentified KP Dom guards severely beat Hasim Glusac and that, due to these beatings and the brutal living conditions, his lungs were severely damaged.

244. The Trial Chamber is not satisfied that the events alleged in par 5.24 of the Indictment have been established. Although it has been established that Hasim Glusac was in poor health and that he did not receive proper medical treatment for his condition, there is no evidence that he was beaten at any time, or that he suffered severe pain as a result of any beating as is alleged in the Indictment. The Prosecution conceded that this incident had not been established.<sup>656</sup>

245. **Par 5.25** alleges that, on an unknown date in May or June 1992, KP Dom guards severely beat Ibrahim Sandal during an interrogation, and that they returned him to his cell seriously injured.

246. The Trial Chamber is satisfied that, sometime during the second half of August 1992, Ibrahim Sandal was brought to the KP Dom. He had been beaten up severely on the way to the KP Dom, as a result of which he suffered serious injuries and health problems. There is no evidence that he was beaten or otherwise mistreated in any way while at the KP Dom, let alone in the manner described in par 5.25.<sup>657</sup> In view of the absence of any clear evidence, the Trial Chamber is not satisfied that Ibrahim Sandal was subjected to any form of mistreatment as charged in par 5.25 of the Indictment.

247. **Par 5.26** of the Indictment alleges that, from April until July 1992, the Accused, in concert with political leaders and military commanders and other high-level staff, prepared lists of detainees to be beaten during night time interrogations and established a daily routine for these beatings. Most evenings during this time, it is alleged, the lists were

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<sup>656</sup> See Prosecution Final Trial Brief, par 101.

<sup>657</sup> FWS-66 (T 1088); FWS-71 (T 2824-2825); Dr Amir Berberkic (T 3759).

delivered to the KP Dom guards who then took the detainees to the administration building for additional interrogations and beatings by unidentified KP Dom guards or soldiers whom the Accused had allowed to enter the prison to beat detainees. This general allegation contained in par 5.26 is limited to those incidents further described in par 5.27 through 5.29 and the attached Schedule B to the Indictment.<sup>658</sup>

248. The Trial Chamber is satisfied that, as alleged in par 5.26, from April 1992 until July 1992 beatings took place on a frequent and systematic basis.<sup>659</sup> KP Dom guards used lists in order to select those detainees to be taken out to the administrative building and beaten there.<sup>660</sup> Some of the detainees were taken out and beaten on several occasions. There is no evidence however that, as alleged, the Accused drafted those lists according to which detainees were selected and called out, or that he participated in any joint criminal enterprise to do so.

249. **Par 5.27** of the Indictment alleges that, in June 1992, KP Dom guards on at least two occasions severely beat Nurko Nisic, Zulfo Veiz, Salem Bico and Krunoslav Marinovic.

250. The Trial Chamber is satisfied that, in June or July 1992,<sup>661</sup> Nurko Nisic, Zulfo Veiz and Salem Bico were severely beaten by guards of the KP Dom, or by policemen from outside the KP Dom, who had been allowed by the guards to enter the KP Dom. Nisic was taken out to be beaten on at least two occasions while he was at the KP Dom.<sup>662</sup> Several

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<sup>658</sup> The last sentence of par 5.26 reads: "These incidents which are described in broad terms in par 5.26g are further described in paragraphs 5.27 through 5.29 and attached Schedule B."

<sup>659</sup> See findings in respect of pars 5.27 - 5.29 and beatings listed in Schedule B, *infra*.

<sup>660</sup> See findings in respect of pars 5.27 - 5.29 and beatings listed in Schedule B, *infra*.

<sup>661</sup> Safet Avdic (T 483-484); FWS-54 (T 767); FWS-162 (T 1387); FWS-142 (T 1824, 1841); Ahmet Hadžimusic (T 1953); FWS-03 (T 2251); FWS-109 (T 2377-2379); FWS-113 (T 2574-2580); FWS-71 (T 2828); Amir Berberkic (T 3791-3792); FWS-69 (T 4116); FWS-172 (T 4559); FWS-250 (T 5048).

<sup>662</sup> FWS-111 (T 1238); FWS-198 (T 1032-1033); FWS-86 (T 1511-1512); FWS-54 (T 1102); FWS-162 (T 1387-1388); Dževad Lojo (T 645); FWS-142 (T 1824); Ahmet Hadžimusic (T 1953); FWS-104 (T 2176-2177); FWS-03 (T 2251); FWS-109 (T 2380); FWS-113 (T 2580); FWS-71 (T 2829-2830, 2837-2839); Ekrem Zekovic (T 3479-3480); Dr Amir Berberkic (T 3790-3791); FWS-69 (T 4116); FWS-172 (T 4564); FWS-250 (T 5040-5041). See, however, the testimony of Risto Ivanovic who denied that Nurko Nisic was ever beaten while he was detained at the KP Dom (T 6175). This witness further claimed that nobody was ever beaten at the KP Dom and that no guard was ever involved in such mistreatment (T 6179). The Trial Chamber notes that Risto Ivanovic worked in shift at the KP Dom with two guards, Zoran Matovic and Milenko Burilo (T 6180); who have been mentioned repeatedly by Prosecution witnesses as being among the worst principal offenders of beatings (see par 273, *infra* concerning the finding of the Trial Chamber in respect of those two guards). The Trial Chamber does not accept the evidence of this witness on that point; nor does his evidence cause the Trial Chamber to have a reasonable doubt that the Prosecution witnesses were telling the truth.

inmates saw the bruises on his face and body.<sup>663</sup> Sometime in June or July 1992, he was taken from his room and his screams and the provocative remarks of those beating him were heard by other detainees.<sup>664</sup> He was never seen again after that. The Trial Chamber is satisfied that, when beating him, the KP Dom guards or policemen from outside the KP Dom, intended to obtain from him a confession that he was somehow involved in military activities, or information to that effect.<sup>665</sup> They *may* also have intended to punish him because they considered that his alleged military activities were somehow connected with the injury of a Serb soldier named or nicknamed "Bota".<sup>666</sup> The Trial Chamber is not satisfied, however, that such an intention has been established beyond reasonable doubt. Nisic was beaten extremely severely.<sup>667</sup> Despite his frailty due to mal-nourishment and mistreatment, he was given no medical assistance and he could not walk for several days following the beatings.<sup>668</sup> The Trial Chamber is satisfied that the mental and physical pain inflicted upon Nisic by the guards of the KP Dom or policemen for the prohibited purpose which *has* been accepted amounted to torture within the meaning of Article 3 and Article 5(f) of the Statute.

251. Turning to Zulfo Veiz, the Trial Chamber is also satisfied that the allegations contained in par 5.27 of the Indictment have been established. While detained at the KP Dom, Veiz was repeatedly taken out and beaten.<sup>669</sup> One of the KP Dom guards or policemen from outside the KP Dom taking part in one of the beatings was heard asking him about the whereabouts of weapons.<sup>670</sup> Once, when coming back from interrogation,

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<sup>663</sup> See for example FWS-111 (T 1238-1239); FWS-198 (T 1032); Rasim Taranin (T 1725); FWS-86 (T 1511-1512); FWS-54 (T 1102); Dževad Lojo (T 645); FWS-182 (T 1630); Ahmet Hadžimusic (T 1953-1954); FWS-138 (T 2069-2070); FWS-71 (T 2830); Dr Amir Berberkic (T 3791-3792); FWS-172 (T 4566).

<sup>664</sup> FWS-198 (T 1005); FWS-162 (T 1387-1388); FWS-142 (T 1824); FWS-104 (T 2176); FWS-109 (T 2380); FWS-71 (T 2839-2840); Ekrem Zekovic (T 3479-3480, 3663); FWS-69 (T 4116); FWS-172 (T 4564); FWS-250 (T 5048-5049).

<sup>665</sup> FWS-71 (T 2839-2840); Ekrem Zekovic (3479-3480); FWS-250 (T 5042, 5049).

<sup>666</sup> Ekrem Zekovic (T 3479-3480).

<sup>667</sup> FWS-215 (T 908); FWS-111 (T 1238); FWS-198 (T 1005-1007, 1032-1034); FWS-82 (T 1725); FWS-86 (T 1510); FWS-54 (T 1102); FWS-162 (T 1386-1388); FWS-85 (T 645-646); FWS-139 (T 358); FWS-182 (T 1630); FWS-142 (T 1824); FWS-119 (T 1954); FWS-138 (T 2070); FWS-104 (T 2176); FWS-03 (T 2251, 2254); FWS-109 (T 2379-2380); FWS-113 (T 2580); FWS-71 (T 2830, 2837, 2840); FWS-73 (T 3264); FWS-216 (T 3479); FWS-214 (T 3791-3792); FWS-69 (T 4116); FWS-172 (T 4654, 4566); FWS-250 (T 5040).

<sup>668</sup> FWS-182 (T 1630); FWS-71 (T 2830, 2837); FWS-214 (T 3791-3792); FWS-172 (T 4566).

<sup>669</sup> FWS-66 (T 1097-1098); FWS-111 (T 1241); FWS-86 (T 1526-1527); FWS-66 (T 1148-1149); FWS-182 (T 1616, 1622); FWS-138 (T 2074); FWS-03 (T 2252-2253); Ahmet Hadžimusic (T 1961); FWS-54 (T 767-768); FWS-109 (T 2394, 2432); FWS-113 (T 2581); FWS-71 (T 2829, 2862); FWS-73 (T 3275); FWS-172 (T 4560).

<sup>670</sup> Dževad Lojo (T 650-651).

Veiz had bruises on his face and his right eye was almost completely closed.<sup>671</sup> One day in June or July 1992, he was taken out and screams, moans and shots were heard, after which he did not return.<sup>672</sup> The Trial Chamber is satisfied that, in view in particular of the repetition of the abuses, their severity and consequences, as well as the aim of the interrogators to obtain information as to the whereabouts of weapons, the mistreatment inflicted upon Zulfo Veiz in June or July 1992 amounted to torture within the meaning of Article 3 and Article 5(f) of the Statute.

252. The Trial Chamber is satisfied that, while he was detained at the KP Dom, Salem Bico, another Muslim detainee, was taken out and beaten by guards of the KP Dom, or policemen from outside the KP Dom, on repeated occasions.<sup>673</sup> Like Zulfo Veiz, he was taken out of his room sometime in June or July 1992, and he never came back.<sup>674</sup> Screams and moans and finally shots were heard coming from the administrative building on the night he was taken.<sup>675</sup> Although the Trial Chamber is satisfied that the beatings were of a very severe nature,<sup>676</sup> there is no evidence that the beating was pursued for any of the listed prohibited purposes rather than being purely arbitrary. Consequently, the Trial Chamber is not satisfied that the mistreatment of Salem Bico amounted to torture pursuant to Article 3 and Article 5(f) of the Statute. The abuse was, however, of such a nature as to qualify as inhumane acts under Article 5(i) as well as cruel treatment under Article 3 of the Statute, and the Trial Chamber is accordingly satisfied that all the elements of those two offences have been established.

253. The Trial Chamber is not satisfied that Krunoslav Marinovic, a Croat detainee, was beaten while at the KP Dom and then returned to his room, as opposed to being beaten before he arrived at the KP Dom.<sup>677</sup> Most witnesses refer to injuries which he had sustained before he was brought to the KP Dom; some of the witnesses also referred to an incident

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<sup>671</sup> FWS-66 (T 1098); FWS-104 (T 2163); Dževad Lojo (T 638-639, 647); Amir Berberkic (T 3801).

<sup>672</sup> Dževad Lojo (T 638-639, 647); FWS-71 (T 2829, 2837, 2865).

<sup>673</sup> FWS-111 (T 1237-1239); FWS-215 (T 901); Dr Amir Berberkic (T 3793).

<sup>674</sup> FWS-111 (T 1237-1238); FWS-138 (T 2081); FWS-54 (769); FWS-08 (T 1783); Dr Amir Berberkic (T 3793); FWS-172 (T 4560-4561). The Trial Chamber is satisfied that the pattern demonstrated by the evidence establishes that Bico was beaten. See pars 326-327, *infra*, the reference to pattern evidence in the section on murder.

<sup>675</sup> FWS-198 (T 1018); FWS-109 (2377 2380); FWS-109 (T 2430-2431); FWS-71 (T 2864); FWS-69 (T 4122).

<sup>676</sup> See also par 263, *infra*, findings in respect of incidents No 5 in Schedule B.

<sup>677</sup> FWS-66 (T 1108); FWS-111 (T 1242); FWS-215 (T 908); Dževad Lojo (T 644-645); Ahmet Hadžimusic (T 1964-1965); FWS-138 (T 2084-2085); FWS-03 (T 2251); FWS-54 (T 741, 766); FWS-86 (T 1532-1533);

which took place just before he disappeared, that is, on an occasion when he was taken from his room and never returned. This latter incident has not been charged under par 5.27 of the Indictment.<sup>678</sup> Ekrem Zekovic stated that Marinovic had been beaten *several times*.<sup>679</sup> Even if that evidence is accepted, it is still unclear whether this refers to beatings which took place prior to his detention at the KP Dom or during that detention. As there remains a doubt on that point, the Trial Chamber is not satisfied that the allegations contained in par 5.27 concerning Krunoslav Marinovic have been established.

254. **Par 5.28** of the Indictment alleges that KP Dom guards tortured and beat Salko Mandžo, having mistaken him for another detainee. While he was being beaten, the Indictment alleges, the Accused appeared and, discovering the mistake, ordered the guards to stop beating him.

255. The Trial Chamber is satisfied that, on an unknown date in the summer of 1992 but before the month of July, Salko Mandžo was mistaken for another detainee, interrogated and seriously beaten; he was hit with a bat, and cut on the face with a knife.<sup>680</sup> Salko Mandžo lost consciousness as a result of a blow he received on his head. The fact that the KP Dom guards were mistaken about the identity of the victim does not detract from the conclusion that, when inflicting such severe physical pain, the guards did so with the intention of obtaining either a confession or information from him or the person they believed him to be.<sup>681</sup> One Prosecution witness testified that Savo Todovic and the Accused walked in during the beating and said that they had been mistaken about the identity of the victim.<sup>682</sup> The Accused denied witnessing such a beating or making a comment as to the identity of the victim.<sup>683</sup> The evidence of the Accused on that point causes the Trial Chamber to have sufficient doubt as to its accuracy as to reject the evidence, which was hearsay only. The Trial Chamber is satisfied by the extreme severity of the abuse effected

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FWS-182 (T 1586); FWS-109 (T 2385); FWS-113 (T 2579); FWS-71 (T 2829); Ekrem Zekovic (T 3505-3506); Dr Amir Berberkic (T 3801); Muhamed Lisica (T 4957).

<sup>678</sup> It has been charged as murder. See par 339, *infra*.

<sup>679</sup> Ekrem Zekovic (T 3505-3506).

<sup>680</sup> FWS-86 (T 1513); FWS-66 (T 1105); FWS-111 (T 1246-1247); FWS-142 (T 1830); FWS-138 (T 2076-2078); Ahmet Hadžimusic (T 1959); FWS-73 (T 3244); Ekrem Zekovic (T 3473-3474); Dr Amir Berberkic (T 3930-3931); FWS-172 (T 4570); FWS-89 (T 4665).

<sup>681</sup> See, in particular, FWS-73 (T 3244). See also Ekrem Zekovic (T 3473).

<sup>682</sup> Ekrem Zekovic (T 3473); Salko Mandžo told Ekrem Zekovic about this incident and the Accused's part in it.

<sup>683</sup> T 7680.

upon Mandžo's physical integrity that the treatment amounted to torture pursuant to the definition of this offence under Article 3 and Article 5(f) of the Statute.

256. **Par 5.29** of the Indictment alleges that, between May and July 1992, on at least two occasions KP Dom guards and military policemen tortured and beat the detainees Vahida Džemal, Enes Uzunovic, Aziz Šahinovic and Elvedin Cedic, who were severely injured as a result. After the beatings, the victims were kept in solitary confinement for several days.

257. The Trial Chamber is satisfied that, in the course of the summer 1992 prior to the month of July, Vahida Džemal, Enes Uzunovic, Aziz Šahinovic and Elvedin Cedic were severely beaten by guards of the KP Dom and military policemen, and that they were then kept in solitary confinement for several days.<sup>684</sup> However, apart from Aziz Šahinovic who was interrogated in relation to allegations of misappropriation of money,<sup>685</sup> there is no evidence before the Trial Chamber concerning any prohibited purpose being pursued by those individuals who beat those four detainees as alleged. It is suggested by the Prosecution that the other victims were being interrogated during or shortly after the beating took place. There is, however, no evidence to that effect in respect of these victims other than Aziz Šahinovic, and the Trial Chamber is therefore not satisfied that the acts in question constituted torture pursuant to Article 3 or Article 5(f) of the Statute.

258. The Trial Chamber is satisfied that the treatment meted out to Aziz Šahinovic amounts to torture pursuant to Article 3 and Article 5(f) of the Statute. The Trial Chamber is also satisfied that the mistreatment inflicted upon Vahida Džemal, Enes Uzunovic, and Elvedin Cedic constituted inhumane acts under Article 5(i) and cruel treatment under Article 3 of the Statute as defined above.

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<sup>684</sup> FWS-139 (T 359-360); FWS-54 (T 752-757); FWS-111 (T 1252); FWS-142 (T 1826-1830); FWS-138 (T 2081); FWS-03 (T 2251-2253); FWS-58 (T 2702); FWS-71 (T 2825-2828); Ekrem Zekovic (T 3469); Dr Amir Berberkic (T 3817, 3925); Muhamed Lisica (T 4957).

<sup>685</sup> See, FWS-71 (T 2826).

(iii) Torture and beatings in Schedule B<sup>686</sup>

259. The Prosecution concedes that insufficient evidence was adduced to establish the incidents alleged in **B 1**, **B 6**, **B 9**, **B 10**, **B 12**, **B 16**, **B 27**, **B 29**, **B 38** and **B 42**. The Trial Chamber accordingly makes no finding with respect to these incidents.

260. The first of the remaining incidents is incident **B 2**. This alleges that, one evening in June or July 1992, Nedžib Babalija was beaten by guards of the KP Dom and/or soldiers including military police on the ground floor of the administration building. Two witnesses, Ekrem Zekovic and FWS-69, testified that Babalija bore the marks of beating.<sup>687</sup> Babalija told Zekovic that he had been severely beaten before he was brought to the KP Dom and that he had been beaten again while at the KP Dom.<sup>688</sup> FWS-69 stated that he did not know whether Babalija was beaten at the KP Dom, but he thought that he had not been.<sup>689</sup> There is no evidence of the seriousness of the beating which allegedly took place at the KP Dom, nor of the date at which the beating allegedly occurred. In those circumstances, the Trial Chamber is not satisfied that the pleaded incident has been established.

261. Incident **B 3** alleges that, one evening between 26 June and 14 July 1992, Šerif Balic was beaten by guards of the KP Dom and/or soldiers including military police on the ground floor of the administration building. The Trial Chamber is not satisfied that this incident has been established. One witness testified that Šerif Balic and his son were taken to the administration and never returned.<sup>690</sup> While this witness also heard the sound of people being beaten after they had been taken to the administration building, it is unclear whether this evidence refers to Šerif Balic and his son.<sup>691</sup>

262. Concerning incident **B 4**, the Trial Chamber is satisfied that, sometime in May or June 1992, D'emo Balic was taken to an isolation cell where he stayed for about 20 days. During that period, he was repeatedly and severely beaten and mistreated while being asked to draw up lists of SDA members and lists of people who possessed weapons.<sup>692</sup> When he was eventually brought back to his room, Balic had apparent bruises under his eyes and

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<sup>686</sup> Schedule B is annexed to the Indictment.

<sup>687</sup> Ekrem Zekovic (T 3511-3512); FWS-69 (T 4107-4108).

<sup>688</sup> Ekrem Zekovic (T 3511-3512).

<sup>689</sup> FWS-69 (T 4108).

<sup>690</sup> FWS-119 (T1955-1956, 1961-1964).

<sup>691</sup> *Ibid.*

<sup>692</sup> FWS-139 (T 361); FWS-138 (T 2068-2069); Ekrem Zekovic (T 3474, 3651, 3711).

could not talk to anyone for days.<sup>693</sup> The Trial Chamber is satisfied that the allegations made under B 4 have been established and that the acts in question both took place with the prohibited purpose of obtaining information and are serious enough as to amount to torture pursuant to Article 3 and Article 5(f) of the Statute.<sup>694</sup>

263. The Trial Chamber notes that the beating of Hamed "Salem" Bico mentioned under incident **B 5** also forms the basis of par 5.27 of the Indictment. The Trial Chamber has already concluded that the mistreatment meted out to him on that occasion amounted to inhumane acts pursuant to Article 5(i) and cruel treatment pursuant to Article 3 of the Statute,<sup>695</sup> but (in the absence of any evidence of a prohibited purpose) that it did not amount to torture. No additional finding is therefore required in respect of that incident.

264. Incident **B 7** alleges that, sometime before the end of June 1992, Abdurahman Cankusić was beaten on the ground floor of the administration building by unidentified guards of the KP Dom and/or soldiers including military policemen. The Trial Chamber is satisfied that, sometime in June 1992,<sup>696</sup> Cankusić was taken out of his room with a group of detainees and never returned.<sup>697</sup> There is no evidence that he was beaten in the course of his disappearance. Although he was taken in the period and in a manner similar to the pattern described below in paragraph 273, in the absence of any indication that he or those with whom he was taken with on that occasion were beaten, the Trial Chamber is not satisfied that this is the only reasonable inference available. The Trial Chamber is therefore not satisfied that this incident has been established.

265. Incident **B 8** alleges that, one evening after 7.00 pm between May and October 1992, Uzeir Cankusic was beaten by KP Dom guards Milenko Burilo and Dragomir Obrenovic and other unidentified individuals on the ground floor of the administration building. The Trial Chamber is satisfied that, on 16 or 17 April 1992, Cankusic and Ibro Selimovic were brought to the hospital.<sup>698</sup> When he arrived, Cankusic had been injured on

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<sup>693</sup> FWS-138 (T 2068-2069); Ekrem Zekovic (T 3474, 3651, 3711).

<sup>694</sup> This incident is not the same incident as that described in par 5.15 of the Indictment which took place prior to incident B 4.

<sup>695</sup> That fact was conceded by the Prosecution in the Prosecution Final Trial Brief, p 2.

<sup>696</sup> FWS-66 stated that he saw Abdurahman Cankusić until sometime in July or August 1992 (T 1106).

<sup>697</sup> Dževad Lojo (T 640-642); see also incidents C 3 and C 4.

<sup>698</sup> FWS-198 (T 1021); FWS-172 (T 4548-4549).

the shoulder by a firearm.<sup>699</sup> Shortly thereafter, both men were taken away and found dead the next day.<sup>700</sup> There is no indication, however, that they had been beaten or otherwise tortured while at the KP Dom.<sup>701</sup> The Trial Chamber is not satisfied that the incident charged in the Schedule has been established.

266. Incident **B 11** alleges that, sometime between June and mid-July 1992 after lunch or dinner, Zaim Cedic was beaten by KP Dom guards Milenko Burilo, Dragomir Obrenovic and other unidentified individuals on the ground floor of the administration building. The Trial Chamber is satisfied that, sometime in June or July 1992, Cedic arrived in room 16 with marks from having been beaten.<sup>702</sup> There is no indication, however, that he was beaten while detained at the KP Dom, nor by whom he might have been beaten. On the contrary, it seems that the beating which caused the injuries took place prior to his transfer to the KP Dom.<sup>703</sup> Only one witness suggested that Zaim Cedic was beaten on several occasions while in solitary confinement, but there is no indication concerning the seriousness and timing of those beatings, nor about the identity of the principal offenders.<sup>704</sup> The Trial Chamber is not satisfied that this incident has been established.

267. The Prosecution concedes in its Final Trial Brief that incident **B 13**, which alleges that, after lunch or dinner sometime in June or mid-July 1992, Halim Dedovic was beaten by military police Drakul, aka Zliko, Krnojelac, Miletic and "Pikolo", is the same as the incident described in par 5.23 of the Indictment.<sup>705</sup> The Trial Chamber therefore makes no additional findings in respect of incident B 13.<sup>706</sup>

268. The Trial Chamber is satisfied that the allegations contained in incident **B 14** have been established. Sometime in late June or later that summer of 1992, Remzija Delic was taken away from Room 18 and severely beaten by former schoolmates. While beating him, they challenged him ever to dare to come back hunting near their houses. Delic was taken

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<sup>699</sup> *Ibid.*

<sup>700</sup> FWS-172 (T 4548-4552).

<sup>701</sup> *Ibid.*

<sup>702</sup> FWS-104 (T 2172-2173); FWS-03 (T 2250); FWS-113 (T 2253-2255); FWS-69 (T 4118); FWS-73 (T 3216-3217).

<sup>703</sup> FWS-113 (T 2254-2256).

<sup>704</sup> Dr Amir Berberkic (T 3813-3814).

<sup>705</sup> Prosecution Final Trial Brief, annexed Schedule B, p 6.

<sup>706</sup> See pars 239-242, *supra*.

back to his room with obvious bruises on his face and lacerations on his back.<sup>707</sup> The Trial Chamber is satisfied that the purpose behind the severe beating of Delic was to intimidate him and thus make him fearful of coming near their houses again and that the beating amounted to torture pursuant to Article 3 and Article 5(f) of the Statute.

269. The Trial Chamber is also satisfied that the allegations contained in incident **B 15** have been established. Sometime in mid-July 1992, Nedžad Delic was taken from Room 18 and beaten by former schoolmates and neighbors, including one of the KP Dom guards Zoran Vukovic. Zoran Matovic, another KP Dom guard, was also present.<sup>708</sup> The latter put a tarpaulin over the head of Delic, beat him and kicked him so severely that he fainted several times. His moans and cries were heard by other detainees and, as a result of the mistreatment, he could not walk nor stand on his feet for a few days.<sup>709</sup> KP Dom guards had to carry him back to his room.<sup>710</sup> The Prosecution failed, however, to establish any prohibited purpose in relation to this incident. With respect to incidents of beatings during interrogation charged as torture, the Prosecution must demonstrate that the principal offender intended to achieve one of the prohibited purposes.<sup>711</sup> As an evidentiary matter, the mere statement that the victim was "taken for interrogation" or "to give a statement" is an insufficient basis *by itself* for the Trial Chamber to conclude that the purpose behind the infliction of pain was to obtain information or a confession. The Prosecution must establish that the principal offender did in fact interrogate or try to obtain information or a confession from the victim or a third person.

270. There is no evidence to support such a finding in this case and torture has therefore not been established. Those instances pleaded which the Trial Chamber has not accepted as establishing torture may nevertheless constitute inhumane acts pursuant to Article 5(i) or cruel treatment pursuant to Article 3 of the Statute if they satisfy the requirements of either or both of those articles. The Trial Chamber is satisfied that the treatment inflicted upon Delic did amount to inhumane acts pursuant to Article 5(i) and cruel treatment pursuant to Article 3 of the Statute.

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<sup>707</sup> FWS-142 (T 1828); FWS-69 (T 4104-4105).

<sup>708</sup> Dr Amir Berberkic (T 3773-3774).

<sup>709</sup> Dr Amir Berberkic (T 3772-3778).

<sup>710</sup> Dr Amir Berberkic (T 3772).

<sup>711</sup> The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

271. The Trial Chamber is satisfied that the allegations contained in incident **B 17** have been established. Prior to being taken to the KP Dom, Juso Džamalija was severely beaten and seriously injured as a result. Once at the KP Dom, he was denied medical attention. He lost consciousness due to the pain he suffered and was beaten several times while in the isolation cell where he was kept with other detainees.<sup>712</sup> Sometime in April or May 1992 while in the isolation cell, Džamalija hanged himself with his belt.<sup>713</sup> The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is satisfied, however, that the treatment meted out to Juso Džamalija while he was detained at the KP Dom, in particular the denial of medical attention, amounted to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

272. The Trial Chamber is satisfied that the allegations made in respect of incident **B 18** have been established. Sometime in mid-June 1992, Hasan Džano, nicknamed Kalebic, an old man, was taken to the solitary confinement cell where he was brutally beaten by KP Dom guard Zoran Matovic and another man named Ivanovic. The blows inflicted and his moans were audible to the other detainees. Džano was carried back to his room, all black and blue. The impact of the baton which the guards used to beat him could clearly be seen on his back. His face was covered in bruises, and his chin had been cut by a kick he received from military boots. He was bleeding profusely as a result, and he breathed with great difficulty. One of the detainees sutured his injuries with a needle and some thread.<sup>714</sup> The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is satisfied that the mistreatment inflicted upon Hasan Džano amounted to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

273. At different times in June and July 1992, generally in the evening, small groups of detainees were called out by a guard of the KP Dom and taken away to the administration building.<sup>715</sup> Soon thereafter, sounds of beating, cries and moans were frequently heard by

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<sup>712</sup> Ekrem Zekovic (T 3499, 3614); Dr Amir Berberkic (T 3812); FWS-250 (T 5025-5029).

<sup>713</sup> FWS-66 (T 1106); FWS-111 (T 1233); FWS-215 (T 903-904); FWS-54 (T 769); Ekrem Zekovic (T 3499); Dr Amir Berberkic (T 3812); FWS-69 (T 4129); FWS-250 (T 5029).

<sup>714</sup> See FWS-142 (T 1823-1824); FWS-104 (T 2165-2169); FWS-03 (T 2246-2249); FWS-113 (T 2569-2574); FWS-73 (T 3261-3263); Dr Amir Berberkic (T 3781-3782); FWS-249 (T 4484).

<sup>715</sup> See for example Safet Avdic (Ex P 123, pp 483-484, 692-693); FWS-86 (T 1519); FWS-86 (T 1520); FWS-182 (T 1622); FWS-138 (T 2069); FWS-03 (T 2250-2254, 2260-2261); FWS-144 (T 2301-2303); FWS-71

other detainees.<sup>716</sup> KP Dom guards sometimes took part in the beating and they could be overheard, insulting or provoking the victims;<sup>717</sup> at least five guards took part in one or several of those incidents.<sup>718</sup> Dragomir Obrenovic, Zoran Matovic, Milenko Burilo, Rade Vukovic and Pedrag Stefanovic.<sup>719</sup> KP Dom guards and individuals coming from outside beat the inmates with their fists and feet or with batons.<sup>720</sup> Shots were sometimes heard and the detainees never returned to their rooms.<sup>721</sup> Other detainees who entered some of the rooms where those beatings had taken place saw traces of blood on the walls and on the floor of the room as well as on a baton.<sup>722</sup> Although the Trial Chamber may not conclude, in the absence of any supporting evidence to that effect, that all individuals taken away on those occasions were indeed beaten, it may nevertheless draw certain inferences as to what had happened to certain individuals from the treatment known to have been meted out to other detainees who were taken together with them or in a similar fashion, provided that it is satisfied that they are the only reasonable inferences available. The Trial Chamber has applied this principle in relation to the following incidents where appropriate.

274. The Trial Chamber is satisfied that incidents **B 19**, **B 33**, **B 34**, **B 48** and **B 59** have been established. The Trial Chamber is satisfied that, sometime in June or July 1992, Kemo or Kemal Dželilovic (B 19), Halim Konjo (B 33), Mustafa Kuloglija (B 34), Mithat and Zaim Rikalo (B 48) and Munib Veiz (B 59) were called out of their rooms as a group and taken to the administration building and severely beaten by KP Dom guards including Milenko Burilo, Zoran Matovic, Dragomir Obrenovic, Rade Vukovic and

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(T 2820, 2822, 2829, 2862, 2889, 2981); FWS-69 (T 4112); FWS-172 (T 4559-4560); Muhamed Lisica (T 4946).

<sup>716</sup> See FWS-138 (T 2068, 2084); Rasim Taranin (T 1724); FWS-03 (T 2250-2254, 2260-2261); FWS-144 (T 2303-2304); FWS-109 (T 2396); Dževad Lojo (T 2584-2587); FWS-71 (T 2829); Ekrem Zekovic (T 3476); Dr Amir Berberkic (T 3811); RJ (T 3861); FWS-69 (T 4110); Muhamed Lisica (T 4957).

<sup>717</sup> See for example FWS-73 (T 3286-3289).

<sup>718</sup> See for example FWS-54 (T 761-762).

<sup>719</sup> See par 317, *infra*.

<sup>720</sup> See pars 274-276, *infra*.

<sup>721</sup> See pars 274, *infra* and "murder" section at pars 333-335, *infra*.

<sup>722</sup> See FWS-71 (T 2858); Muhamed Lisica (T 4963-4965).

Pedrag Stefanovic.<sup>723</sup> The cries and moans of the victims were heard by other detainees.<sup>724</sup> FWS-71 saw these detainees being lined up in front of the administration building and being taken in individually, and heard screams and moans starting shortly thereafter.<sup>725</sup> FWS-54 saw Matovic put his foot on Dželilovic's head in an apparent attempt to see whether he was still alive.<sup>726</sup> Amir Berberkic recognised the voice of Zaim Rikalo while he was being beaten.<sup>727</sup> FWS-66, FWS-03 and FWS-113 heard the voice and cries of Konjo while he was being beaten.<sup>728</sup> FWS-71 could see Konjo standing with a cut on his upper neck and blood on his T-shirt.<sup>729</sup> FWS-71 also recognised KP Dom guard Burilo's voice during the beating.<sup>730</sup> When the sounds of the beating died down, several detainees heard shots being fired and FWS-54 saw Matovic leaving the administration building and coming back carrying blankets.<sup>731</sup> Shortly thereafter, FWS-54 heard a vehicle leaving the KP Dom.<sup>732</sup> When the vehicle came back 10 or 15 minutes later, he saw men in green-grey uniforms cleaning it with buckets and mops.<sup>733</sup> None of the detainees ever returned, nor were they ever heard of again. The Trial Chamber is satisfied from the circumstances in which they were taken away that Dželilovic, Konjo, Kuloglija, Mithat and Zaim Rikalo and Veiz were severely beaten by KP Dom guards as alleged in the Indictment. The Trial Chamber is satisfied that this is the only reasonable inference to be drawn. The Prosecution failed to establish any prohibited purpose in relation to these incidents, so that torture has not been established. The Trial Chamber is nevertheless satisfied that the allegations contained in

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<sup>723</sup> See FWS-139 (T 357); Safet Avdic (T 482-494, 514-517); FWS-54 (T 758-762, 765, 772); FWS-215 (T 906, 912, 930); FWS-198 (T 1017-1018); FWS-66 (T 1064-1066, 1100-1101); FWS-111 (T 1237-1240, 1256); FWS-162 (T 1401); FWS-86 (T 1514); FWS-142 (T 1826-1827); Ahmet Hadžimusic (T 1955-1957, 1961-1964); FWS-138 (T 2071, 2074, 2081, 2084); FWS-03 (T 2250-2254); FWS-109 (T 2379, 2383, 2394); FWS-113 (T 2576-2580, 2583, 2586); FWS-71 (T 2828-2833, 2840, 2853-2854, 2954, 2958, 2887); FWS-73 (T 3252-3253, 3267-3268, 3369, 3296); Ekrem Zekovic (T 3487, 3499, 3508-3509); Dr Amir Berberkic (T 3789-3791, 3794, 3800, 3802-3803); FWS-69 (T 4111-4112, 4123-4124); FWS-172 (T 4559, 4564-4565); FWS-137 (T 4750, 4802); Muhamed Lisica (T 4947-4960).

<sup>724</sup> See, for instance, FWS-54 (T 762); FWS-03 (T 2261); FWS-109 (T 2394-2395).

<sup>725</sup> FWS-71 (T 2829-2830, 2837).

<sup>726</sup> FWS-54 (T 761).

<sup>727</sup> Dr Amir Berberkic (T 3789-3791).

<sup>728</sup> FWS-66 (T 1101); FWS-03 (T 2254); FWS-113 (T 2586). See also FWS-142 who thinks that he recognised his voice on that occasion (T 1826-1827). See also, FWS-210 (T 4958-4959).

<sup>729</sup> FWS-71 (T 2954).

<sup>730</sup> FWS-71 (T 2840).

<sup>731</sup> FWS-54 (T 762-763). See also Ekrem Zekovic (T 3487); FWS-71 (T 2837); Muhamed Lisica (T 4947-4948).

<sup>732</sup> FWS-54 (T 762-763). See also FWS-198 (T 1022).

<sup>733</sup> FWS-54 (T 762-763).

B 19, B 33, B 34, B 48 and B 59 have been established, and that the treatment inflicted upon these six individuals amounted to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

275. The Trial Chamber is satisfied that incidents **B 20** and **B 28** have been established. These incidents allege that, sometime between May and August 1992, Ramo D' endušić (B 20) and Nail Hodžić (B 28) were beaten by KP Dom guards Milenko Burilo, Dragomir Obrenovic and other unidentified individuals on the ground floor of the administration building. The Trial Chamber is satisfied that, sometime in June or July 1992, both men were called out of their room, that they were subsequently beaten and that the moans of the victims were heard by other detainees.<sup>734</sup> These two incidents are part of the pattern described in paragraph 273 *supra*, and they occurred in a manner similar to that described in that paragraph.<sup>735</sup> FWS-66 saw D' endušić being taken out and he heard both D' endušić and Hodžić being beaten.<sup>736</sup> The Trial Chamber is satisfied from the circumstances in which they were taken away that D' endušić and Hodžić were severely beaten as alleged in the Indictment.<sup>737</sup> The Trial Chamber is satisfied that this is the only reasonable inference to be drawn and that this incident has been established. The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is nevertheless satisfied that the treatment inflicted upon these five individuals amounted to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

276. The Trial Chamber is also satisfied that incident **B 21** and **B 46** have been established. The Trial Chamber is satisfied that, sometime in June or July 1992, Emir Frašto (B 21) and Husko or Husein Rikalo (B 46) were taken as part of a group of detainees

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<sup>734</sup> In relation to Ramo D' endušić, see Safet Avdic (T 519); FWS-215 (T 904); FWS-66 (T 1107); FWS-182 (T 1638); Ahmet Hadžimusic (T 1961-1964); FWS-104 (T 2184, 2217); FWS-54 (T 770); FWS-138 (T 2076); FWS-109 (T 2377-2378, 2394); FWS-113 (T 2582); FWS-71 (T 2886); Ekrem Zekovic (T 3489, 3495); Dr Amir Berberkic (T 3809); FWS-69 (T 4124-4125); FWS-172 (T 4560-4561). See also incident 8 in Schedule C. In relation to Nail Hodžić, see FWS-65 (T 516); FWS-119 (T 1955-1964, 1967); FWS-113 (T 2574-2582); FWS-71 (T 2833-2836); FWS-73 (T 3267); Ekrem Zekovic (T 3503); FWS-66 (T 1107); FWS-86 (T 1516); FWS-69 (T 4118); FWS-137 (T 4750-4756); Muhamed Lisica (T 4960-4961); FWS-250 (T 5078).

<sup>735</sup> See, in particular, FWS-65 (T 516); FWS-66 (T 1107); FWS-119 (T 1955-1967); FWS-109 (T 2377-2378, 2394); FWS-113 (T 2574-2576, 2582); FWS-71 (T 2883-2887); Ekrem Zekovic (T 3489-3499); FWS-172 (T 4559-4561); FWS-137 (T 4750-4756).

<sup>736</sup> FWS-66 (T 1107).

<sup>737</sup> The Trial Chamber is satisfied that this incident is different to that considered in the section on murder. See par 340, *infra*.

to the administration building where they were severely beaten. Frašto and Rikalo were taken together with Nurko Nisic and Esad Kiselica.<sup>738</sup> FWS-162 said that he saw the four detainees standing in front of the gate. He also heard Nisic being beaten for half an hour and begging "Zelja" to stop.<sup>739</sup> "Zelja" simply answered: "Now you'll see how we beat".<sup>740</sup> FWS-104 and Amir Berberkic both heard Rikalo being beaten and the provocative remarks of those beating him.<sup>741</sup> The beating of these four men lasted for about two hours.<sup>742</sup> The Trial Chamber is satisfied that the allegations contained in B 21 and B 46 have been established. The Prosecution failed to establish any prohibited purpose in relation to these two incidents, so that torture has not been established. The Trial Chamber is satisfied, however, that the treatment inflicted upon Frašto and Rikalo amounted to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

277. Incident **B 22** alleges that, sometime between 26 June and 14 July 1992, Adnan Granov was beaten by unidentified individuals, KP Dom guards and/or soldiers from outside the KP Dom, including military policemen, on the ground floor of the administration building. The Trial Chamber is satisfied that the allegations have been established. During his detention, in June and July 1992, Granov was repeatedly beaten.<sup>743</sup> He was accused of having travelled to Germany before the war to obtain weapons and of having illegally transmitted radio messages.<sup>744</sup> Zekovic said that Granov, whom he knew personally, had been beaten badly.<sup>745</sup> FWS-142 said that, on one of those occasions when Granov was taken out, he heard moans and screams coming from the administration building.<sup>746</sup> Granov was eventually taken away and he disappeared.<sup>747</sup> The Trial Chamber is satisfied that Granov was being beaten in order either to obtain information about radio transmission or weapons or that he was being punished for his involvement in those matters.

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<sup>738</sup> FWS-162 (T 1386-1387); FWS-03 (T 2252-2253; FWS-172 (T 4559-4561). See also, FWS-111 (T 1240); FWS-66 (T 1100-1101, 1108); FWS-162 (T 1386-1387); FWS-198 (T 1010-1011); FWS-142 (T 1824); FWS-104 (T 2176-2178); FWS-03 (T 2257, 2261); FWS-54 (T 772); FWS-109 (T 2832); Dr Amir Berberkic (T 3787-3789). FWS-172 mentioned that they may have been taken in July rather than June 1992 (T 4559).

<sup>739</sup> FWS-162 (T 1387-1388).

<sup>740</sup> FWS-162 (T 1387-1388).

<sup>741</sup> FWS-104 (T 2176-2177); Dr Amir Berberkic (T 3789).

<sup>742</sup> FWS-162 (T 1388); FWS-03 (T 2250-2252, 2258); FWS 172 (T 4559-4561).

<sup>743</sup> See FWS-66 (T 1107); Safet Avdic (T 519); FWS-111 (T 1241); FWS-215 (T 905); FWS-139 (T 364); FWS-182 (T 1638); FWS-142 (T 1826); FWS-54 (T 770); FWS-86 (T 1539-1541); FWS-109 (T 2385); FWS-113 (T 2583); Ekrem Zekovic (T 3501); Muhamed Lisica (T 4963).

<sup>744</sup> See Ekrem Zekovic (T 3501-3502); FWS-111 (T 1241); FWS-215 (T 905).

<sup>745</sup> Ekrem Zekovic (T 3501).

<sup>746</sup> FWS-142 (T 1826-1827).

<sup>747</sup> FWS-73 (T 3404); Ekrem Zekovic (T 3502); FWS-66 (T 1107); FWS-111 (T 1241); FWS-182 (T 1638); FWS-142 (T 1826); FWS-86 (T 1542); FWS-109 (T 2385-2395);

In view of the seriousness of the injuries inflicted and the repetition of the beatings, the Trial Chamber is satisfied that the treatment inflicted upon him is serious enough to amount to torture.

278. Incident **B 23** alleges that, sometime between 26 June and 14 July 1992, Izet Grošonja was beaten by unknown KP Dom guards and/or soldiers from outside the KP Dom, including military police on the ground floor of the administration building. The Trial Chamber is satisfied that, at some point, Grošonja was taken out of his room and never returned.<sup>748</sup> There is no indication, however, that he was ever beaten while detained at the KP Dom<sup>749</sup> nor, if he was, is there any indication of the gravity of the beating. Accordingly, the Trial Chamber is not satisfied that this incident has been established.

279. Incident **B 24** alleges that, on an unknown date, Resad Hadžimesic was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police on the ground floor of the administration building. The Trial Chamber is satisfied that, sometime in the latter half of September 1992,<sup>750</sup> Hadžimesic was taken out, ostensibly for plum picking, and never returned.<sup>751</sup> The Trial Chamber is not satisfied, however, that Hadžimesic was beaten as alleged. One witness mentioned that Hadžimesic was taken several times and beaten, but there is no evidence of the seriousness of the beating or of the identity of the principal offenders.<sup>752</sup> Accordingly, the Trial Chamber is not satisfied that, either at the time he was taken out or prior to that, Hadžimesic was beaten at the KP Dom in the manner described in the Schedule, nor that the beating was serious enough to amount to any of the offences charged.<sup>753</sup>

280. The Trial Chamber is satisfied that the incidents **B 25**, **B 26** and **B 51** have been established. On one occasion in the summer of 1992, Latif Hasanbegovic, Aziz Haskovic and Halim Seljanci were taken out together and severely beaten by two KP Dom guards, Zoran Matovic and Milenko Burilo. They were beaten all over their bodies, including on the soles of their feet, and one of the guards used a baseball bat for that purpose.

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<sup>748</sup> FWS-69 (T 4119); FWS-139 (T 354).

<sup>749</sup> FWS-139 seems to suggest that he had been beaten prior to his being brought to the KP Dom (T 355).

<sup>750</sup> FWS-65 (T 524); FWS-104 (T 2185, 2209); FWS- 113 (T 2597-2599); FWS-214 (T 3928); FWS-216 (T 3513-3516).

<sup>751</sup> *Ibid.*

<sup>752</sup> FWS-73 (T 3285-3286).

<sup>753</sup> FWS-65 (T 524-525); FWS-104 (T 2185-2187,2209); FWS- 113 (T 2597-2599); FWS-214 (T 3928).

As a result, they were barely able to move or to stand on their feet when returned to their room.<sup>754</sup> The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is nevertheless satisfied that the treatment meted out to Latif Hasanbegovic, Aziz Haskovic and Halim Seljanci amounted to both inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

281. The Trial Chamber is satisfied that incident **B 30** has been established. Sometime in June 1992, Kemo or Kemal Isanovic and a young man by the last name of Cedic were called out by a soldier from outside the KP Dom, and a KP Dom guard, taken away and severely beaten. Their screams and moans were clearly heard by other detainees. They came back swollen and bruised.<sup>755</sup> The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is nevertheless satisfied that the treatment inflicted upon Kemo or Kemal Isanovic, as described in Schedule B,<sup>756</sup> amounted to both inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

282. The Trial Chamber is further satisfied that, as alleged under incident **B 31**, on an unknown date in the summer of 1992, Ibrahim Kafedžic was taken out for interrogations. Kafedžic was beaten and returned with his body black and blue, and his face red with bruises. Kafedžic was taken out on several occasions and he was very frightened. He told other detainees that a man named Vladicic had interrogated him.<sup>757</sup> Kafedžic told Zekovic that he was being beaten terribly because a relative of his had joined the BH army.<sup>758</sup> The Trial Chamber is satisfied that the beating of Ibrahim Kafedžic alleged in B31 has been established, that it was for the prohibited purpose of obtaining information and that, in view

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<sup>754</sup> In respect of Latif Hasanbegovic, see FWS-109 (T 2359-2362); FWS-71 (T 2810, 2821-2822). In respect of Aziz Haskovic, see FWS-109 (T 2359-2362); FWS-71 (T 2822). In respect of Halim Seljanci (incident B 51), see FWS-109 (T 2359-2362); FWS-58 (T 2701); FWS-71 (T 2810, 2821-2822).

<sup>755</sup> FWS-03 (T 2252); FWS-73 (3214-3218); Dr Amir Berberkic (T 3927).

<sup>756</sup> It is alleged in incident B 31 that, sometime in June 1992, Ibro Kafedžic was beaten by guards and/or soldiers including military police on the ground floor of the administration building after lunch or dinner.

<sup>757</sup> Ekrem Zekovic (T 3517); FWS-69 (T 4077-4079).

<sup>758</sup> Ekrem Zekovic (T 3517).

of the seriousness of the injury and the repetition of the beatings, it amounted to torture pursuant to Articles 3 and 5 of the Statute.<sup>759</sup>

283. Incident **B 32** alleges that, on one occasion after 7.00 pm between May and October 1992, Rasim Kajgana was beaten by KP Dom guards Milenko Burilo, Dragomir Obrenovic and unknown others on the ground floor of the administration building. The Trial Chamber is satisfied that, in September 1992, Kajgana was taken out of the KP Dom and never seen again, but there is no evidence that he was beaten in the course of that event or prior to it.<sup>760</sup> The Trial Chamber is not satisfied that the incident has been established.

284. Incidents **B 33** and **B 34** have already been dealt with above.<sup>761</sup>

285. Incident **B 35** alleges that, sometime in May or June 1993, Omer Kunovac was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police, on the ground floor of the administration building. The Trial Chamber is satisfied that Kunovac was one of two deaf-mutes detained at the KP Dom,<sup>762</sup> and that a deaf-mute was beaten by a policeman named Pjelvaljic.<sup>763</sup> The Trial Chamber is unable to determine whether that victim was Kunovac, nor is it able to determine the seriousness of the beating inflicted. Another witness who knew Kunovac testified that Kunovac was originally brought to his room all beaten up and that he later died of his injuries.<sup>764</sup> This witness conceded that he had assumed that Kunovac had been beaten in the solitary confinement cell at the KP Dom, and he did not rule out the possibility that the beating might have taken place prior to Kunovac's arrival at the KP Dom.<sup>765</sup> In those circumstances, the Trial Chamber is not satisfied that the incident described under B 35 has been established.

286. The Trial Chamber observes that in its Final Trial Brief the Prosecution changed the name of the alleged victim of incident **B 36** from MK (i.e. Salko, nicknamed "Kelta", Mandžo) to Fuad Mandžo, without giving notice of that fact to either the Defence or the

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<sup>759</sup> The Trial Chamber did not take into account those injuries which might have been inflicted prior to his arrival at the KP Dom (see Ekrem Zekovic, T 3517).

<sup>760</sup> FWS-198 (T 1021); FWS-71 (T 2879, 2886); FWS-73 (T 3284, 3411-3413); Ekrem Zekovic (T 3497); FWS-69 (T 4086); Muhamed Lisica (T 5009).

<sup>761</sup> See par 274, *supra*.

<sup>762</sup> FWS-73 (T 3289-3290).

<sup>763</sup> FWS-73 (T 3289-3290).

<sup>764</sup> FWS-214 (T 3760-3763).

<sup>765</sup> FWS-214 (T 3762).

Trial Chamber and without seeking leave to amend the Indictment. Without proper notice of such a change to the Defence, it would not be appropriate for the Trial Chamber to make any finding as to whether or not Fuad Mandžo was beaten or mistreated in the manner described in Schedule B. Incident B36, as pleaded, alleges that, one evening sometime between mid-May and July 1992, Salko, nicknamed "Kelta", Mandžo was beaten by unidentified KP Dom guards and soldiers from outside the KP Dom in the administration building. This is the same incident as that contained in par 5.28 of the Indictment, in relation to which the Trial Chamber came to the conclusion that the acts charged amounted to torture pursuant to Article 3 and Article 5(f) of the Statute.<sup>766</sup> Another finding therefore need not be made in respect of these allegations.

287. The Trial Chamber is satisfied that the allegations contained in incident **B 37** have been established. Sometime in mid-June 1992, Emir Mandžo was taken to the gate of the KP Dom and brutally beaten. Mandžo was placed on a chair while KP Dom guards or soldiers from outside the KP Dom took his shoes off and inserted his arms and legs through the frame of another chair. One of the principal offenders took a baton and beat him on the arms and legs. Zoran Vukovic, a man from Josanica, hit him with his soldier's boot on the jaw, and he fainted. Another KP Dom guard, Zoran Matovic, also took part in the beating. Mandžo fainted several times, but they kept splashing water on him until he regained consciousness. It lasted for about half an hour before they realised, as with the incident described in par 5.28 of the Indictment, that he was not the individual they were looking for.<sup>767</sup> When Mandžo was returned to the room, his body resembled one huge wound. His face was completely distorted from the blows, his upper lip was lacerated, and his teeth in the upper jaw were broken. He had large swellings on the soles of both his feet. The backs of his hands were swollen, his index fingers were broken and his back bore the marks of blows inflicted by a baton. He was unable to get up for three days. The other detainees had to carry him, and bring him food in his room.<sup>768</sup> The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is nevertheless satisfied that the treatment meted out to Emir Mandžo

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<sup>766</sup> See pars 254-255, *supra*.

<sup>767</sup> See pars 254-255, *supra* in respect of par 5.28.

<sup>768</sup> FWS-86 (T 1513); FWS-66 (T 1104); FWS-139 (T 360); FWS-182 (T 1629); Ahmet Hadžimusic (T 1959); FWS-138 (T 2076-2079); FWS-104 (T 2166-2169); FWS-03 (T 2248-2249); FWS-113 (T 2569-2571); FWS-73 (T 3261-3263); Dr Amir Berberkic (T 3784-3786); FWS-249 (T 4484-4486).

amounts to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

288. Incident **B 39** alleges that, one evening sometime between 24 May and 7 July 1992, a Croat named Matovic was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police on the ground floor of the administration building. There is no evidence that the incident described in the Indictment occurred.<sup>769</sup> The Trial Chamber observes that, in its Final Trial Brief, the Prosecution changed the name of the alleged victim of this incident Matovi} to Mate Ivancic without giving notice of that fact to either the Defence or the Trial Chamber,<sup>770</sup> and without seeking leave to amend the Indictment. The Trial Chamber does not in such circumstances make a finding in relation to Ivancic. The Trial Chamber is not satisfied that the pleaded incident has been established.

289. Incident **B 40** alleges that, after 6.00 pm on several occasions between 29 April and 19 August 1992, Avdo Mehmedspahic was beaten by four policemen from outside the KP Dom, Zoran Vladicic, Miso Koprivica, Petko Gašovic and Vojislav Starovic, and other unknown individuals. Several witnesses stated that they saw Mehmedspahic at the KP Dom with injuries.<sup>771</sup> Several of them stated or conceded that those injuries might have been incurred prior to his being brought to the KP Dom.<sup>772</sup> In those circumstances, the Trial Chamber is not satisfied that the evidence suggesting that he might also have been beaten while at the KP Dom,<sup>773</sup> let alone in the manner and at the time mentioned in the Schedule, is sufficient to conclude that this incident has been established.

290. Incident **B 41** alleges that, one night between 13 June and 30 June 1992, Azim Mesbur was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police on the ground floor of the administration building. The Trial Chamber is satisfied that Mesbur was taken out of his room sometime in September 1992 and was never seen again.<sup>774</sup> However, there is no evidence that he was beaten at that

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<sup>769</sup> FWS-03 (T 2250-2252); FWS-182 (T 1630).

<sup>770</sup> Prosecution Final Trial Brief, Schedule B, p 22.

<sup>771</sup> FWS-111 (T 1246); Dževad Lojo (T 655); FWS-73 (T 3285); Ekrem Zekovic (T 3520); FWS-172 (T 4569-4570).

<sup>772</sup> FWS-111 (T 1246); FWS-73 (T 3285); FWS-172 (T 4569).

<sup>773</sup> See FWS-111 (T 1246); FWS-86 (T 1515); FWS-216 (T 3520); FWS-73 (T 3285).

<sup>774</sup> FWS-111 (T 1243); Dževad Lojo (T 656); FWS-113 (T 2594); Ekrem Zekovic (T 3524); FWS-250 (T 5040-5042).

time or at any other time while detained at the KP Dom.<sup>775</sup> Accordingly, the Trial Chamber is not satisfied that the incident has been established.

291. Incident **B 43** alleges that, on one occasion after lunch or dinner between June and mid-July 1992, Mehmet Pašalic was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police on the ground floor of the administration building. The Trial Chamber is satisfied that Pašalic was taken to the gate and never seen again.<sup>776</sup> There is no evidence, however, that he was beaten, and the Trial Chamber is not satisfied that this incident has been established.

292. Incident **B 44** alleges that, one afternoon in the summer of 1992, Mensud Pašovic was beaten by KP Dom guard Dragan Zelenovic and other unknown individuals. The Trial Chamber is not satisfied that this incident has been established. The Trial Chamber is satisfied that Pašovic was taken away at some point during the summer of 1992 and never seen again,<sup>777</sup> but there is no evidence that he was beaten at that time or at any other time.

293. Incident **B 45** alleges that, sometime between June and mid-July 1992 after lunch or dinner, Hidajet Rikalo was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police, on the ground floor of the administration building. Witness Berberkic said that he knew three relatives by the last name Rikalo: Husein, Zaim and Hidajet or "Hido".<sup>778</sup> Berberkic also stated that the three of them were taken away in a similar manner during the same period, that they were beaten and they never returned.<sup>779</sup> Berberkic distinctly recognised the voices of both Husein and Zaim whom he knew well when they were being beaten in the administration building.<sup>780</sup> Although Berberkic did not recognise the voice of Hidajet, whom he did not know so well, the Trial Chamber is satisfied from the circumstances in which he was taken away that Hidajet Rikalo was also severely beaten. The Trial Chamber is satisfied that this is the only reasonable inference to be drawn, and that this incident has been established. The Prosecution failed to establish any prohibited purpose in relation to this incident, so that torture has not been established. The Trial Chamber is nevertheless satisfied that the

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<sup>775</sup> FWS-85 mentioned that Mesbur may have been beaten before being taken to the KP Dom (T 656).

<sup>776</sup> FWS-03 (T 2252-2253, 2258-2260); Dr Amir Berberkic (T 3808); FWS-69 (T 4124-4125); FWS-172 (T 4561).

<sup>777</sup> FWS-138 (T 2083); FWS-109 (T 2400-2401); Ekrem Zekovic (T 3489); Muhamed Lisica (T 4947).

<sup>778</sup> Dr Amir Berberkic (T 3787).

<sup>779</sup> Dr Amir Berberkic (T 3787-3791). See also, FWS-73 (T 3267).

<sup>780</sup> *Ibid.*

treatment meted out to Hidajet Rikalo amounts to inhumane acts pursuant to Article 5(i) as well as cruel treatment pursuant to Article 3 of the Statute.

294. Incident **B 46** has already been dealt with above.<sup>781</sup>

295. Incident **B 47** alleges that, one evening sometime between 26 June and 14 July 1992, Necko Rikalo was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police, on the ground floor of the administration building. The Trial Chamber is satisfied that Rikalo was taken out sometime in late June or early July 1992 and never returned.<sup>782</sup> One witness mentioned that he heard the sound of beatings which took place during the period – mid-June – when Rikalo was taken away.<sup>783</sup> The Trial Chamber is not satisfied that this evidence referred to Rikalo, or that it is sufficient to establish the incident described in B 47.

296. Incident **B 48** has already been dealt with above.<sup>784</sup>

297. The Prosecution concedes in its Final Trial Brief that incident **B 49** is identical to the incident charged under paragraph 5.23 of the Indictment.<sup>785</sup> Incident B 49 alleges that, on several occasions at the end of June 1992, Hajro Šabanovic was beaten in the administration building by military police from outside the KP Dom, Drakul, aka Zliko, Krnojelac, Miletic and “Pikolo”. The Trial Chamber therefore need not make additional findings in respect of incidents B 49.<sup>786</sup>

298. Incident **B 50** alleges that, sometime between 26 June and 14 July 1992, Haso Selimovic was beaten by unidentified KP Dom guards and/or soldiers from outside the KP Dom, including military police, on the ground floor of the administration building. The Trial Chamber is satisfied that, sometime in June 1992,<sup>787</sup> Selimovic was taken out and never returned.<sup>788</sup> The Trial Chamber is not satisfied, however, that he was beaten in the course of his disappearance or prior to this date. The Trial Chamber is not satisfied that this incident has been established.

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<sup>781</sup> See par 276, *supra*.

<sup>782</sup> FWS-172 (T 4559-4561).

<sup>783</sup> *Ibid*.

<sup>784</sup> See par 274, *supra*.

<sup>785</sup> See Prosecution Final Trial Brief, p 27.

<sup>786</sup> See pars 239-242, *supra*.

<sup>787</sup> FWS-119 (T 1955-1956); FWS-03 (T 2251).

<sup>788</sup> FWS-119 (T 1955-1961); FWS-03 (T 2250-2253); FWS-69 (T 4119); FWS-250 (T 5077).

299. Incident **B 51** has already been dealt with above.<sup>789</sup>

300. The Trial Chamber is satisfied that, as described in incident **B 52**, sometime in August or September 1992, Mehmed Sofrad' ija, nicknamed "Mesa", was taken to an isolation cell, interrogated and badly beaten.<sup>790</sup> His screams could be heard while he was being interrogated.<sup>791</sup> When he was brought back to his room, his entire face was swollen and bore the marks of beatings. He stayed in the isolation cell for about seven days without anything to eat or drink, and he had no choice but to drink his own urine.<sup>792</sup> He was so frightened that he would not survive this ordeal that he gave his watch to another detainee, asking him to give it to his son.<sup>793</sup> The Trial Chamber is satisfied that the allegations contained in B 52 have been established and that all the elements of the definition of torture pursuant to Article 3 and Article 5(f) of the Statute have been made out, including the prohibited purpose of obtaining information.

301. Incident **B 53** alleges that, sometime during daytime in April 1992, Esad Šoro was beaten by Miso Koprivica, a police inspector from outside the KP Dom. FWS-54 testified that he was himself taken out and interrogated by Koprivica.<sup>794</sup> FWS-54 stated that Koprivica had treated him, the witness, fairly and that he did not beat him.<sup>795</sup> FWS-54 added that other detainees – the three Šoro brothers, Esad, Ševal and Sulejman, as well as Elvedin Cedic – told him that Koprivica did beat them.<sup>796</sup> FWS-54, however, questioned the reliability of their statements.<sup>797</sup> FWS-109 testified that Esad Šoro was taken away and never seen again, but there is no evidence that Esad Šoro was beaten on the occasion alleged.<sup>798</sup> In those circumstances, the Trial Chamber is not satisfied that the incident described above has been established by that hearsay evidence.

302. Incident **B 54** alleges that, sometime during daytime in April 1992, Ševal Šoro was also beaten by Miso Koprivica, a police inspector from outside the KP Dom. The Trial

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<sup>789</sup> See par 280, *supra*.

<sup>790</sup> FWS-73 (T 3282); Ekrem Zekovic (T 3525); Dr Amir Berberkic (T 3928); FWS-137 (T 4760).

<sup>791</sup> FWS-73 (T 3282); FWS-137 (T 4760, 4800).

<sup>792</sup> Dr Amir Berberkic (T 3930).

<sup>793</sup> Dr Amir Berberkic (T 3930).

<sup>794</sup> FWS-54 (T 751-754).

<sup>795</sup> *Ibid.*

<sup>796</sup> FWS-54 (T 752).

<sup>797</sup> FWS-54 (T 752): "However, I later heard from some others, *now to what extent you can believe this or not is different*, that he beat them. I did not see that, but he really did not treat me that way." (emphasis added)

<sup>798</sup> T 2398-2402.

Chamber reiterates the conclusions reached in respect of B53.<sup>799</sup> The Trial Chamber is satisfied that Ševal Šoro was taken away and never returned.<sup>800</sup> There was no evidence, however, that he was beaten on the occasion alleged, let alone at the time, in the manner or by the individual mentioned in the Schedule.<sup>801</sup> The Trial Chamber is not satisfied that this incident has been established.

303. Incident **B 55** alleges that, sometime during daytime in April 1992, Sulejman Šoro was also beaten by Miso Koprivica, a police inspector. The Trial Chamber reiterates the conclusions reached in respect of B53;<sup>802</sup> there was no other evidence that Sulejman Šoro was dealt with in the manner described in the Indictment. The Trial Chamber is not satisfied that this incident has been established.

304. Incident **B 56** alleges that, after 6.00 pm on several occasions between 29 April and 19 August 1992, Habib Subašić was beaten by four policemen from outside the KP Dom, Zoran Vladicic, Miso Koprivica, Petko Gašovic and Vojislav Starovic and other unknown individuals. One witness testified that Subašić had been seriously beaten before he arrived at the KP Dom.<sup>803</sup> Another witness stated that he saw marks resulting from beating on Subašić's body, and was told by him that he had been beaten; he did not, however, tell him when or by whom.<sup>804</sup> The Trial Chamber is not satisfied that the incident has been established.

305. The Trial Chamber is satisfied that the treatment meted out to FWS-159, as described in incident **B 57**, has been established, that the principal offenders acted with the prohibited purpose of obtaining information and that it amounts to torture pursuant to Article 3 and Article 5(f) of the Statute. Despite obvious injuries sustained before he arrived at the KP Dom at the end of January 1993, FWS-159 was interrogated on his arrival by Boro Ivanovic and someone named Milorad; he was threatened, slapped and denied any

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<sup>799</sup> See par 301, *supra*; see also FWS-69 (T 4085-4086) and FWS-210 (T 4967, 5009) who testified that Sulejman Šoro was taken away at some point and never returned. There is no evidence that he was beaten on that occasion.

<sup>800</sup> FWS-111 (T 1258); FWS-139 (T 367); FWS-54 (T 767); FWS-109 (T 2377-2378, 2395-2396); FWS-71 (T 2865-2866); Amir Berberkic (T 3927); FWS-172 (T 4560-4561); FWS-137 (T 4750); Muhamed Lisica (T 4962).

<sup>801</sup> But see par 339, *infra*, in relation to his murder on another occasion.

<sup>802</sup> See par 301, *supra*; see also FWS-69 (T 4085-4086) and FWS-210 (T 4967 and 5009) who testified that Sulejman Šoro was taken away at some point and never returned. There is no evidence that he was beaten on that occasion.

<sup>803</sup> FWS-86 (T 1517).

<sup>804</sup> FWS-58 (T 2700).

medical treatment.<sup>805</sup> FWS-159 was subsequently locked in an isolation cell for about three months, during which time he was again repeatedly interrogated by Boro Ivanovic about military activity.<sup>806</sup> On at least ten occasions during that period, he was beaten particularly brutally by Serb soldiers and KP Dom guards.<sup>807</sup> One of the guards, Zoran Matovic, beat him with his feet and hands on the kidneys, spine, head and around the heart.<sup>808</sup> The same guard also beat him with a knife and threatened to cut his heart out.<sup>809</sup>

306. Incident **B 58** alleges that, one evening between May and August 1992, Munib Vehida was beaten by KP Dom guards Milenko Burilo and Dragomir Obrenovic and other unidentified individuals. There is no evidence supporting this allegation. The Trial Chamber is therefore not satisfied that this incident has been established.

307. Finally, incident **B 59** has already been dealt with above.<sup>810</sup>

### 3. The responsibility of the Accused

308. The Accused denied that he ever saw or heard about beatings of non-Serb detainees at the KP Dom.<sup>811</sup> The Trial Chamber is satisfied, however, that the Accused knew that Muslim detainees were being beaten and that they were otherwise being generally mistreated in the manner described under par 5.4 through 5.29 of the Indictment.

309. First, the Trial Chamber is satisfied that the Accused saw one detainee being beaten. Although the Accused acknowledged that he met Ekrem Zekovic after the latter had been severely beaten, he denies that he saw him being beaten or that he saw any marks or indication which might have led him to conclude that Zekovic might have been beaten.<sup>812</sup> The Trial Chamber does not accept that assertion as credible, and rejects the Accused's evidence. The Trial Chamber has already accepted and reiterates that the Accused

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<sup>805</sup> FWS-159 (T 2442-2454). There is no suggestion that the person named "Milorad" was the Accused.

<sup>806</sup> FWS-159 (T 2457).

<sup>807</sup> FWS-159 (T 2479-2484).

<sup>808</sup> FWS-159 (T 2483-2484).

<sup>809</sup> FWS-159 (T 2483).

<sup>810</sup> See par 274, *supra*.

<sup>811</sup> The Accused (T 7677, 8112).

<sup>812</sup> The Accused (T 7681-7682, 8121). See also Defence witness Risto Ivanovic (T 6152). The Trial Chamber does not accept the evidence of this witness on that point; nor does his evidence cause the Trial Chamber to have a reasonable doubt that the Prosecution witnesses were telling the truth. See also Ekrem Zekovic (T 3574-3575).

intervened to stop the beating of Zekovic by one of the KP Dom guards.<sup>813</sup> This guard, Milenko Burilo, continued to attack Zekovic while being taken away by the Accused.<sup>814</sup> At some point, Burilo threw Zekovic against a wall as a result of which the latter lost consciousness.<sup>815</sup> The evidence of the Accused on that point does not cause the Trial Chamber to have any reasonable doubt that Zekovic was telling the truth.

310. Secondly, although he denied it,<sup>816</sup> the Accused was personally told about non-Serb detainees being beaten and mistreated.<sup>817</sup> RJ told the Accused that detainees could hear the sounds of beatings coming from the administrative building.<sup>818</sup> The Accused merely said that he had no authority over that part of the building.<sup>819</sup> RJ also told the Accused about the beating of a retarded detainee.<sup>820</sup> The Accused said that he would look into the matter.<sup>821</sup> The Trial Chamber does not accept the denials of the Accused in relation to these issues nor did they cause the Trial Chamber to have any reasonable doubt that the Prosecution witnesses were telling the truth.

311. Thirdly, in view of the widespread nature of the beatings at the KP Dom and the obvious resulting physical marks on the detainees, the Accused could not have failed to learn of them, although he denies it.<sup>822</sup> The consequences of the mistreatment upon the detainees, the resulting difficulties that some of them had in walking, and the pain which they were in must have been obvious to everyone. The Trial Chamber notes that the

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<sup>813</sup> See pars 228-233, *supra* where the Trial Chamber points out that this beating was not the subject of the charge in the Indictment. However, it remains evidence in the case from which inferences may legitimately be drawn by the Trial Chamber in relation to issues arising out of incidents which *are* the subject of charges in the Indictment.

<sup>814</sup> Ekrem Zekovic (T 3569-3570).

<sup>815</sup> Ekrem Zekovic (T 3569-3570).

<sup>816</sup> The Accused said that he never heard about any beatings (T 7678).

<sup>817</sup> See for example RJ (T 3860-3867); Ahmet Hadžimusic (T 1979-1981).

<sup>818</sup> RJ (T 3860-3864).

<sup>819</sup> RJ (T 3860-3866).

<sup>820</sup> RJ (T 3865-3866).

<sup>821</sup> RJ (T 3865-3866). Ahmet Hadžimusic gave evidence of having overheard a conversation between two relatives named Cankusic who discussed the disappearance of the sons of one of them, and that one of the two men had reported it to the Accused. According to Hadžimusic, Cankusic asked the Accused where his sons were. The Accused answered that they had been sentenced and taken away to serve their terms. When Cankusic asked the Accused why they had been beaten so much, the Accused attempted to justify the beatings by saying that they had been beaten in order to obtain a confession. This evidence against the Accused was hearsay and, in the absence of any circumstantial support for the statements made to Hadžimusic, the Trial Chamber does not consider it sufficiently credible to base a finding that the Accused had in fact been made aware of those facts: Ahmet Hadžimusic (T 1979-1981, 2012).

<sup>822</sup> The Accused (T 7677).

Accused held the position of warden for 15 months, during which time he went to the KP Dom almost every day of the working week. While there he would go to the canteen,<sup>823</sup> the prison yard or elsewhere inside the compound,<sup>824</sup> all places where he had plenty of opportunities to notice the physical condition of the non-Serb detainees.

312. The Trial Chamber does not accept the Accused's blanket denial of any knowledge of beatings as being credible. It is satisfied that he must have been aware that the detainees, for whose care he was responsible, and some of whom he knew personally,<sup>825</sup> were being mistreated. The Trial Chamber is also satisfied that the Accused, having witnessed the beating of Zekovi}, was aware that the purpose of the beating was of *punishing* him for his failed escape.<sup>826</sup> That is a prohibited purpose, so that the Accused was, the Trial Chamber accepts, aware that Zekovi} was being tortured. However, as already indicated, the Accused has not been charged with criminal responsibility for the torture of Zekovi}.<sup>827</sup> Had he been so charged, he would have been responsible as a superior pursuant to Article 7(3), because he failed to punish KP Dom guard Burilo for torturing Zekovi}.

313. The Trial Chamber is not satisfied, however, that the Accused knew that the other beatings were inflicted for one of the purposes provided for in the prohibition against torture, rather than being meted out purely arbitrarily. The fact that the Accused witnessed the beating of Zekovic, ostensibly for the prohibited purpose of *punishing* him for his failed escape is not sufficient, in itself, to conclude that the Accused knew or that he had reason to know that, other than in that particular instance, beatings were inflicted for any of the prohibited purposes. Having personally observed Burilo torturing Zekovic, the Accused was obliged to punish Burilo, but that isolated fact did not oblige him to investigate the incident in such a way as would have put him on notice that others were being *tortured* in

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<sup>823</sup> Several witnesses mentioned that they saw him at the refectory or on his way to the refectory: see for example Rasim Taranin (T 1706); Ahmet Hadžimusic (T 1981); FWS-249 (T 4497-4498); FWS-250 (T 5056, 5068-5069); FWS-109 (T 2409-2410); RJ (T 3892); Ekrem Zekovic (T 3451); FWS-138 (T 2096-2097).

<sup>824</sup> See FWS-139 (T 381); FWS-111 (T 1276); FWS-162 (T 1403); FWS-69 (T 4130); FWS-172 (T 4590); FWS-249 (T 4497-4498). The Accused said that he did not often go through the yard, only "when the need arose" (T 7660). Further, he said that he "usually went to the furniture factory at the time when there were no detained persons in the yard" (T 7677).

<sup>825</sup> See for example Faik Tafro (the Accused, T 7611); Ekrem Zekovic (the Accused, T 7917); Muhamed Lisica (T 7918); RJ (T 7929).

<sup>826</sup> The Accused may also have been told that Cankusic's sons were beaten to obtain a *confession*, but the Trial Chamber is not satisfied beyond reasonable doubt that he was in fact made aware of the facts communicated to Hadžimusic.

<sup>827</sup> Nor was the Accused charged with criminal responsibility for the torture of Cankusic's sons.

the KP Dom. The Accused is therefore not responsible as a superior for the torture charged in the Indictment.

314. The Trial Chamber is satisfied that every incident which amounts to torture pursuant to Article 3 and Article 5 of the Statute automatically amounts to cruel treatment pursuant to Article 3 and other inhumane acts pursuant to Article 5(i), as the offence of torture in fact subsumes those two lesser offences. Any finding that an act of torture has been committed in one specific instance would, therefore, imply that an act of cruel treatment and/or other inhumane acts has been committed. In view of the majority decision of the Appeals Chamber in the *Celebici* judgment, the Trial Chamber is obliged to enter additional convictions for the subsumed offences. No additional punishment is imposed for the additional convictions.

315. With respect to "common purpose" liability under Article 7(1), there is no acceptable evidence that the Accused entered into any agreement for a joint criminal enterprise to commit beatings and torture against non-Serb detainees.

316. With respect to aiding and abetting liability pursuant to Article 7(1), the Trial Chamber is satisfied that the Accused knew of the beatings and that, by failing to take any appropriate measures which, as the warden, he was obliged to adopt, he encouraged these acts, at least in respect of his subordinates. The Trial Chamber is satisfied therefore that the Accused's liability for aiding and abetting the beatings pursuant to Article 7(1) has been established. The Trial Chamber considers, however, that, in view of the nature of the Accused's participation, the more appropriate basis of liability in relation to the beatings is his responsibility as a superior pursuant to Article 7(3) of the Statute. As the Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility based on the same acts, it will enter a conviction under Article 7(3) only.<sup>828</sup>

317. It appears from the evidence that essentially two categories of individuals were involved in the beating of non-Serb detainees: guards of the KP Dom and people coming from outside of the KP Dom. In respect of the first group, the Trial Chamber is satisfied

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<sup>828</sup> See par 173, *supra*.

that many guards were involved in these beatings,<sup>829</sup> including Dragomir Obrenovic,<sup>830</sup> Milenko Burilo,<sup>831</sup> Milenko Elcic,<sup>832</sup> Zoran Matovic,<sup>833</sup> Vlatko Pljevaljcic,<sup>834</sup> Predrag Stefanovic,<sup>835</sup> Jovo Savic,<sup>836</sup> Radovan Vukovic,<sup>837</sup> Milovan Vukovic,<sup>838</sup> Milivoj Milic,<sup>839</sup> and Milenko Elcic.<sup>840</sup> These guards called the detainees out of their room and took them to other rooms where they knew that they would be beaten and sometimes personally took part in the beatings themselves.<sup>841</sup>

318. In respect of the actions of the guards of the KP Dom, the Accused is responsible as their superior under Article 7(3) of the Statute. As warden of the KP Dom, the Accused was the *de jure* superior of the guards,<sup>842</sup> and he knew, for the reasons given above, that they were involved in the beating of non-Serb detainees. Not only did the Accused personally see one of his subordinates beat a detainee,<sup>843</sup> he also heard about such incidents, and it must have been clear that, considering that the guards were in direct contact with and controlled the detainees, some of them were involved. The Trial Chamber considers that the Accused failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders for the following reasons:

- (i) He failed to investigate the allegations of beatings, when he would inevitably have ascertained the identity of those responsible for many of those beatings (including those individuals from outside the KP Dom).
- (ii) He failed to take any appropriate measures to stop the guards from beating and mistreating detainees when, as the warden and their superior, he was obliged to do

<sup>829</sup> See in particular: FWS-54 (T 761-762); FWS-66 (T 1096, 1135-1137); FWS-215 (T 891-893); FWS-139 (T 399-412); FWS-182 (T 1650-1652); FWS-138 (T 2111-2120); FWS-104 (T 2179); FWS-109 (T 2362); RJ (T 3881-3889). See par 189ff, *supra*.

<sup>830</sup> Dragomir Obrenovic is No 46 in Ex P 3.

<sup>831</sup> Milenko Burilo is No 56 in Ex P 3.

<sup>832</sup> Milenko Elcic is No 34 in Ex P 3.

<sup>833</sup> Zoran Matovic is No 48 in Ex P 3.

<sup>834</sup> Vlatko Pljevaljcic is No 35 in Ex P 3.

<sup>835</sup> Predrag Stefanovic is No 22 in Ex P 3.

<sup>836</sup> Jovo Savic is No 55 in Ex P 3.

<sup>837</sup> Radovan Vukovic is No 52 in Ex P 3.

<sup>838</sup> Milovan Vukovic is No 45 in Ex P 3.

<sup>839</sup> Milivoj Milic is No 23 in Ex P 3.

<sup>840</sup> Milenko Elcic is No 34 in Ex P 3.

<sup>841</sup> See par 273, *supra*.

<sup>842</sup> See pars 96-107, *supra*.

<sup>843</sup> See pars 231-233, *supra* in respect of the beating of Ekrem Zekovic. See pars 254-255, *supra* in respect of the beating of Salko Mandžo where it is unclear whether the Accused saw the actual beating taking place or whether he walked in as the beating had just stopped.

so. In particular, the Accused failed to order the guards to stop beating detainees and to take appropriate measures so that other individuals from outside the KP Dom would not be in a position to mistreat detainees.

- (iii) He failed to speak to his subordinates about the mistreatment of detainees.
- (iv) He failed to punish those guards who would have been identified, had he carried out an investigation, as being responsible for the beatings or to take steps to have them punished.
- (v) He failed to report their abuses to a higher authority.

319. In respect of the second group of principal offenders, namely, those individuals, soldiers, policemen and other persons who were not guards under the Accused's direct command, the Trial Chamber is not satisfied that the Accused should be held responsible for *their* acts. The Trial Chamber is not satisfied that the Accused was shown to have had effective control over them as required for criminal liability as a superior to attach under Article 7(3). Nor is the Trial Chamber satisfied that the Accused is individually responsible under Article 7(1) for having aided and abetted *their* crimes, as it has not been established beyond reasonable doubt that in fact he *knew* that those individuals, as opposed to the guards of the KP Dom, were taking part in the beatings.<sup>844</sup> There were sufficient indications to put him on notice that beatings were taking place and that outsiders *may* have been involved, and thus put him under an obligation to investigate the matter, but that would not suffice, in the absence of evidence that he had actual *knowledge*, as opposed to mere suspicions concerning their part therein, to hold him responsible for aiding and abetting those who were not guards.<sup>845</sup> The Prosecution has not established any other basis upon which, had he known that outsiders were involved in the beating of detainees, the Accused may be said to have aided and abetted them. However, in accordance with the findings made in par 318, *supra*, the Accused is criminally responsible as a superior under Article 7(3) for the actions of the KP Dom guards (a) who permitted individuals from outside the KP Dom to enter the KP Dom in order to participate in the mistreatment of

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<sup>844</sup> The Accused said that he was aware that outsiders were entering the KP Dom in order to carry out interrogations of the detainees: The Accused, T 7662.

<sup>845</sup> See, for instance, Ekrem Zekovic (T 3450) and RJ (T 3862, 3865-3866).

detainees, thereby (at the least) aiding and abetting them in that mistreatment, and (b) who participated with those outsiders in that mistreatment.

320. In summary, the Trial Chamber is satisfied that the Accused is guilty pursuant to Article 7(3) of the Statute for the crimes of inhumane acts pursuant to Article 5(i) and cruel treatment pursuant to Article 3 of the Statute (respectively counts 5 and 7 of the Indictment) in respect of the following incidents: par 5.9, 5.15, 5.16, 5.18, 5.20, 5.21 (in respect of FWS-110, FWS-144, Muhamed Lisica as well as several other unidentified detainees), 5.27 (in respect of Salem Bi-o),<sup>846</sup> and 5.29 (in respect of Vahida Džemal, Enes Uzunovic and Elvedin Cedic) of the Indictment,<sup>847</sup> and schedule incidents A 2, A 7, A 10, A 12, B 15, B 17, B 18, B 19, B 20, B 21, B 25, B 26, B 28, B 30, B 33, B 34, B 37, B 45, B 46, B 48, B 51 and B 59. In addition, the following incidents for which a finding of torture was made do in fact, in light of what has been said above,<sup>848</sup> amount to inhumane acts pursuant to Article 5(i) of the Statute and cruel treatment pursuant to Article 3 of the Statute, and the Accused is also found guilty pursuant to Article 7(3) for these incidents charged under Counts 5 and 7 of the Indictment: par 5.21 (in respect of FWS-73), 5.23, 5.27 (in respect of Nurko Nisic and Zulfo Veiz),<sup>849</sup> 5.28, and par 5.29 (in respect of Aziz Šahinovic) and schedule incidents B 4, B 14,<sup>850</sup> B 22, B 31, B 52 and B 57.

#### D. Murder

321. The Accused is charged with murder as a violation of the laws or customs of war, pursuant to Article 3 of the Statute of the Tribunal, and recognised by common Article 3(1)(a) of the Geneva Conventions, and with murder as a crime against humanity, pursuant to Article 5(a) of the Statute.<sup>851</sup>

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<sup>846</sup> The Accused is found responsible only for the acts of his subordinates, not for those acts committed by individuals over which he had no effective control.

<sup>847</sup> In respect of this incident, the Accused is found responsible only for the acts of his subordinates, not for those acts committed by individuals over which he had no effective control.

<sup>848</sup> See pars 181, 313, *supra*.

<sup>849</sup> The Accused is found responsible only for the acts of his subordinates, not for those acts committed by individuals over which he had no effective control.

<sup>850</sup> In respect of this incident, the Accused is found responsible for his failure to ensure that his subordinates would prevent outsiders from entering the KP Dom and beating detainees. He is not responsible, however, for the actual beatings carried out by those outsiders who were not his subordinates.

<sup>851</sup> Count 8 and Count 10.

## 1. The law

322. The general requirements with respect to Articles 3 and 5 of the Statute have been met.<sup>852</sup>

323. It is clear from the jurisprudence of the Tribunal that the elements of the offence of murder are the same under both Article 3 and Article 5 of the Statute.<sup>853</sup> These elements have been expressed slightly differently, but those slight variations in expression have not changed the essential elements of the offence.

324. The basic requirements for the crime of murder are:

1. The victim named in the indictment is dead.
2. The victim's death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility.
3. That act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:
  - (a) to kill, or
  - (b) to inflict grievous bodily harm, or
  - (c) to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.<sup>854</sup>

325. It is necessary to have regard to two particular issues arising with respect to the law in this case. The first issue concerns the fact that the Prosecution, although alleging that the victims in Schedule C were murdered at the KP Dom, has not been able to bring direct evidence before the Trial Chamber of their deaths, such as an identification of their bodies.

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<sup>852</sup> See pars 51-64, *supra*.

<sup>853</sup> *Kordic and Cerkez* Trial Judgment, pars 236.

<sup>854</sup> *Kordic and Cerkez* Trial Judgment, par 236; *Delalic* Trial Judgment, par 439. Many decisions of this Tribunal and of the ICTR have adopted a definition of murder which refers to only one or two of these alternative states of mind. The relevant states of mind have nevertheless been expressed in this way, sometimes in differing terms but to substantially the same effect, in those decisions: *Akayesu* Trial Judgment, par 589; *Delalic* Trial Judgment, pars 425, 434-435, 439; *Kayishema & Ruzindana* Trial Judgment, pars 150-151; *Rutaganda* Trial Judgment, par 80; *Jelusic* Trial Judgment, par 35; *Musema* Trial Judgment, par 215; *Blaškic* Trial Judgment, pars 153, 181.

The second issue concerns the death of one individual by suicide.<sup>855</sup>

326. The first issue can be dealt with quite simply. Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. The Defence has not disputed this. It has accepted, quite rightly, that the fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.<sup>856</sup> All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of what occurred in the KP Dom.

327. The evidence presented by the Prosecution to establish a circumstantial case as to the death of the victims in such circumstances includes such facts as: proof of incidents of mistreatment directed against the individual; patterns of mistreatment and disappearances of other individuals detained at the KP Dom; the general climate of lawlessness at the KP Dom where the acts were committed; the length of time which has elapsed since the person disappeared; and the fact that there has been no contact by that person with others whom he would have been expected to contact, such as his family.<sup>857</sup> In essence, the Trial Chamber must be satisfied, looking at the evidence as a whole, that the only reasonable

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<sup>855</sup> Juso Džamalića, listed as victim C 6 (Ex P 55).

<sup>856</sup> T1158-1159. The Defence conceded that it has no reason to question the fact that the persons listed in Schedule C were in fact dead. The Defence contests the circumstances of their deaths and the alleged involvement of the Accused.

<sup>857</sup> This approach is supported by the jurisprudence of the ECHR, the Inter-American Court and national legal systems. See for example *Godinez Cruz v. Honduras*, judgment of 20 January 1989 (Inter-Am.Ct. H. R. (Ser. C no.5) (1989), par.155; *Cakici v Turkey*, Judgment on 8 July 1999, to be published in ECHR 1999. For decisions of national legal systems see for example, *People v Bolinski*, April 1, 1968, 260 Cal.App.2d 705, 714-715, 67 Cal. Rptr. 347, 353; *State of Kansas v Pyle*, Supreme Court of Kansas, March 1, 1975, 216 Kan. 423; 532 P.2d 1309; *People of the State of New York v Lipsky*, Court of Appeals of New York, November 8, 1982, 57 N.Y. 2d 560, 443 N.E.2d 925; 457 N.Y.S. 2d 451 (this case expressly lays to rest an earlier jurisprudence which required production of the body of the deceased); *Epperly v Commonwealth of Virginia*, Supreme Court of Virginia, September 9, 1982, 224 Va. 214; 294 S.E.2d 882; *Stocking v The State*, December 21, 1855, 7 Ind. 259, 263; *Commonwealth v Burns*, Supreme Court of Pennsylvania, January 21, 1963, 409 Pa. 619, 630; 187 A.2d 552; *Commonwealth v Lettrich*, March 22, 1943, 346 Pa. 497, 502-503, 31 A.2d 155; *Commonwealth v Homeyer*, February 13, 1953, 373 Pa. 150, 156-157, 94 A.2d 743; *People v. Ray Cullen*, Supreme Court of California, July 27, 1951, 37 Cal. 2d 614, 613, 234 P.2d 1, 15-16; *People v Scott*, Court of Appeal of California, Second Appellate District, Division Three, December 21, 1959, 176 Cal. App. 2d 458 1 Cal. Rptr. 600; *People v Clark*, Court of Appeal of California, Second Appellate district, Decision one, January 8, 1925, 70 Cal. App. 531 233 P.980; *Regina v Onufrejczyk*, Court of Criminal Appeal [1955]1 QB 388; 1 All ER 247; 2 WLR 273; 39 CR App Rep 1; *Chamberlain v The Queen* (1984) 51 A.L.R. 225; *Regina v Horry* [1952] N.Z.L.R. 111, 122; *Regina v Flynn*, 111 C.C.C. (3d) 521; *Weissensteiner v The Queen* (1993) 178 CLR 217; *Pfennig v The Queen* (1995) 182 CLR 461.

inference from that evidence is that the particular person died as a result of what occurred in the KP Dom.<sup>858</sup>

328. The second issue to be addressed by the Trial Chamber concerns the death of a person who it is alleged committed suicide by hanging himself in an isolation cell after a terrible beating. The Prosecution charges the Accused with his murder. The acts and omissions alleged by the Prosecution to have caused the victim's suicide are the beating, the subsequent denial of medical treatment and the confinement of the victim to an isolation cell. The Prosecution case is that the situation created was such that it was reasonably foreseeable to the Accused, or to those for whom he bears criminal responsibility, that the victim would kill himself.

329. The crucial issues are causation and intent. The relevant act or omission by the Accused or by those for whose acts or omissions the Accused bears criminal responsibility must have caused the suicide of the victim and the Accused, or those for whom he bears criminal responsibility, must have intended by that act or omission to cause the suicide of the victim, or have known that the suicide of the victim was a likely and foreseeable result of the act or omission. The Accused cannot be held criminally liable unless the acts or omissions for which he bears criminal responsibility induced the victim to take action which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence of the conduct of the Accused, or of those for whom he bears criminal responsibility.

## 2. Findings: Schedule C killings

330. The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992,<sup>859</sup> and that the only reasonable

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<sup>858</sup> *Prosecutor v Duško Tadić*, Judgment On Allegations of Contempt Against Prior Counsel, Milan Vujin, IT-94-1-A-R77, 31 Jan 2000, par 91; *Delalić* Appeal Judgment, par 458.

<sup>859</sup> FWS-71 (T 2828-2868, 2829 2869-2873, 2925, 2972); FWS-69 (T 4112); FWS-172 (T 4559-4560); Dr Amir Berberkic (T 3787-3794, 3800-3812); Ahmet Hadžimusic (T 1953); Dževad S Lojo (T 2575-2587); FWS-111 (T 1235-1259); FWS-215 (T 885, 900); FWS-109 (T 2377); FWS-54 (T 758, 766-769, 772); FWS-73 (T 3400); FWS-142 (T 1824); FWS-172 (T 4459); FWS-162 (T 1387); RJ (T 3860-3869); FWS-3(T 2250-2254); Safet Avdic (T 483-484). FWS-86 (T 1519-1521); FWS-182 (T 1622); FWS-138 (T 2609); FWS-144

explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind, at the KP Dom.

331. The Prosecution alleges in the Indictment that the deaths occurred between June and August 1992.<sup>860</sup> In its Final Trial Brief, it alleges that the deaths occurred between 12 June 1992 and 28 June 1992.<sup>861</sup> The Trial Chamber is not satisfied that the Prosecution has established that the deaths occurred within this more specific and more limited time frame. There was only one witness who identified this exact period, and during his evidence that witness admitted that he could not be sure that these dates were correct, although he was sure that the deaths occurred around that time period.<sup>862</sup> A number of other witnesses identified Vidovdan or St Vitus Day, 28 June 1992, as a day close to the final act of killings.<sup>863</sup> The Trial Chamber is satisfied that it is probable that many of the deaths did occur in the latter half of June 1992. It is not satisfied, however, taking into consideration all of the evidence presented, that the Prosecution has established that the deaths were restricted to that time period. Accordingly, the Trial Chamber is satisfied only that it has been established that the killings occurred sometime during the months of June and July 1992.

332. Evidence was given that the Accused was absent from the KP Dom from 24 June 1992 for a period of about 7 days. At this time he was in Belgrade where his wounded son was fighting for his life.<sup>864</sup> The Accused produced a number of documents to support the evidence of witnesses that he was absent during this time.<sup>865</sup> The documents produced by the Accused included a document which authorised his travel to Belgrade on 24 June 1992 for an unspecified period of time,<sup>866</sup> and a document dated approximately two months later

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(T 2301-2303); Muhamed Lisica (T 4946); FWS-198 (T 1011-1023); FWS-139 (T 352, 368); FWS-66 (T 1099); FWS-137 (T 4746); FWS-104 (T 2182); Dževad Lojo (T 650); FWS-250 (T 5048).

<sup>860</sup> Indictment, par 5.32.

<sup>861</sup> Prosecution Final Trial Brief, pars 118, ft 401. At par 122 of the Final Trial Brief the Prosecution alleges that other evidence indicates that numerous killings occurred from May 1992 onwards. The only evidence referencing this claim is par 5.32 of the Indictment.

<sup>862</sup> FWS-71 (T 2828-2868, 2925, 2972).

<sup>863</sup> Dževad S Lojo (T 2574); FWS-109 (T 2377); Dr Amir Berberkic (T 3787); FWS-69 (T 4112, 4124); FWS-172 (T 4559); FWS-71 (T 2828); FWS-142 (T 1824); Ahmet Hadžimusic (T 1953); FWS-54 (T 767).

<sup>864</sup> Ex P 43, Božo Drakul (T 7220-7227); Milenko Dundjer (T 5379); Ex 92-1 –A, Ex D 90-1-A.

<sup>865</sup> The Prosecution argued that Ex D 92A confirms only that the Accused was authorised to travel to Belgrade for an unspecified amount of time on 24 June 1992. Ex D 92-1-A also does not confirm that the Accused travelled to Belgrade on that particular day. The document refers to a travel authorisation no 55/92 while the number of the travel authorisation is Ex D 92A is 37/92.

<sup>866</sup> Ex D 92A.

which purported to reimburse the Accused for expenses incurred during the trip.<sup>867</sup> The Prosecution, while not challenging the authenticity of these documents, alleges that they could not establish that the Accused actually travelled to Belgrade at that time. It argued that the document purporting to reimburse the Accused for expenses incurred on the trip to Belgrade were actually related to a trip taken by the Accused at a later date. In support of this argument, the Prosecution relies on the fact that employees of the KP Dom were required to prepare their claims for reimbursement of travel three days after the execution of the travel.<sup>868</sup> One of the Defence witnesses who worked at the KP Dom, however, gave evidence that the reimbursement was related to the trip taken by the Accused on 24 June 1992 and that it had not been paid to the Accused earlier either because there were insufficient funds at the KP Dom or because the Accused has not requested it earlier. His evidence was that the document relied upon by the Prosecution related to only part of the reimbursement to which the Accused was entitled, and that the Accused had in fact been paid two-thirds of his travel entitlement on 24 June 1992.<sup>869</sup> The Trial Chamber accepts that the evidence adduced by the Accused gives rise to a reasonable doubt as to whether the Accused was present at the KP Dom from 24 June 1992, a doubt which the Prosecution has not eliminated.<sup>870</sup> The Trial Chamber is therefore satisfied that the Accused was present at the KP Dom during this period in which the beatings and subsequent killings occurred only until 24 June 1992, and that he did not return to the KP Dom until about 2 or 3 July 1992.

333. The pattern established by the evidence is as follows: During the months of June and July 1992, KP Dom guards went to the rooms of the detainees after the roll call<sup>871</sup> and called out from a list the names of individuals to accompany them for interrogations.<sup>872</sup> The list from which the names were called was handed by the guard at the administration

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<sup>867</sup> Ex D 92-1-A.

<sup>868</sup> Ex D 93A.

<sup>869</sup> Drakul Bozo (T 7224).

<sup>870</sup> Desanka Bogdanovic (T 7103-7105, 7009-7021); Svetozar Bogdanovic (T 7064-7068, 7088).

<sup>871</sup> FWS-109 (T 2377-2378); FWS-172 (T 4631, 4559, 4565); FWS-250 (T 5094); FWS-137 (T 4746); FWS-111 (T 1248); FWS-85 (T 648); FWS-86 (T 1519); Rasim Taranin (T 1724); FWS-119 (T 1955); FWS-144 (T 2301); RJ (T 3860); FWS-03 (T 2251); FWS-182 (T 1622); FWS-162 (T 1384); Ekrem Zekovic (T 3476); FWS-69 (T 4110). Although most of the witnesses identified the beatings as occurring during the evenings, a couple of witnesses claimed that the beatings would begin in the afternoons and continue until late in the evenings: FWS-66 (T 1096); Dr Amir Berberkic (T 3811).

<sup>872</sup> FWS-71 (T 2829, 2862-2866, 2868-2883); FWS-66 (T 766); FWS-172 (T 4559-4560, 4564-4566); FWS-73 (T 3260-3271); FWS-54 (T 753, 758-762, 766); FWS-104 (T 2183-2184); Muhamed Lisica (T 4960-4961); FWS-137 (T 3267, 4746); FWS-215 (T 894, 906); FWS-111 (T 1237); FWS-66 (T 1093-1111); FWS-73 (T 3272-3273); FWS-86 (T 1517-1520); Dževad S Lojo (T 2574-2575); FWS-66 (T 1093); FWS-69 (T 1097); FWS-137 (T 4746); Safet Avdic (T 483-486); FWS-109 (T 2378); Dr Amir Berberkic (T 3787, 3968-3969); FWS-144 (T 2301); Dževad Lojo (T 639). The Trial Chamber places no weight upon the statement given by

entrance to the guard in the compound of the KP Dom.<sup>873</sup> The persons called out were taken from their rooms to the metal gate at the entrance of the administration building and lined up outside the administration building.<sup>874</sup> One by one, or in small groups, they were called into a ground floor room of that building.<sup>875</sup> They were taken into one of the rooms on the left and right hand sides of the staircase, or into a room marked "Tel" on Ex P 6 which was situated in the left wing of the administration building, or the next room. There they were often beaten.<sup>876</sup> The beatings lasted well into the evening and the sounds of the beating and the screams of the victims could be heard by other detainees at the KP Dom.<sup>877</sup> Some witnesses identified the person who was being beaten from the screams or from the victim's pleas or from questions asked of the victim during the beating.<sup>878</sup> In addition, some witnesses partially observed the beating of one or more of the victims through a window of the room where they were detained. These witnesses identified among the principal offenders of the beating some of the KP Dom guards.<sup>879</sup>

334. When the beating stopped, victims were sometimes taken to an isolation cell.<sup>880</sup> In other instances, the sound of pistol shots was heard,<sup>881</sup> and then the sound of a vehicle with a faulty exhaust pipe was heard being started in front of the KP Dom.<sup>882</sup> This vehicle was

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Muhamed Lisica (Ex P 318/A) alleging the involvement of the Accused in the preparation of the lists (T 4910-4913); Ekrem Zekovic (T 3475).

<sup>873</sup> A number of witnesses gave evidence which established that the lists were prepared by the Administration of the KP Dom: FWS-73 (T 3329-3331); FWS-182 (T 1623); Safet Avdic (T 484); Dževad S Lojo (T 2575). The Trial Chamber does not interpret this evidence as implicating the Accused.

<sup>874</sup> Dževad S Lojo (T 2575); FWS-66 (T 1093-1095); FWS-144 (T 2301-2302); FWS-109 (T 2380); FWS-71 (T 2837); Ahmet Hadžimusic (T 1956); FWS-54 (T 758-773); FWS-162 (T 1384-1387).

<sup>875</sup> FWS-71 (T 2837, 2865, 2875, 2886); FWS-172 (T 4572); FWS-66 (T 1093-1095); Safet Avdic (T 488)

<sup>876</sup> FWS-54 (T 756-761); FWS-73 (T 3259-3260); FWS-71 (T 2841, 2852-2853); Dr Amir Berberkic (T 3773-3775); FWS-86 (T 1519-1520); FWS-198 (T 1012-1013); Safet Avdic (T 491-492); FWS-182 (T 1683); FWS-119 (T 2005-2006); FWS-138 (T 2087-2088); FWS-109 (T 2360); Ekrem Zekovic (T 3475); RJ (T 3887); FWS-69 (T 4084); FWS-58 (T 2693).

<sup>877</sup> FWS-69 (T 4110, 4125); FWS-172 (T 4559-4560); RJ (T 3860); Ekrem Zekovic (T 3475, 3477-3479, 3481-3482); FWS-86 (T 1526); Rasim Taranin (T 1724-1725); FWS-109 (T 2378); FWS-144 (T 2302); FWS-71 (T 2837); Dževad Lojo (T 650); FWS-215 (T 886, 896); Safet Avdic (T 489-493); FWS-198 (T 1012-1013); FWS-66 (T 1095).

<sup>878</sup> Ahmet Hadžimusic (T 1957); Dževad Lojo (T 640-642); FWS-66 (T 1097-1098); Dr Amir Berberkic (T 3789, 3792); FWS-71 (T 2839-2840); Muhamed Lisica (T 4956-4957); FWS-73 (T 3264-3266); FWS-86 (T 1623-1624); FWS-142 (T 1824); FWS-104 (T 2176-2178); FWS-03 (T 2254); FWS-71 (T 2839-2840); FWS-250 (T 5049); FWS-162 (T 1387-1388); FWS-69 (T 4111); Ekrem Zekovic (T 3479-3487).

<sup>879</sup> FWS-71 (T 2841-2854); FWS-54 (T 758-765, 803); FWS-66 (T 1096); Dr Amir Berberkic (T 3968-3969).

<sup>880</sup> FWS-69 (T 4087-4088); Muhamed Lisica (T 4963).

<sup>881</sup> FWS-78 (transcript admitted from Kunarac proceedings T 2139); FWS-71 (T 4654-4565); FWS-69 (T 4125, 4191-4192); FWS-109 (T 2379-2380); FWS-66 (T 1100-1101); Muhamed Lisica (T 4950); Ekrem Zekovic (T 3481, 3482, 3487); Dr Amir Berberkic (T 3811); FWS-73 (T 3254); FWS-58 (T 2693-2699); FWS-182 (T 1635-1636); FWS-142 (T 1824); FWS-109 (T 2379-2383); Dževad Lojo (T 641-642, 651-652); FWS-54 (T 758-762); FWS-198 (T 1018); FWS-172 (T 4564); FWS-71 (T 2837-2838, 2866, 2883, 2886).

<sup>882</sup> FWS-138 (T 2088); FWS-69 (T 4087); FWS-71 (T 4654-4565); FWS-109 (T 2384); FWS-66 (T 1096); Ekrem Zekovic (T 3479-3486); FWS-142 (T 1824-1825); FWS-58 (T 2664-2269); FWS-86 (T 1527-1528);

identified as a Zastava Kedi, belonging to a pool of vehicles kept at the KP Dom.<sup>883</sup> The Zastava Kedi could be heard leaving the front of the KP Dom. The reflection of the headlights of the vehicle on the structure of the bridge allowed the witnesses to observe it travelling along the Drina Bridge and stopping towards the end of the bridge.<sup>884</sup> Many witnesses said that they heard sounds of objects being thrown into the Drina River after the vehicle had stopped, but the Trial Chamber interprets this evidence as more likely being based on inferences which the witnesses drew from the fact that the vehicle stopped while still on the bridge.<sup>885</sup> The Trial Chamber is not satisfied that the bodies of detainees were thrown into the Drina River.

335. During and after the beatings, guards of the KP Dom were seen carrying blankets into the administration building and removing what appeared to be bodies in those blankets.<sup>886</sup> Blood and bloodied instruments were seen in the rooms where the beatings occurred.<sup>887</sup> Traces of blood were seen on the Zastava Kedi vehicle with the faulty exhaust pipe which was heard leaving the KP Dom after one or more of the beatings.<sup>888</sup> Bullet holes were observed in the walls of the hall behind the metal door to the administration building.<sup>889</sup>

336. There was little direct evidence that any of the persons listed in Schedule C were killed on the evening they were called out from the room in which they were detained. The Trial Chamber is nevertheless satisfied that all but three of the persons listed on Schedule C were either beaten to death, shot, or died later as a result of the injuries inflicted by the

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Dr Amir Berberkic (T 3809-3810); FWS-172 (T 4565); FWS-71 (T 2838-2839); Muhamed Lisica (T 4898-4899, 4955); FWS-144 (T 2301-2303, 2337).

<sup>883</sup> FWS-111 (T 1248); FWS-71 (T 2838-2839); FWS-249 (T 4426); Ekrem Zekovic (T 3482-34855, 3669).

<sup>884</sup> FWS-58 (T 2695, 2698-2699); Safet Avdic (T 493, 513-514, 555); It is clear that Safet Avdic relied upon inferences which he drew from seeing the headlights reflected on the bridge, as it was impossible to see the roadway of the bridge from the room in which he was incarcerated: FWS-144 (T 2302-2306, 2336-2237); FWS-111 (T 1216); Racine Manas (T1897-1898, 1907, 1920).

<sup>885</sup> FWS-86 (T 1527-1528); FWS-58 (T 2694, 2713, 2715); FWS-69 (T 4125, 4191-4192); FWS-37 (T 4792); FWS-138 (T 2069-2090); FWS-109 (T 2377-2386); FWS-66 (T 1100); FWS-182 (T 1635); Dževad Lojo (T 653-654); FWS-73 (T 3371-3372); Ekrem Zekovic (T 3544-3545); Osman Subašić (T 4101-4134).

<sup>886</sup> Muhamed Lisica (T 4949); FWS-54 (T 762); FWS-71 (T 2855); Ekrem Zekovic (T 3482-3483).

<sup>887</sup> FWS-71 (T 2868); Muhamed Lisica (T 3475-3476).

<sup>888</sup> Muhamed Lisica (T 4899-4903, 4997-4999); Ekrem Zekovic (T 3483, 3369-3071); FWS-109 (T 2384, 2424); FWS-142 (T 1841); FWS-138 (T 2088); FWS-109 (T 2384); FWS-249 (T 4424-4427, 4427-4428). Defence witness Lazar Divljan gave evidence that the vehicle was used to transport fish and meat and had stains as a result (T 5998-5999). The Trial Chamber does not accept this evidence, and does not regard it as creating any doubt as to the truthfulness of the Prosecution case.

<sup>889</sup> FWS-249 (T 4534).

beating in one of the isolation cells of the KP Dom. This is the only reasonable inference to be drawn from the evidence.

337. The Trial Chamber has already accepted that many of the detainees alleged to have been murdered at the KP Dom had been subject to earlier beatings or acts of torture at the KP Dom.<sup>890</sup> After their release from the KP Dom, many other detainees made contact with the families of the victims.<sup>891</sup> The families informed them that they had received no contact from those alleged to have been murdered, and they had been unable to trace the victims.<sup>892</sup> A witness for the State Commission for the Finding of Missing Persons gave evidence of the attempts that had been made to locate these missing persons, and of the fact that all of the persons are reported as having last been seen at the KP Dom. Only those persons whose presence at the KP Dom can be confirmed by two independent witnesses are listed as having disappeared while detained at the KP Dom.<sup>893</sup> Many of the alleged victims are also registered with the International Committee of the Red Cross as missing persons. None of the bodies of the alleged victims listed in Schedule C has been located, although two bodies of persons not listed on Schedule C but last seen at the KP Dom have been discovered in a mass grave.<sup>894</sup> Death certificates have been issued for some of the alleged victims at the request of the families by the municipal courts of Gora`de and Sarajevo.<sup>895</sup>

338. The evidence of one of the former guards of the KP Dom corroborated the evidence of the Prosecution witnesses. Risto Ivanovic gave evidence that, when the army came to the KP Dom, the guard on duty was given a list of the names of detainees who were to be brought to the gate. He said that he did not know what happened to them after being brought to the gate, but he noticed that they were not seen again in the KP Dom.<sup>896</sup>

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<sup>890</sup> See pars 237-306, *supra*.

<sup>891</sup> Muhamed Lisica (T 4967, T 4977); FWS-104 (T 2217-2218); FWS-71 (T 2886-2887); Ekrem Zekovic (T 3520); Dr Amir Berberkic (T 3790, 3810, 3925); FWS-73 (T 3387-3388, 3399, 3402, 3407); FWS-109 (T 2395-2396); Dževad S Lojo (T 2590-2591); FWS-139 (T 435); Safet Avdic (T 514).

<sup>892</sup> Jussi Kemppainen (T 1162-1171) an investigator with the Office of the Prosecutor gave evidence regarding the results of inquiries in relation to the individuals alleged to have been murdered at the KP Dom. The results of those inquiries were tendered into evidence as Ex P 55/1. Relatives and friends of the alleged victims were contacted and asked to provide documentation about these persons. The Bosnian Government was also contacted to provide documentation. The basic documents within Ex P 55/1 are Bosnian State Commission for Missing Persons certificates, ICRC missing person confirmation and certificates, death certificates, municipal court decisions from Bosnia, newspaper articles and other certificates and documents.

<sup>893</sup> Amor Masovic (T 4209-4399).

<sup>894</sup> Ex P 55/1; Jussi Kemppainen (T 1167-1168, 1170-1171); Amor Masovic (B-12) (T 4233-4237).

<sup>895</sup> Ex P 55/1.

<sup>896</sup> Risto Ivanovic (T 6172-6178). In all other respects the Defence witnesses denied that any of the events occurred: Radomir Dolas (T 5823-5824, 5891-5892); Risto Ivanovic (T 6100, 6167, 6189, 6204); Lazar Divljan (T 6009, 6019); Zoran Mijovic (T 6225, 6228, 6379, 6381, 63877, 6401); Miladin Matovic (T 6450-

Ivanovic could not remember the date upon which these events occurred but the evidence is consistent with the evidence given by the Prosecution witnesses of the taking out of detainees in June and July 1992.<sup>897</sup>

339. The Trial Chamber is satisfied that the guards of the KP Dom participated with the military in the killing of detainees at the KP Dom.<sup>898</sup> The Trial Chamber is satisfied that Alija Altoka (C 1),<sup>899</sup> Hamid "Salem" Bico (C 2),<sup>900</sup> Abdurahman Ankušić (C 3),<sup>901</sup> Refik Ankušić (C 4),<sup>902</sup> Elvedin "Enko" Cedic (C 5),<sup>903</sup> Kemal Dželilović (C 7),<sup>904</sup> Ramo Džendusić (C 8),<sup>905</sup> Adil Granov (C 9),<sup>906</sup> Mate Ivancić (C 11),<sup>907</sup> Esad Kiselica (C 12),<sup>908</sup> Halim Konjo (C 13),<sup>909</sup> Adil Krajcin (C 14),<sup>910</sup> Mustafa Kuloglija (C 15),<sup>911</sup> Fuad Mandžo

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6451). The Trial Chamber does not accept this evidence, and does not regard it as creating any doubt as to the truthfulness of the prosecution case.

<sup>897</sup> Risto Ivanovic (T 6171-6186).

<sup>898</sup> Ekrem Zekovic (T 3479).

<sup>899</sup> FWS-111 (T 1249-1250); FWS-54 (T 766); Dževad S Lojo (T 2584); FWS-71 (T 2866, 2868, 2877); FWS-73 (T 3273); FWS-172 (T 4560-4561); FWS-137 (T 4750, 4759, 4802).

<sup>900</sup> FWS-215 (T 901); FWS-198 (T 1017-1018); FWS-198 (T 2081); FWS-54 (T 768-769); FWS-109 (T 2380-2383, 2430); Dževad S Lojo (T 2583); FWS-71 (T 2864, 2866); FWS-73 (T 3269); FWS-214 (T 3793); FWS-69 (T 4122); FWS-172 (T 4559-4561).

<sup>901</sup> FWS-66 (T 1105-1106); FWS-111 (T 1250-1251); FWS-215 (T 903); FWS-85 (T 642); FWS-139 (T 357-358); FWS-138 (T 2074); FWS-54 (T 769); FWS-73 (T 3271); FWS-69 (T 4118); FWS-172 (T 4560-4561).

<sup>902</sup> FWS-66 (T 1105-1106); FWS-65 (T 516); FWS-111 (T 1251-1252); FWS-85 (T 642); FWS-139 (T 358); FWS-54 (T 766); FWS-71 (T 2862, 2865); FWS-69 (T 4118); FWS-172 (T 4560-4561).

<sup>903</sup> FWS-66 (T 1106); FWS-54 (T 753, 766); Muhamed Lisica (T 4958). The proper name of the victim is Elvedin Cedic, his nickname is "Enko" (T 754, 766).

<sup>904</sup> FWS-65 (T 516); FWS-54 (T 759-762); FWS-66 (T 1100-1102); FWS-111 (T 1253); FWS-215 (T 904); FWS-119 (T 1957-1961); FWS-138 (T 2084); FWS-109 (T 2394); Dževad S Lojo (T 2586); FWS-71 (T 2887); FWS-73 (T 3253); Ekrem Zekovic (T 3499); Dr Amir Berberkic (T 3802-3803); FWS-69 (T 4123); FWS-137 (T 4750, 4757, 4802); Muhamed Lisica (T 4747, 4967).

<sup>905</sup> FWS-66 (T 1107); FWS-182 (T 1638); FWS-119 (T 1961, 1967); FWS 104 (T 2183-2184); FWS-138 (T 2076); FWS-54 (T 770); Dževad S Lojo (T 2582); FWS-71 (T 2883, 2886-2887); FWS-73 (T 3406-3407); Ekrem Zekovic (T 3489); Dr Amir Berberkic (T 3809); FWS-69 (T 4559-4561).

<sup>906</sup> FWS-66 (T 1107); FWS-111 (T 1241); FWS-215 (T 905); FWS-182 (T 1638); FWS-142 (T 1826); FWS-54 (T 770); FWS-86 (T 1541); FWS-109 (T 2393); Dževad S Lojo (T 2583); FWS-73 (T 3273); Ekrem Zekovic (T 3502); Muhamed Lisica (T 4963).

<sup>907</sup> FWS-66 (T 1100-1102); FWS-111 (T 1253); FWS-215 (T 905); FWS-85 (T 643); FWS-139 (T 366); FWS-119 (T 1966); FWS-54 (T 767); FWS-109 (T 2385, 2394); Dževad S Lojo (T 2579); FWS-71 (T 2862); FWS-73 (T 3271); Ekrem Zekovic (T 3504); Dr Amir Berberkic (T 3807).

<sup>908</sup> FWS-66 (T 1107); FWS-162 (T 1386-1387); FWS-215 (T 906); FWS-139 (T 366); FWS-119 (T 1961); FWS-138 (T 2072); FWS-54 (T 770); FWS-109 (T 2385, 2431); Dževad S Lojo (T 2584); FWS-71 (T 2836, 2862); Dr Amir Berberkic (T 3811-3812).

<sup>909</sup> FWS-111 (T 1237, 1239-1240); FWS-86 (T 1514); FWS-65 (T 516); FWS-66 (T 1101); FWS-215 (T 906); FWS-85 (T 644); FWS-139 (T 357); FWS-182 (T 1627); FWS-142 (T 1826); FWS-138 (T 2071); FWS-03 (T 2251, 2254); FWS-198 (T 1017); FWS-54 (T 770-771); FWS-109 (T 2383, 2431); Dževad S Lojo (T 2580, 2586); FWS-71 (T 2830, 2854, 2860); FWS-73 (T 3266, 3391); Dr Amir Berberkic (T 3794); FWS-69 (T 4111-4116, 4185); FWS-172 (T 4564-4565, 4636).

<sup>910</sup> FWS-66 (T 1101); FWS-111 (T 1255); FWS-215 (T 906); FWS-182 (T 1638); FWS-162 (T 1399-1400); FWS-54 (T 769); FWS-71 (T 2868).

<sup>911</sup> FWS-86 (T 1513); FWS-54 (T 759, 811-813); FWS-66 (T 1103-1104); FWS-111 (T 1256); FWS-215 (T 906-907); FWS-85 (T 644); FWS-198 (T 1020); FWS-109 (T 2394); Dževad S Lojo (T 2583); FWS-71 (T 2830); FWS-73 (T 3268); Ekrem Zekovic (T 3487); Dr Amir Berberkic (T 3803); FWS-69 (T 4124); FWS-172 (T 4561); FWS-137 (T 4750, 4758); Muhamed Lisica (T 4941, 4946-4948).

(C 16),<sup>912</sup> Krunoslav Marinovic (C 17)<sup>913</sup>, Nurko Nisic (C 19)<sup>914</sup>, Hamid Ramovic (C 20)<sup>915</sup>, Husein Rikalo (C 21),<sup>916</sup> Mithat Rikalo (C 22),<sup>917</sup> Zaim Rikalo (C 23),<sup>918</sup> Seval Soro (C 24),<sup>919</sup> Kemal Tulek (C 25),<sup>920</sup> Enes Uzunovic (C 26),<sup>921</sup> D' emal Vahida (C 27),<sup>922</sup> Munib Veiz (C 28),<sup>923</sup> and Zulfo Veiz (C 29)<sup>924</sup> died as a result of the acts of members of the military coming from outside into the KP Dom and of the guards of the KP Dom. The Trial Chamber is satisfied that, amongst the guards involved in these acts, were Milenko Burilo, Zoran Matovic, Milovan Vukovic, Dragomir Obrenovic, Radovan Vukovic, Slavoko Koroman, Dragan Zelenovic, Vlatko Pljevaljic and Predrag Stefanovic.<sup>925</sup> These acts involved beating, or shooting, the detainees, and they were done by those persons with an

<sup>912</sup> FWS-86 (T 1513); FWS-66 (T 1100-1104); FWS-111 (T 1256); FWS-215 (T 908); FWS-139 (T 357, 366); FWS-138 (T 2078); FWS-142 (T 1830); FWS-54 (T 767); Dževad S Lojo (T 2582); FWS-71 (T 2866); FWS-73 (T 3272).

<sup>913</sup> FWS-66 (T 1108); FWS-111 (1242); FWS-85 (T 645); FWS-119 (T 1965); FWS-138 (T 2085); FWS-03 (T 2252); FWS-54 (T 766); FWS-109 (T 2385); Dževad S Lojo (T 2579); FWS-71 (T 2830); FWS-73 (T 3398-3399); Ekrem Zekovic (T 3505); Dr Amir Berberkic (T 3800-3801); Muhamed Lisica (T 4957).

<sup>914</sup> FWS-215 (T 908); FWS-111 (T 1237-1238); FWS-82 (T 1511); FWS-65 (T 516); FWS-54 (T 767); FWS-162 (T 1386-1388); FWS-85 (T 646); FWS-139 (T 358); FWS-182 (T 1630); FWS-142 (T 1824-1825); FWS-119 (T 1953); FWS-138 (T 2070); FWS-104 (T 2176); FWS-03 (T 2251-2252); FWS-109 (T 2379-2380); Dževad S Lojo (T 2580); FWS-71 (T 2829-2830, 2853-2855); Ekrem Zekovic (T 3479, 3487); Dr Amir Berberkic (T 3792-3793); FWS-69 (T 4116); FWS-172 (T 4559-4561, 4564-4566, 4636); FWS-250 (T 5048-5049).

<sup>915</sup> FWS-54 (T 759); FWS-66 (T 1108); FWS-111 (T 1257); FWS-119 (T 1967).

<sup>916</sup> FWS-111 (T 1240); FWS-66 (T 1100-1108); FWS-162 (T 1386-1388); FWS-198 (T 1011); FWS-215 (T 908-909); FWS-119 (T 1964); FWS-142 (T 1824-1825); FWS-138 (T 2081); FWS-104 (T 2178); FWS-54 (T 772); FWS-109 (T 2383, 2431); FWS-171 (T 2830, 2832, 2861); FWS-73 (T 3267); Ekrem Zekovic (T 3507-3508); Dr Amir Berberkic (T 3787-3789); FWS-69 (T 4117); FWS-172 (T 4559-4561).

<sup>917</sup> FWS-111 (T 1240); FWS-66 (T 1100-1108); FWS-119 (T 1964); FWS-138 (T 2081); FWS-54 (T 772); FWS-109 (T 2383, 2431, 2861); FWS-73 (T 3267); Ekrem Zekovic (T 3508); FWS-69 (T 4117).

<sup>918</sup> FWS-111 (T 1240); FWS-66 (T 1100-1108); FWS-119 (T 1964); FWS-138 (T 2081); FWS-54 (T 772); FWS-109 (T 2383, 2431); FWS-71 (T 2832); FWS-73 (T 3267); Ekrem Zekovic (T 3507-3508); Dr Amir Berberkic (T 3789); FWS-69 (T 4117).

<sup>919</sup> FWS-111 (T 1258); FWS-139 (T 367); FWS-54 (T 767, 769); FWS-109 (T 2862); FWS-73 (T 3272); FWS-172 (T 4560-4561); FWS-137 (T 4750, 4759).

<sup>920</sup> FWS-65 (T 494); FWS-66 (T 1109); FWS-111 (T 1258); FWS-215 (T 911-912); FWS-85 (T 646); FWS-139 (T 367); FWS-144 (T 2306-2308); FWS-119 (T 1957); FWS-73 (T 3276).

<sup>921</sup> FWS-86 (T 1514); FWS-54 (T 759, 773); FWS-111 (T 1258); FWS-215 (T 912); FWS-182 (T 1629); FWS-138 (T 2146); Dževad S Lojo (T 2664); FWS-71 (T 2868); FWS-73 (T 3272-3273); Dr Amir Berberkic (T 3805, 4019); FWS-69 (T 4124); FWS-137 (T 4762).

<sup>922</sup> FWS-66 (T 1109-1110); FWS-111 (T 1258-1259); FWS-139 (T 367); FWS-54 (T 773); FWS-71 (T 2866); FWS-73 (T 3260); FWS-137 (T 4802).

<sup>923</sup> FWS-66 (T 1101); FWS-111 (T 1242-1243); FWS-86 (T 1557); FWS-65 (T 516); FWS-54 (T 759, 765); FWS-66 (T 1100); FWS-162 (T 1401); FWS-215 (T 912); FWS-139 (T 357); FWS-182 (T 1685); FWS-03 (T 2252); FWS-119 (T 1961); FWS-198 (T 1017); FWS-109 (T 2379); Dževad S Lojo (T 2578); FWS-71 (T 2830); FWS-73 (T 3275-3276); Ekrem Zekovic (T 3509); Dr Amir Berberkic (T 3802, 3810); FWS-69 (T 4123); FWS-172 (T 4560-4561); FWS-137 (T 4797-4799); Muhamed Lisica (T 4947, 4967).

<sup>924</sup> FWS-66 (T 1097-1098); FWS-111 (T 1241-1242); FWS-86 (T 1518, 1526-1527); FWS-215 (T 912-913); FWS-85 (T 638-639, 647, 649); FWS-139 (T 357); FWS-182 (T 1616); FWS-03 (T 2252-2253); FWS-119 (T 1961); FWS-54 (T 767); FWS-109 (T 2395); Dževad S Lojo (T 2581); FWS-71 (T 2862, 2866); FWS-73 (T 3270, 3275-3276); FWS-69 (T 4123); FWS-172 (T 4560-4561).

<sup>925</sup> FWS-54 (T 758-766); FWS-71 (T 2854-2855); FWS-69 (T 4111).

intention either to kill them or to inflict grievous bodily harm or serious injury, or in a reasonable knowledge that such acts were likely to cause death.<sup>926</sup>

340. With respect to Nail Hodžic (C 10), a death certificate was issued by the Bosnia and Herzegovina Joint Military Command stating that he was slain in Foca on 26 June 1992 while performing a military task in Foca.<sup>927</sup> While there is an explanation available for the issue of this certificate which is consistent with Hodžic having been killed at the KP Dom, its existence raises a reasonable possibility that he may have died elsewhere.<sup>928</sup> Accordingly, the Trial Chamber is not satisfied beyond reasonable doubt that Nail Hodžic was murdered at the KP Dom, although it is very probable that he was.<sup>929</sup>

341. With respect to Omer Mujezinovic (C 18), the Trial Chamber is not satisfied that there was any evidence to establish that he was murdered at the KP Dom. A representative of the State Commission for Tracing Missing Persons gave evidence that Omer Mujezinovic was killed in a car accident. His opinion was that the person who compiled Schedule C had made a mistake and that the name should be Samir Mujezinovic.<sup>930</sup> One of the Prosecution witnesses who had been detained in the KP Dom also gave evidence that he thought the name Omer Mujezinovic was incorrect and that the name should have been Samir Mujezinovic. However, his evidence was that this person was taken out of the KP Dom with a large group of people on the 17 September 1992.<sup>931</sup> The only other witness who identified a person called Samir Mujezinovic gave a similar account, alleging that he was taken out with a group in mid-September 1992.<sup>932</sup> Another witness gave evidence of a person called Omer Mujezinovic being detained at the KP Dom, but he was unable to give

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<sup>926</sup> FWS-54 (T 758-766); FWS-71 (T 2839-2840); FWS-69 (T 4111); FWS-66 (T 1096, 1137); FWS-85 (T 659); FWS-139 (T 404-406); FWS-182 (T 1652); FWS-138 (T 2116-2117); FWS-104 (T 2179); FWS-109 (T 2362); RJ (T 3881, 3888).

<sup>927</sup> Ex P 55/1.

<sup>928</sup> The Prosecution claimed that the certificate was requested by the victim's wife for the purpose of establishing the death of her husband. The Prosecution could not explain the basis for the finding made in the certificate but suggested that the certificate was formulated in such a way to console Mrs Hodžić. They referred the Trial Chamber to the decision of the Cantonal Court in Sarajevo, dated 3 June 1998, which found that Nail Hodžić was killed on 26 June 1992 in the KP Dom. That decision was based on eyewitness accounts, among them the account of FWS-182 and as such the Prosecution said that evidence should be accepted by the Trial Chamber (T 8281-8282).

<sup>929</sup> FWS-66 (T 1107); FWS-86 (T 1516-1517); Safet Avdic (T 516); FWS-215 (T 905); FWS-119 (T 1961); FWS-54 (T 766-767); FWS-109 (T 2394); Dževad S Lojo (T 2582); FWS-71 (T 2833-2836); FWS-73 (T 3267, 3396); Ekrem Zekovic (T 3503); FWS-172 (T 4560); FWS-137 (T 4750, 4756, 4802); Muhamed Lisica (T 4960-4961); FWS-69 (T 4118); FWS-250 (T 5078). The Trial Chamber has not taken his death into account.

<sup>930</sup> Amor Masovic (T 4282).

<sup>931</sup> FWS-111 (T 1256-1257).

<sup>932</sup> FWS-69 (T 4085-4086).

any evidence as to what had happened to that person.<sup>933</sup> Accordingly, the Trial Chamber is not satisfied that the Prosecution has established that either Samir Mujezinovic or Omer Mujezinovic was murdered at the KP Dom.

342. Juso Džamalija (C 6) committed suicide in an isolation cell of the KP Dom after a severe beating. The evidence concerning his death was equivocal. Some witnesses gave evidence that he was depressed about his family situation and committed suicide for that reason.<sup>934</sup> The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt that the beating inflicted on the victim at the KP Dom was the cause of the victim's suicide. This is the case to which the legal issue discussed above is directed.<sup>935</sup>

### 3. The responsibility of the Accused

343. There is no evidence to show that the Accused was involved in the preparation of the lists of names of persons to be taken out of the KP Dom to be interrogated, nor any evidence that the Accused was present in the rooms where the beatings and killings occurred or that he was present at the KP Dom during the evenings when the beatings and killings occurred. There was also no evidence that the Accused issued any orders to the guards of the KP Dom with respect to the beatings and killings.

344. The Trial Chamber is nevertheless satisfied that the Accused had knowledge that people were being beaten and were disappearing from the KP Dom during the evenings of the month of June 1992.<sup>936</sup> RJ told the Accused in the month of June 1992 that the detainees could hear the sounds of people being beaten in the administration building and that people were disappearing from the KP Dom overnight. He asked the Accused what had happened to a group of people who had disappeared overnight and was told not to ask, as the Accused did not know.<sup>937</sup>

345. The Trial Chamber is not satisfied that the Prosecution has demonstrated that the Accused knew that people being called out in the evenings of the month of June 1992 and disappearing from the KP Dom were being killed. RJ, who frequently talked with the

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<sup>933</sup> FWS-215 (T 908).

<sup>934</sup> FWS-111 (T 1233); FWS-250 (T 5026-5031, 5099); FWS-66 (T 1106-1107); Ekrem Zekovic (T 3499); Dr Amir Berberkic (T 3812-3813).

<sup>935</sup> See pars 328-329, *supra*.

<sup>936</sup> See pars 308-313, *supra* regarding the Accused's knowledge of beatings.

<sup>937</sup> RJ (T 3867-3871).

Accused, asked him on another occasion at the request of Halid Konjo what had happened to his brother, Halim Konjo. He was told by the Accused not to ask him anything because he was dead.<sup>938</sup> RJ claimed that the Accused had refused to discuss the circumstances surrounding the death of Halim Konjo, but other witnesses gave evidence that they had been told by RJ that the Accused had said that Halim Konjo had succumbed to a beating and died.<sup>939</sup> The Trial Chamber accepts the evidence of RJ on this issue and rejects the hearsay evidence of the other witnesses. The Accused admitted that he knew about the death of Halim Konjo the morning after his death had occurred in June 1992<sup>940</sup> and did not deny that he told RJ about the death.<sup>941</sup> His evidence was that he had been told by Jakonovic that Konjo had committed suicide and that a commission had come and investigated the death.<sup>942</sup> He said that it was only natural for him to tell his colleague about the death of Halim Konjo because there was no reason for him to hide it.<sup>943</sup> No other evidence was adduced by the Defence to establish that an investigation into the death of Halim Konjo had been carried out. No other evidence was adduced by the Prosecution to establish that the Accused was aware of the death of any other detainees, other than Juso Džamaliija, who the Trial Chamber has already determined died as a result of suicide, and whose death the Accused admitted being aware of.<sup>944</sup> In these circumstances, the Trial Chamber is not satisfied that the Accused was aware that the detainees disappearing during the month of June 1992 were being killed or that he had any knowledge of detainees being taken out and killed during the month of July 1992.

346. The Prosecution alleges that the Accused's responsibility for the murders arises from his involvement in a joint criminal enterprise to murder detainees pursuant to

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<sup>938</sup> RJ (T 3871-3876).

<sup>939</sup> RJ (T 3871-3874); FWS-139 (T 391-392); FWS-54 (T 771); FWS-69 (T 4114-4115).

<sup>940</sup> The Accused (T 7678, 8114-8115).

<sup>941</sup> The Trial Chamber is unable to establish the exact date upon which Halim Konjo died.

<sup>942</sup> Muhamed Lisica gave evidence that he heard the interrogation and beating of Halim Konjo. This occurred right at the beginning when the camp was just established and the boss there was still Slavko Koroman. His evidence was that the beating could have occurred on a Friday or a Saturday. On the Sunday he went out to work with Slavko who told him that Konjo had suffered a stroke and died. The doctors had established that he would have died regardless of the beating. He was working at the hospital, building something to do with the morgue and was told by a guard that Konjo was lying in the morgue and that he had died from a heart attack and not the beating. He went to the morgue and saw the body for himself. He did not look closely to try and identify the body any further (T 4959-4960). The Trial Chamber is not satisfied that this evidence takes the issue any further.

<sup>943</sup> T 7678, 8114-8115.

<sup>944</sup> The Accused (T 7678). The Accused has been found not responsible for that suicide; see par 342, *supra*.

Article 7(1).<sup>945</sup> To attach criminal liability to the Accused for the joint criminal enterprise of murder, the Prosecution must establish that there was an agreement among the military authorities, guards of the KP Dom and the Accused to murder detainees and that each of these persons, including the Accused, shared the intent of murder. The Trial Chamber is not satisfied that the Prosecution has established that the Accused was a member of any joint criminal enterprise to commit murder, and therefore is not satisfied that his responsibility under this head has been established.

347. The Prosecution also alleges that the Accused incurred criminal responsibility pursuant to Article 7(1) by aiding and abetting the murder of detainees at the KP Dom. For the Accused to be found guilty of aiding and abetting the deaths which occurred, it was necessary for the Prosecution to demonstrate that the Accused was aware of the specific crime to be carried out by the principal offender and to show that the assistance he gave the principal offender had a substantial effect on the commission of that crime by the principal offender. Although the Trial Chamber is satisfied that the failure of the Accused to use his authority to prevent outsiders coming into the KP Dom had a substantial effect on the commission of the killings by the principal offenders, the Prosecution has failed to establish that the Accused was aware of the crimes which were being committed as a result of his failure. As such, the Accused was not aware of the *mens rea* of the principal offender and is therefore not guilty of aiding and abetting the killings carried out under Article 7(1).

348. Finally the Prosecution alleges that the Accused incurred superior responsibility for the deaths at the KP Dom pursuant to Article 7(3). The position of the Accused as the warden of the KP Dom and his power to prevent and punish crimes has already been determined by the Trial Chamber.<sup>946</sup> The Trial Chamber is not satisfied that the Prosecution has established that the Accused incurred superior responsibility for the killings that occurred at the KP Dom during the months of June and July 1992. The Trial Chamber accepts that the Accused had knowledge of two deaths, the suicide of Juso Džamalija, and the suspicious death of Halim Konjo. The Trial Chamber is also satisfied that the Accused had been told by RJ about beatings and disappearances which were occurring in the month of June 1992. However the Trial Chamber is not satisfied that this was sufficient information in the possession of the Accused to put him on notice that his subordinates were

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<sup>945</sup> Prosecution Pre-Trial Brief, par 49.

<sup>946</sup> See par 107, *supra*.

involved in the murder of detainees.<sup>947</sup> Accordingly, the Accused's responsibility as a superior for the killings that occurred at the KP Dom during the months of June and July 1992 has not been established.

## E. Enslavement

349. The Accused is charged with slavery as a violation of the laws and customs of war pursuant to Article 3 of the Statute,<sup>948</sup> on the basis of both the 1926 Slavery Convention and customary international law, and with enslavement as a crime against humanity pursuant to Article 5 of the Statute.

### 1. The law

350. Enslavement under Article 5 of the Tribunal's Statute has been defined by the Tribunal as the exercise of any or all of the powers attaching to the right of ownership over a person.<sup>949</sup> The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers.<sup>950</sup>

351. Although not enumerated under Article 3, slavery may still be punishable under that Article if the four requirements specific to Article 3, set out above,<sup>951</sup> are met.<sup>952</sup>

352. First, slavery constitutes a violation of international humanitarian law. Slavery is expressly prohibited by Additional Protocol II, Article 4 ("Fundamental guarantees"), which provides:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction...

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever...

(f) slavery and the slave trade in all their forms ...

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<sup>947</sup> *Delalic* Appeal Judgment, pars 229-241.

<sup>948</sup> Indictment, Count 18.

<sup>949</sup> *Kunarac* Trial Judgment, par 539.

<sup>950</sup> *Kunarac* Trial Judgment, par 540.

<sup>951</sup> See par 52, *supra*.

<sup>952</sup> The two preliminary requirements for the application of Article 3 are met: see par 61, *supra*

Further, the offences of slavery or enslavement are identified as a crime against humanity under the Nuremberg Charter and the Tokyo Charter.<sup>953</sup>

353. Second, the Trial Chamber is satisfied that the prohibition against slavery is customary in nature.<sup>954</sup> The *Kunarac* Judgment held that enslavement constituted a crime against humanity under customary international humanitarian law, and the Trial Chamber is satisfied that the analysis there of the customary nature of enslavement also applies to the offence of slavery under Article 3 of the Statute.<sup>955</sup> The Trial Chamber accepts that the express prohibition of slavery in Additional Protocol II of 1977, which relates to internal armed conflicts, confirms the conclusion that slavery is prohibited by customary international humanitarian law outside the context of a crime against humanity. The Trial Chamber considers that the prohibition against slavery in situations of armed conflict is an inalienable, non-derogable and fundamental right, one of the core rules of general customary and conventional international law. The commentary to Additional Protocol II lends further support to the finding of the customary international humanitarian law nature of the prohibition against slavery:

This sub-paragraph reiterates the tenor of Article 8, paragraph 1, of the [ICCPR]. *It is one of the "hard-core" fundamental guarantees, now reaffirmed in the Protocol. The prohibition of slavery is now universally accepted; therefore the adoption of the sub-paragraph did not give rise to any discussion.* However, the question may arise what is meant by the phrase "slavery and the slave trade in all their forms". It was taken from the Slavery Convention [...] adopted in 1926 (Article 1). A Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, was adopted in 1956, and supplements and reinforces the prohibition[...].<sup>956</sup>

The jurisprudence of the ICTR is consistent with the Trial Chamber's conclusion that the crime of slavery is customary international law.<sup>957</sup>

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<sup>953</sup> The Statutes of the ICTY (Article 5(c)) and the ICTR (Article 3(c)) give to the Tribunals jurisdiction in relation to enslavement as a crime against humanity.

<sup>954</sup> In the light of this finding, it is unnecessary to decide whether the 1926 Slavery Convention, as treaty law, can serve as a basis for a slavery charge under Article 3. There are also no binding agreements between the relevant parties purporting to vary the customary international law on slavery for the purposes of this case.

<sup>955</sup> See *Kunarac* Judgment, pars 515-543. The time relevant to the charges in the *Kunarac* proceedings – July 1992 to February 1993 – are included in the time relevant to the charges in the present case – May 1992 to August 1993.

<sup>956</sup> Sandoz *et al* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 1376 (emphasis added). Article 1 of the Slavery Convention provides in relevant part: "(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. (2) [...]" Yugoslavia ratified the Slavery Convention on 28 Sept 1929.

<sup>957</sup> In the *Akayesu* case it was held that: "Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II [footnote 158: Save for [Article]4(2)(f) slavery and the slave trade in all their forms]. *All of the guarantees, as enumerated in Article 4 reaffirm and supplement*

354. Third, the offence of slavery is a serious violation, constituting a breach of a rule protecting an important value which involves grave consequences for a victim.

355. Fourth, the Trial Chamber is also satisfied that the crime of slavery entails individual criminal responsibility. In the *Tadić* case, the Appeals Chamber stated that customary international law imposes criminal liability for not only serious violations of common Article 3, but also for other general principles and rules on the protection of victims of internal armed conflict.<sup>958</sup> As slavery constitutes a serious violation of international humanitarian law applicable to internal armed conflict, its violation entails individual criminal responsibility.<sup>959</sup>

356. The Trial Chamber is satisfied that the offence of slavery under Article 3 of the Tribunal's Statute is the same as the offence of enslavement under Article 5.<sup>960</sup> As such, slavery under Article 3 requires proof of the same elements as constitute enslavement under Article 5. Accordingly, throughout this judgment the Trial Chamber will use the term enslavement to refer to both offences.

357. The Prosecution alleges that the Accused committed enslavement as a violation of both Articles 3 and 5 of the Statute by subjecting the detainees of the KP Dom to forced

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*Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.*" (*Akayesu* Trial Judgment, par 610 (emphasis added)). The Trial Chamber in the *Rutaganda* case, with reference to the *Akayesu* Trial Judgment, confirmed that "although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof [...] form part of existing international law." (*Rutaganda* Trial Judgment, par 87 (also confirmed in the *Musema* Trial Judgment, par 240)). Article 4 of the ICTR Statute provides for the Prosecution of serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II. The non-exhaustive, enumerated list of violations repeats Art 4(2) of Additional Protocol II almost verbatim but excludes slavery. The ICTY Appeals Chamber has held that certain customary rules have developed to govern internal armed conflicts, including rules with respect to the protection of all those who do not or no longer take active part in hostilities (*Tadić* Jurisdiction Decision, par 127). In particular, many provisions of Additional Protocol II "can now be regarded as declaratory of existing rules, as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles." (*ibid*, par 117).

<sup>958</sup> *Tadić* Jurisdiction Decision, par 134; *Delalić* Appeal Judgment, pars 160, 164, 171, 174.

<sup>959</sup> Article 6(1) of Additional Protocol II applies to "the Prosecution and punishment of *criminal offences related to the armed conflict*." Thus, although the Protocol does not obligate states to criminalise violations – unlike certain provisions of the Geneva Conventions and Additional Protocol I – the Protocol regards certain violations of its provisions as *criminal offences* and entitles states to prosecute and punish such criminal offences in accordance with Article 6.

<sup>960</sup> *Kunarac* Trial Judgment, par 523.

labour from May 1992 until August 1993.<sup>961</sup> The Prosecution alleges that the enslavement of detainees occurred:

[...] primarily in relation to forced labour. However, it submits that under the formulation accepted by the Trial Chamber in *Kunarac*, other factors can be taken into consideration in finding the accused guilty of this crime.<sup>962</sup>

The Trial Chamber is of the view that this pleading identifies the basis of the charge of enslavement as forced labour. The names of detainees forced to work are provided in, and limited to, Schedule E to the Indictment.<sup>963</sup> The Trial Chamber makes findings only with respect to these detainees.

358. To establish the allegation that detainees were forced to work and that the labour detainees performed constituted a form of enslavement, the Prosecution must establish that the Accused (or persons for whose actions he is criminally responsible) forced the detainees to work, that he (or they) exercised any or all of the powers attaching to the right of ownership over them, and that he (or they) exercised those powers intentionally.<sup>964</sup>

359. International humanitarian law does not prohibit all labour by protected persons in armed conflicts.<sup>965</sup> Generally, the prohibition is against *forced* or *involuntary* labour.<sup>966</sup> It is clear from the Tribunal's jurisprudence that "the exaction of forced or compulsory labour or service" is an "indication of enslavement", and a "factor to be taken into consideration in determining whether enslavement was committed".<sup>967</sup> In essence, the determination of whether protected persons laboured involuntarily is a factual question which has to be considered in light of all the relevant circumstances on a case by case basis. Such circumstances may include the following:

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

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<sup>961</sup> Indictment, pars 5.41-5.46 and counts 16 and 18. Schedule E to the Indictment (attached to the second amended indictment, but incorporated by reference to the third amended indictment) lists 60 KP Dom detainees who were allegedly forced to work.

<sup>962</sup> Prosecution Final Trial Brief, par 562.

<sup>963</sup> Indictment, par 5.41. The sub-heading of that Schedule is "Detainees who were forced to work".

<sup>964</sup> *Kunarac* Trial Judgment, par 542.

<sup>965</sup> *Kunarac* Trial Judgment, par 542.

<sup>966</sup> Involuntariness is the fundamental definitional feature of "forced or compulsory labour" of the ICCPR (Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 167). Article 8 of the ICCPR prohibits, *inter alia*, slavery, servitude and forced or compulsory labour.

<sup>967</sup> *Kunarac* Trial Judgment, pars 542-543.

vulnerability; detention or captivity, psychological oppression or socio-economic conditions.<sup>968</sup>

What must be established is that the relevant persons had no real choice as to whether they would work.

360. Civilians deprived of their liberty in the context of a non-international armed conflict can nevertheless be made to work under certain circumstances. Article 5(1) of Additional Protocol II sets out the applicable standard, as follows:<sup>969</sup>

In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; [...] (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.<sup>970</sup>

The permissibility of labour under Article 5 is subject to the condition that such labour is not in violation of the fundamental guarantees laid down in Article 4, quoted earlier.<sup>971</sup> Where those guarantees are violated, the performance of that labour may be treated as an indication of enslavement. With respect to the interpretation to be attached to the provisions of Article 5, the Trial Chamber considers that the word “similar” means that the working conditions and safeguards need not be exactly the same as those enjoyed by the local civilian population. The terms “conditions” and “safeguards” mean that such persons need not necessarily be remunerated by wages for all work they are made to do. The absence of any explicit reference to “wages” in Article 5, in contrast to the explicit requirement that wages be paid in Geneva Convention IV Articles 40, 51 and 95, requires the Trial Chamber to determine on a case by case basis whether labour performed should have been compensated in some way.

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<sup>968</sup> *Kunarac* Trial Judgment, par 542.

<sup>969</sup> The Trial Chamber considers that, with respect to the matter of forced labour, reference must be made to Additional Protocol II for the relevant principles and rules applying to non-international armed conflicts, instead of to the Geneva Conventions and customary international law relating to international armed conflicts. Furthermore, in the absence of any indication that the customary law, if any, with respect to labour exacted from protected persons in conflicts as defined in Additional Protocol II differs from the provisions relating to labour of the Protocol, the Trial Chamber considers the Protocol’s provisions as laying down the applicable standards.

<sup>970</sup> Certain provisions of, for example, Geneva Convention IV also stipulate that certain categories of persons may be made to work under certain conditions (Geneva Convention IV, Articles 95, 40, 51).

<sup>971</sup> See par 352, *supra*.

## 2. Findings

### (a) Par 5.41 and forced labour

361. In par 5.41 of the Indictment, it is alleged that during May 1992 the Accused approved decisions to force the detainees listed in Schedule E to the Indictment to work and that, in July 1992, he, in concert with other high-level prison staff, formed and began to supervise a workers' group of approximately 70 of the detainees with special skills. The Trial Chamber is not satisfied, for the following reasons, that this allegation has been established.

362. The Accused's responsibilities as warden included directing the Drina Economic Unit ("DEU").<sup>972</sup> Before the war, civilian KP Dom employees and convicts worked in the DEU.<sup>973</sup> The DEU, akin to a private company, was closely tied to the publicly run KP Dom, but also functioned independently of it.<sup>974</sup> Both the State and the DEU – through its business activities - financed the KP Dom.<sup>975</sup> During the war, the DEU continued to function independently of the KP Dom.<sup>976</sup> The DEU consisted of various units, the three main productive ones being the Brioni farm, the metal and mechanical workshop ("metal workshop") and the furniture factory.<sup>977</sup> By his own account, the Accused was responsible for the different heads of the various units within the DEU.<sup>978</sup>

363. During the Accused's administration, labour in the KP Dom and Fo-a in general was scarce.<sup>979</sup> In relation to the DEU in particular, the number of convicts available for work was considerably lower than prior to the war. In order to secure the necessary labour, the Accused initially approached Radojica Mladjenovi}, President of the Executive Council of Fo-a municipality. He asked for his assistance in securing civilian craftsmen. A few carpenters were later provided for the furniture factory by assignment-to-work orders,

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<sup>972</sup> The Accused (T 7915); Bo`o Drakul (T 7161, 7178).

<sup>973</sup> The Accused (T 7911).

<sup>974</sup> Bo`o Drakul (T 7202).

<sup>975</sup> Bo`o Drakul (T 7202-7203). However, from 1 January to 15 September 1992, the KP Dom received only ten percent of its regular state budget: Bo`o Drakul (T 7203-7204); Ex P 84.

<sup>976</sup> Bo`o Drakul (T 7236-7237). The DEU, for example, continued to invoice the KP Dom for eggs and milk delivered to it (Exs D 101 and 101A, 102 and 102A, 103 and 103A, 104 and 104A) but the money was never collected because the KP Dom had insufficient funds: Bo`o Drakul (T 7237). The DEU also paid wages into personal accounts of KP Dom convicts who worked in the DEU: Bo`o Drakul (T 7237, 7266). During the war, only the remaining Serb convicts who worked in the DEU were paid in some form: Bo`o Drakul (T 7237, 7266-7267, 7281-7283, 7342).

<sup>977</sup> Bo`o Drakul (T 7161-7162); Radomir Dolas (T 5812-5814).

<sup>978</sup> The Accused (T 7915, 7922).

<sup>979</sup> The Accused (T 7910); Ex P 46A, p 14.

although it is not clear when they were assigned or who they were.<sup>980</sup> Requiring more workers, the Accused again approached Mladjenovi}, asking for more civilians with particular skills,<sup>981</sup> without success.<sup>982</sup>

364. Later, at a meeting of the heads of the various units (“directors’ meeting”),<sup>983</sup> a decision was made as to the number of men, including KP Dom detainees, needed by each work unit.<sup>984</sup> The Accused, by his own account, was thus aware of the initial decision to use KP Dom detainees to work.

365. Following the failure of Mljadenovi} to assist the Accused in securing sufficient labour from outside the KP Dom,<sup>985</sup> and prior to the directors’ meeting, Savo Todovi} approached the Accused with a list of detainees composed at the request of the military command from the Tactical Group. The listed detainees were to be put to work for the DEU according to their trades as necessary.<sup>986</sup> The number of detainees actually put to work for the DEU and elsewhere varied over time, sometimes considerably. On the whole, it appears that there was a small core group of detainees and convicts who mostly worked on the farm, at the metal workshop or at the furniture factory during the Accused’s administration. This core group of detainees may have numbered between 20 and 45.<sup>987</sup> The detainees who worked were generally skilled and able to work.

366. Todovi} played a central role in the work done by the detainees. He was in charge of the assignment of work duties, making lists of who would be working where, in co-ordination with the heads of the various units of the DEU and others, including the military police from, for example, Kalinovic.<sup>988</sup>

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<sup>980</sup> The Accused (T 7911, 7826-7827).

<sup>981</sup> The Accused (T 7911, 7827). He asked for a head of the varnishing shop and an upholsterer.

<sup>982</sup> The Accused (T 7692, 7914-7915). See also Ex P 46A, p 14.

<sup>983</sup> The Accused (T 7912). Attending the meeting were, amongst others, the heads of the furniture factory, the metal and mechanical workshop, the farm, the commercial department and the accountant. Savo Todovi} did not attend.

<sup>984</sup> The Accused (T 7692, 7912); Ex P 46A, pp 14, 18.

<sup>985</sup> The Accused (T 7692).

<sup>986</sup> The Accused (T 7692, 7913-7914); Ex P 46A, p 14.

<sup>987</sup> Based on a rough calculation of the number of different detainees who worked whilst being detained in the KP Dom. See also D`evad Lojo (T 674-676, 680); Muhamed Lisica (T 4860); Risto Ivanovi} (T 6099).

<sup>988</sup> FWS-66 (T 1144 ff, 1153); D`evad Lojo (T 672); FWS-249 (T 4500 ff); FWS-73 (T 3222ff); Risto Ivanovic (T 6146-6147). The work duties were not approved by Savo Todovic for all detainees (T 6161-6143). There was a rehabilitation officer for a while, Aleksander Cecevic, who was in charge (T 6142) (evidence of Risto Ivanovic); FWS-198 (T 984). One Prosecution witness, Muhamed Lisica, testified that the Accused approved the lists (T 4910-4913); Divljan Lazar, the warehouse clerk, never addressed Todovi} but always the guard on duty when he needed detainees to work for him (T 6056).

367. After the director's meeting, the Accused also made a request to Mladjenovi} for a driver and someone to fix the boiler room. This request was granted and assignment-to-work orders were given to Krsmanovi} and Milan Pavlovi}, both of whom were at that time at the front lines.<sup>989</sup>

368. The evidence establishes that the decision to use detainees to work for the DEU was taken fairly soon after the Accused's arrival at the KP Dom.<sup>990</sup> Whether that decision envisaged the detainees working only in the DEU is unclear. However, the Trial Chamber is satisfied that some of the detainees did eventually work in positions not usually falling within the DEU's functions.

369. It has not been established that a decision was taken to force the detainees to work. The Accused gave evidence that, upon having been shown the list of detainees who could work in the DEU by Todovi}, he specifically asked whether the detainees volunteered to work. Todovi}'s reply was that they volunteered because it was better than spending time in the KP Dom.<sup>991</sup> The Accused stated that he himself would have preferred to work rather than "sitting there, let alone being in a detention unit".<sup>992</sup>

370. The Prosecution alleges that most of the Schedule E detainees were kept imprisoned from summer 1992 until 5 October 1994 for the primary purpose of being used for forced labour.<sup>993</sup> The Trial Chamber is not satisfied that this allegation has been established. The direct evidence relating to this allegation centres on an incident when some of the metal workers were exchanged without the knowledge of their supervisor, Relja Goljanin.<sup>994</sup> Detainees Muhamed Lisica, FWS-249 and Ekrem Zekovi} gave evidence, which is accepted by the Trial Chamber, that they worked in the metal workshop and that sometime in 1992 some of the detainees with whom they worked in the metal workshop were exchanged. Goljanin had not been told that this was to occur and he was upset that his workers had been taken. Following this, Todovi}, and perhaps Goljanin, compiled a list of

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<sup>989</sup> The Accused (T 7829). Pavlovi} may have received his assignment-to-work order around May 1992 (T 6890).

<sup>990</sup> D'evad Lojo (work started very soon after 19 April 1992) (T 673).

<sup>991</sup> The Accused (T 7692); Ex P 46A, pp 14, 17; Ex 50A, p16.

<sup>992</sup> Ex P 50A, p 16.

<sup>993</sup> Indictment, par 5.41; *see also* The Accused's Position as Warden, par 96ff, *supra*.

<sup>994</sup> Muhamed Lisica (T 4972-4977); FWS-249 (T 4480-4482); Ekrem Zekovi} (T 3490-3491, 3615); The Accused (T 7917-7918).

names of the remaining metal workshop workers.<sup>995</sup> The Prosecution case was that this list was made to prevent any of the other metal shop workers being taken for exchange. The evidence was unclear, however, as to what happened to the list which was made. Muhamed Lisica gave evidence that a list of the names of all the metal workers was put up in the hallway of the administration building. However, he could not recall whether he saw the list before or after the exchange, raising substantial questions as to what the purpose of such a list was had it been put up there. There was also no evidence to establish that the Accused knew or should have known anything about a list of workers drawn up to prevent further exchanges of metal workers. He cannot, therefore, be criminally responsible as a superior pursuant to Article 7(3) of the Statute. Nor was there any evidence as to whether any one of the remaining metal workers was in fact later exchanged. As a result, the Trial Chamber is not satisfied that the Prosecution has established that there was a plan to keep detainees imprisoned for the primary purpose of using them as labour or that the Accused was in any way responsible for or involved in a plan to keep any detainees at the KP Dom for the primary purpose of being used for forced labour.

(b) Par 5.42 and forced labour

371. In par 5.42 of the Indictment, the Prosecution alleges that the guards of the KP Dom called out members of the workers' group on a daily basis and forced them to work inside and outside the camp, from 7.00 am to at least 3.00 or 4.00 pm.<sup>996</sup> On occasion, Todovi} or Relja Goljanin also called the detainees from their rooms. The Trial Chamber is satisfied that detainees were called out to work from lists prepared by Savo Todovi}. Detainees worked Mondays to Fridays starting at about 7.00 am and finishing about 3.30 pm.<sup>997</sup> Detainees who worked on the house of the Accused started at around 7.30 or 8.00 am and worked until about 5.00 or 5.30 pm.<sup>998</sup> All working detainees had regular breaks of about half an hour at around 10.00 am for snacks and a lunch break of about an hour. Sometimes they had additional breaks.<sup>999</sup> Some detainees worked in the compound, others outside, including in other towns. The names or assigned numbers of those who worked outside the

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<sup>995</sup> Lisica is also the only witness who claimed that Goljanin said something to the effect that he would have to go and see the Accused and the command about the matter. There is no evidence that Goljanin actually did so. According to FWS-249 and Zekovi}'s testimony, Todovi} helped in preparing a list.

<sup>996</sup> Indictment, par 5.42.

<sup>997</sup> FWS-198 (T 984); Muhamed Lisica (T 4865, 4867); FWS-249 (T 4419-4420); The Accused (T 7696).

<sup>998</sup> FWS-250 (T 5058).

<sup>999</sup> Muhamed Lisica (T 4865, 4868-4869); FWS-249 (T 4420-4421).

compound were taken down as they left the compound in a register by the guard on duty at the gate. Upon returning to the compound the detainees were searched.<sup>1000</sup>

372. The Prosecution alleges that the detainees who were called out to work were forced to do so and that their work was involuntary and unpaid. It is claimed that even ill or injured detainees were forced to work, that those who refused were sent to solitary confinement and that when working they were guarded by the regular prison guards of the KP Dom or soldiers from outside the KP Dom.<sup>1001</sup> Having considered all the relevant evidence, the Chamber is not satisfied that the general circumstances in the KP Dom during the Accused's administration were of such a nature as to render the work of every detainee involuntary. Whether a particular detainee was forced to work is to be assessed on an individual basis, as to whether he had no real choice as to whether he had to work.

373. In considering whether an individual detainee was forced to work, the Trial Chamber considers the following factors to be relevant: the substantially uncompensated aspect of the labour performed, the vulnerable position in which the detainees found themselves, the allegations that detainees who were unable or unwilling to work were either forced to or put in solitary confinement, claims of longer term consequences of the labour, the fact of detention and the inhumane conditions in the KP Dom.

374. The Trial Chamber is satisfied that, except for the extra food which the working detainees received and the cigarettes that some of them sometimes received, their work was substantially uncompensated.<sup>1002</sup> By the Accused's own account, the KP Dom did not have enough money to pay them.<sup>1003</sup> The Trial Chamber is also satisfied that the working detainees were generally under armed supervision.<sup>1004</sup>

375. The Trial Chamber is not satisfied that the Prosecution has established that those detainees who refused to or could not work were sent to solitary confinement during the Accused's administration. The evidence adduced by the Prosecution to demonstrate this allegation was equivocal. Muhamed Lisica gave evidence that on one occasion, while he

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<sup>1000</sup> For example, Risto Ivanovi } (T 6143-6144); Muhamed Lisica (T 4865); FWS-249 (T 4418-4419); FWS- 144 (T 2321-2322).

<sup>1001</sup> Indictment, par 5.42.

<sup>1002</sup> The Accused (T 7696-7698); FWS-198 (T 985); FWS-89 (T 4707); Risto Ivanovi } (T 6099). According to the Accused (T 7698) and Bo`o Drakul (T 7281, 7283), the KP Dom did not have to pay for the work done by the Muslim detainees as they were under military jurisdiction.

<sup>1003</sup> The Accused (T 7698).

<sup>1004</sup> See findings with respect to the specific work done by the detainees.

was being transported to the hospital to work, he refused to work and was sent to solitary confinement. However, it was not established that he was sent to solitary confinement because of that refusal. Upon his return to the KP Dom, he was searched and a letter was discovered in his possession which he had been asked by a fellow Muslim detainee to take to a relative.<sup>1005</sup> It is unclear whether he was sent to solitary confinement by Savo Todovi} for having refused to work or for having carried the letter.<sup>1006</sup> It is also unclear when this alleged incident took place, and it may have been after the Accused's administration.<sup>1007</sup> FWS-73 once refused to work,<sup>1008</sup> and he said that Todovi} went to his room and kicked him all the way to work.<sup>1009</sup> There is, however, no evidence as to when this alleged incident took place, and it could well have happened after the Accused's administration.<sup>1010</sup> FWS-71 said that he had been forced to go to work in the mine once by Todovi} when he was ill, but this took place in October 1993 after the Accused's administration.<sup>1011</sup> FWS-71 said that, if detainees could not go to work, they had to go to a doctor or medical technician. He recalled Fehim Dedovi} being taken away a couple of times to be beaten in the isolation cell for not being able to work. Again, it is unclear when this alleged incident took place. The Prosecution also alleged that FWS-198 was sent to solitary confinement when he dared to refuse to work.<sup>1012</sup> However, FWS-198's evidence was that he was sent to solitary confinement without any reason for five to six days, after having asked Todovi} whether he could work. This allegation is therefore not established.

376. There was no direct evidence adduced by the Prosecution that those who could not or were unwilling to work were forced to do so during the Accused's administration. Many of the Prosecution's witnesses expressed their own conclusions that this was the case, but no attempt was made to demonstrate the factual basis for those conclusions or that they applied to the period of the Accused's administration. When asked whether he refused,

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<sup>1005</sup> Initially he was sent to solitary confinement for twenty days, but after three or four days he was released and started working again (T 4880).

<sup>1006</sup> Muhamed Lisica (T 4880-4881).

<sup>1007</sup> FWS-198 made a reference to Muhamed Lisica ending up in solitary confinement for refusing to work. He used that alleged incident to explain his testimony why one could not refuse to work, citing the fear for solitary confinement. However, FWS-189's testimony throws no light on when this alleged incident might have taken place (T 984-985).

<sup>1008</sup> FWS-73 (T 3224).

<sup>1009</sup> FWS-73 (T 3224).

<sup>1010</sup> FWS-198 (T 983-984).

<sup>1011</sup> FWS-71 (T 2912-2913).

<sup>1012</sup> Prosecution Final Trial Brief, par 177.

rebelled or expressed disapproval when told that he had to work, FWS-249 responded that he thought that to do so would have been a big risk and that it did not occur to him to refuse.<sup>1013</sup> FWS-144 explained a statement he made, that Todovi} could force even sick persons to work and that nobody could overturn his decision, by saying that the detainees had no possibility of refusing to go to work because that would only have worsened their position in the camp.<sup>1014</sup> Rasim Taranin also asserted that he could not do or say anything with respect to whether he wanted to load and unload flour.<sup>1015</sup> When asked whether detainees who were called out to work could refuse, D`evad Lojo expressed his opinion that, unless one had serious medical reasons, it would have been very risky to have refused, for a sanction of solitary confinement or forced labour would follow.<sup>1016</sup> He said he knew that there were cases when the head officials made those who were ill go out and work.<sup>1017</sup> Safet Avdi} similarly recalled overhearing or being told that Todovi} told detainees that they had to work despite being ill.<sup>1018</sup> Neither of these two witnesses indicated when they learnt of detainees being made to work despite being ill, and no attempt was made to establish that it happened during the Accused's administration.

377. A finding that a specific detainee or detainees in general were forced to work is not safely available from conclusions stated by witnesses without some indication of the factual basis upon which these conclusions were reached. Evidence of a conclusion drawn by a witness, without more, does not establish beyond reasonable doubt that the conclusion coincided with the fact to be established. The circumstances and conditions under which the detainees were imprisoned from 1992 to 1994 in the KP Dom varied sufficiently for the Prosecution to have been required to elicit, for example, specific examples, further particulars, including with respect to identified time-periods, or explanations with respect to such evidence from witnesses. Evidence from its own witnesses which contradicted the Prosecution's general assertion also made more detailed testimony from witnesses necessary. For example, Safet Avdi}, apparently early in 1992, asked not to be assigned to hard labour for health reasons and his request was granted.<sup>1019</sup> Another witness, FWS-182, testified that, after he almost fainted when unloading flour, an old Serb friend of his who

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<sup>1013</sup> FWS-249 (T 4523).

<sup>1014</sup> FWS-144 (T 2316, 2335).

<sup>1015</sup> Rasim Taranin (T 1701-1702).

<sup>1016</sup> D`evad Lojo (T 680-681).

<sup>1017</sup> D`evad Lojo (T 681).

<sup>1018</sup> Safet Avdi} (T 474-475).

<sup>1019</sup> Safet Avdi} (Ex P 123, p 689).

was in charge let him return to the KP Dom. On another occasion when FWS-182 could not work in the kitchen, he was allowed to recover before he started cleaning the compound.<sup>1020</sup> It is not clear when these incidents relating to FWS-182 took place. The beliefs and fears of the detainees, in particular in the context of the general inhumane conditions and atmosphere in the KP Dom, are of course relevant to a determination of whether they worked voluntarily, but a reliance solely on such unsupported conclusions expressed by the witnesses would not be safe in the circumstances outlined.

378. The physical consequences of the work on the health of the detainees, if any, also constitutes a factor relevant to the determination as to whether someone was forced to work. However, the evidence adduced on this point is also equivocal. FWS-249 gave evidence that he and the other working detainees were exhausted after work, and that he personally suffers from back problems.<sup>1021</sup> He said that his doctors assumed that these problems resulted from the physical work at the KP Dom.<sup>1022</sup> However, as established above, the Trial Chamber is not satisfied that his back problems are a direct consequence of the labour he performed while at the KP Dom.<sup>1023</sup> FWS-142 testified that he was exhausted and had no strength when asked in September 1993 by Savo Todovi} whether he would work in the Miljevina mine.<sup>1024</sup> This incident took place after the Accused's administration.

(c) Par 5.43 and forced labour

379. In par 5.43 of the Indictment it is alleged that the detainees had to work in the kitchen within the KP Dom.<sup>1025</sup> The Prosecution indicated that it does not charge as enslavement the cleaning tasks within the compound and the work in the kitchen such as washing dishes, slicing bread, distributing food and cleaning the kitchen, all alleged to have been done by the Muslim detainees.<sup>1026</sup> The Chamber regards this indication as a

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<sup>1020</sup> FWS-182 (T 1647).

<sup>1021</sup> FWS-249 (T 4431-4433).

<sup>1022</sup> FWS-249 (T 4433).

<sup>1023</sup> See par 153, *supra*.

<sup>1024</sup> FWS-142 (T 1831-1832).

<sup>1025</sup> Indictment, par 5.43.

<sup>1026</sup> Prosecution Final Trial Brief, par 160, fn 521.

withdrawal of those charges.<sup>1027</sup> This includes the allegation that FWS-54 was forced to work.<sup>1028</sup>

380. The Trial Chamber is not satisfied that the allegation that detainees were forced to work in the furniture factory<sup>1029</sup> has been established. The evidence led by the Prosecution upon this issue was of very poor quality. Little attempt was made to establish that, in truth, the detainees were forced to work, and reliance was placed almost entirely upon the unsupported belief of the detainees that they were obliged to work. Some were asked to give the basis of their belief, but no one was asked, for example, whether he objected to working or whether he had been told by a person in authority that he would be punished if he did not. In many instances, no effort was made to establish that the particular detainee worked during the period of the Accused's administration. Moreover, when reasons were given, they were mainly that the detainee wished to obtain the extra food given to workers or to escape from his room. The Trial Chamber does not accept that such a motive, without more, amounts to the detainees being forced to work. The issue in every case is as already stated, whether the particular detainee had lost his choice to consent or to refuse the work he was doing.

381. The detainees started to work in and for the furniture factory sometime around September or late 1992.<sup>1030</sup> Between approximately six to fifteen people worked there.<sup>1031</sup> KP Dom detainees working in the factory during the Accused's administration included

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<sup>1027</sup> A number of detainees did such tasks: FWS-65 swept the canteen and carried firewood from the cauldron to the kitchen. There is no indication that he was forced to do it (T 471); Rasim Taranin worked in the kitchen for about 10 months (T 1712); FWS-182 cleaned the kitchen and later cleaned the compound (T 1647); FWS-73 worked on and off in the kitchen for a few months (T 3322-3223); FWS-89 worked in the heating room (T 4660); Muhamed Lisica cleaned chimneys (T 4906-4907); FWS-77 worked in the kitchen: FWS-249 (T 4450); Mujo Dudi} worked mainly as a cleaner in the administrative building: FWS-249 (T 4453); Muhamed Lisica (T 4916); FWS-198 (T 1019); Taib Reko worked in the compound: FWS-249 (T 4457, 4459); Ekrem Zekovi} sealed off an area where a door had been broken (T 3449); FWS-86 cleaned carpets (T 1486); FWS-54 distributed food in the kitchen (T 746-747); FWS-142 did some work around the compound (T 1831); FWS-71 cleaned rooms (T 2896, 2973-2974); Safet Avdi} cleaned the dining area and prepared firewood for the kitchen: P 123, (T 689); FWS-250 did cleaning jobs in the kitchen (T 5056); Krsto Krnojelac, a cook, supervised the detainees in the kitchen (T 5939-5940).

<sup>1028</sup> The only detainee who is alleged to have worked solely in the kitchen, distributing food for three days: FWS-54 (T 746).

<sup>1029</sup> Indictment, par 5.43.

<sup>1030</sup> D`evad Lojo (T 676); Miladin Matovi} testified that the Muslim detainees started working there around perhaps mid-June 1992 (T 6432).

<sup>1031</sup> D`evad Lojo (T 672); FWS-86 (T 1487); Risto Ivanovi} (T 6099); Miladin Matovi} (T 6433); The Accused (T 7693).

FWS-198, FWS-66,<sup>1032</sup> Muharem Ba-vi},<sup>1033</sup> Sulejman Pejкуси}, Sacir Muratovi}, FWS-138, Ivan Soldan and Trako or Traki}.<sup>1034</sup> The work included making furniture, such as bookshelves, cutting fabrics for upholstery and upholstering furniture, loading furniture onto trucks and assembling wardrobes at the local hospital.<sup>1035</sup> The detainees worked Monday to Friday for a period of eight hours each day.<sup>1036</sup> Miladin Matovi}, who received a work assignment at the KP Dom and was eventually transferred by Mitar Rasevi} to work within the factory, guarded these detainees from sometime in May or June 1992 until September 1993.<sup>1037</sup> As compared to the pre-war situation, the furniture factory operated at about ten percent of its capacity.<sup>1038</sup>

382. The Trial Chamber is not satisfied that D`evad Lojo, Ekrem Zekovi}, FWS-71 and FWS-215 were forced to work in the factory or that they worked there during the Accused's administration. Lojo started working in the furniture factory sometime in August 1993,<sup>1039</sup> Zekovi}'s work began sometime in late August or early September 1993,<sup>1040</sup> while FWS-71 worked during parts of 1992 and the whole of 1993.<sup>1041</sup> During that time, which may well have been after the Accused's administration, he also worked in the furniture factory.<sup>1042</sup> FWS-215 was assigned to work duty in the furniture factory, possibly sometime in mid-1993, but the evidence was not clear.<sup>1043</sup> With respect to FWS-66, the evidence was that he volunteered to work. He was assigned to work at the furniture factory in spring of 1993, prior to which he asked Todovi} for work so as not to be locked up in a room.<sup>1044</sup> FWS-198 gave evidence that he started working in the factory in April 1993, after being told to do so by Todovi},<sup>1045</sup> and that he continued to work until October 1993.<sup>1046</sup> He expressed the view that, once a detainee was selected to work, he could not refuse because of the fear of

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<sup>1032</sup> FWS-198 (T 976); FWS-66 (T 1123-1125).

<sup>1033</sup> The evidence is only that he "worked": FWS-249 (T 4451); He worked in the carpentry shop: Muhamed Lisica (T 4915).

<sup>1034</sup> Miladin Matovi} (T 6433-6434).

<sup>1035</sup> D`evad Lojo (T 676, 678); FWS-198 (T 976, 987-979).

<sup>1036</sup> FWS-198 (T 978-979); Miladin Matovi} (T 6434).

<sup>1037</sup> Miladin Matovi} (T 6432-6433, 6437). He established and was in charge of the fire protection unit in the furniture factory and he also guarded detained Muslims and convicted Serbs working at the furniture factory (T 6433).

<sup>1038</sup> Bo`o Drakul (T 7278-7279).

<sup>1039</sup> D`evad Lojo (T 672-673). He worked there for about a year: D`evad Lojo (T 672).

<sup>1040</sup> Ekrem Zekovi} (T 3443). It lasted until mid-December 1993.

<sup>1041</sup> FWS-71 (T 2896).

<sup>1042</sup> FWS-71 (T 2896). He testified that all the work that he did in those years was forced, and that he would never have volunteered to work (T 2896).

<sup>1043</sup> FWS-215 (T 878-879).

<sup>1044</sup> FWS-66 (T 1123-1125).

<sup>1045</sup> FWS-198 (T 976).

<sup>1046</sup> FWS-198 (T 976).

ending up in solitary confinement.<sup>1047</sup> The reference to the fear of solitary confinement was to the alleged instance when Muhamed Lisica was sent to solitary confinement for having refused to work.<sup>1048</sup> The Trial Chamber has already determined that it is not clear when and for what reason Lisica was put in solitary confinement.<sup>1049</sup> FWS-198's reference to this alleged incident is therefore equivocal. It could be interpreted in different ways, including that Lisica was put in solitary confinement prior to April 1993, or that he honestly believed that Lisica was put in solitary confinement for refusing to work. In the light of this ambiguity, it has not been demonstrated beyond reasonable doubt that FWS-198 was forced to work in the furniture factory during the Accused's administration.

383. With respect to Muharem Ba-vi}, Sacir Muratovi}, FWS-66 and FWS-138, the evidence is insufficient to accept that they were forced to work in the furniture factory. Sulejman Pejкуси}, Ivan Soldan and Trako or Traki} are not listed in Schedule E, but in any event the evidence relating to their work is insufficient to accept that they were forced to work in the furniture factory.

384. The Trial Chamber is not satisfied that the allegation that within the KP Dom the detainees had to work in the metal workshop, repairing army vehicles or looted cars, has been established.<sup>1050</sup> This work began sometime in the second half of May 1992.<sup>1051</sup> Workshop related work was carried out in and outside the workshop, including in the town at the bakery, the Zelengora hotel and the hospital, as well as in Miljevina and Velecevo.<sup>1052</sup> The work involved repairing KP Dom vehicles,<sup>1053</sup> and sometimes the vehicles of private individuals,<sup>1054</sup> locksmith tasks<sup>1055</sup> and general maintenance inside and outside the KP Dom, including on the farm.<sup>1056</sup> As compared to the pre-war situation, the metal workshop produced little. For the most part it operated to maintain and service existing facilities and equipment.<sup>1057</sup> The number of people working in and for the workshop numbered between

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<sup>1047</sup> FWS-198 (T 984-985).

<sup>1048</sup> FWS-198 (T 984-985).

<sup>1049</sup> See par 375, *supra*.

<sup>1050</sup> Indictment, par 5.43.

<sup>1051</sup> D`evad Lojo (T 676).

<sup>1052</sup> Ekrem Zekovi} (T 3443); FWS-144 (T 2314-2315); FWS-78 (Ex P 161, p 2122); Muhamed Lisica (T 4870-4871); Muhamed Lisica (T 4862, 4873-4874).

<sup>1053</sup> D`evad Lojo (T 673); Rasim Taranin (T 1727); FWS-144 (T 2314, 2331); FWS-249 (T 4423, 4425, 4426, 4433); Ex P 161; Muhamed Lisica (T 4874, 4898).

<sup>1054</sup> FWS-249 (T 4423, 4425, 4426, 4433); Ex P 46A, p 19.

<sup>1055</sup> D`evad Lojo (T 673-674); Ekrem Zekovi} (T 3448-3449); FWS-144 (T 2314); Muhamed Lisica (T 4865).

<sup>1056</sup> FWS-249 (T 4420, 4430); FWS-144 (T 2314); Muhamed Lisica (T 4865, 4876-4877, 4896, 4903-4905, 4972).

<sup>1057</sup> Bo`o Drakul (T 7278-7279).

about six and fifteen.<sup>1058</sup> The KP Dom detainees who worked in the workshop included FWS-249, Hamdo Hadic or Hadzic, Ekrem Zekovi}, FWS-144, Muhamed Lisica and Rasim Taranin.<sup>1059</sup> They generally worked the usual working hours. The people working in the workshop were mostly skilled.<sup>1060</sup> Relja Goljanin was the supervisor of the workshop.<sup>1061</sup> One guard, or sometimes two, guarded the detainees in the workshop.<sup>1062</sup> If taken to work outside of the workshop, they were usually guarded by KP Dom guards.<sup>1063</sup> When they worked in the compound itself, guards did not usually escort them.<sup>1064</sup> Apart from a snack, which all the KP Dom detainees who worked received, and cigarettes that Goljanin and sometimes the guards gave them,<sup>1065</sup> the metal workers had slightly more freedom than other working detainees, and they were sometimes able to get pears from trees near to the workshop.<sup>1066</sup>

The Accused visited the workshop, once to give instructions with respect to certain work,<sup>1067</sup> and some of the detainees spoke to him while he was there.<sup>1068</sup>

385. Taranin was told to go to the workshop, presumably sometime in 1992,<sup>1069</sup> because he is a mechanic.<sup>1070</sup> He was asked whether he chose to work in the metal workshop.<sup>1071</sup> He responded that there was no choice, that you had to work where assigned. In his view, being in a camp meant that one had no choice but to do what one was told.<sup>1072</sup> He was not asked whether he objected to working and no evidence was given as to the nature or conditions of the work he did. It was the obligation of the Prosecution to make its evidence

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<sup>1058</sup> Muhamed Lisica (T 4859); FWS-249 testified that there was a permanent group of metal workers working in the metal workshop consisting of about ten to twelve people, and a changing group, varying in numbers depending on the work required (T 4415-4416); FWS-86 (T 1487); Risto Ivanovi} (T 6099); The Accused (T 7693).

<sup>1059</sup> FWS-249 (T 4411, 4414, 4417, 4423); Ekrem Zekovi} (T 3443); FWS-78 (Ex P 181, p 2116); Rasim Taranin (T 1727).

<sup>1060</sup> The Accused (T 7915); FWS-249 (T 4414); Ex P 161, p 2116; FWS-78 (Ex P 161, p 2116); Muhamed Lisica (T 4820).

<sup>1061</sup> Ekrem Zekovi} (T 3443); Muhamed Lisica (T 4861, 4871); FWS-249 (T 4421); Milosav Krsmanovi} (T 6686); FWS-78 (Ex P 161, T 2120); The Accused (T 7915).

<sup>1062</sup> FWS-249 (T 4423); Ekrem Zekovi} (T 3654).

<sup>1063</sup> FWS-249 (T 4433-4434); Muhamed Lisica was also guarded by the military police once when working at the hotel Zelengora (T 4862, 4873).

<sup>1064</sup> Ekrem Zekovi} (T 3652-3653, 3671).

<sup>1065</sup> Muhamed Lisica (T 4860-4861); FWS-249 (T 4430); Rasim Taranin (T 1728).

<sup>1066</sup> FWS-249 (T 4430).

<sup>1067</sup> Ekrem Zekovi} (T 3444-3446); Muhamed Lisica (T 4872).

<sup>1068</sup> Ekrem Zekovi} (T 3444-3446).

<sup>1069</sup> Rasim Taranin (T 1710, 1712, 1727).

<sup>1070</sup> Rasim Taranin (T 1727).

<sup>1071</sup> Rasim Taranin (T 1728).

<sup>1072</sup> Rasim Taranin (T 1728).

clear, but it did not do so. In the circumstances, the Trial Chamber is not satisfied that it has been established that Taranin was in fact forced to work in the workshop.

386. FWS-249 started working in the metal workshop around early July 1992.<sup>1073</sup> The equipment with which he was required to work was obsolete and, to compensate for this, additional physical effort was required. The off-loading from trucks of heavy furniture and the changing of tyres was challenging physical work.<sup>1074</sup> At the end of the working day he was exhausted.<sup>1075</sup> FWS-249 was asked in a general way whether he was forced to work.<sup>1076</sup> He responded that it was without doubt forced labour, explaining that it was such because a guard specifically called him out to work from a list.<sup>1077</sup> Later, in response to questions as to whether he refused, rebelled or expressed any disapproval when told that he would work, he expressed the opinion that to have done that would have been a big risk and it did not occur to him to refuse.<sup>1078</sup> The Trial Chamber has already considered the evidentiary value of FWS-249's subjectively expressed opinions about whether the work he undertook was forced.<sup>1079</sup> It is clear that FWS-249 obviously felt that he was forced to work. However, in the absence of any indication that during the Accused's administration he did not want to work, or additional evidence regarding the nature and conditions of the work he did such as to indicate that he worked involuntarily, the substantive reasons advanced for his view that he was objectively forced to work is an insufficient basis for the Trial Chamber to find that he was in fact forced to work. It was not established that he lost his real choice as to whether he would work, whatever his apparent belief that he had no choice. As such, it has not been demonstrated that FWS-249 was forced to work in the metal workshop during the Accused's administration.

387. Ekrem Zekovi} worked in the metal workshop from mid-July 1992 until he tried to escape from the camp in July 1993.<sup>1080</sup> When asked a general question as to whether he volunteered or was forced to work, he responded that he was a volunteer, because to work

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<sup>1073</sup> FWS-249 (T 4411, 4414). He also worked in Miljevina for three or four times, staying there for ten to twenty days, sometimes a month or even more, but it is unclear who authorised or requested him to work there. Whilst there, he worked under the supervision of the local military commander: FWS-249 (T 4434-4439).

<sup>1074</sup> FWS-249 (T 4430).

<sup>1075</sup> FWS-249 (T 4430-4433).

<sup>1076</sup> FWS-249 (T 4414).

<sup>1077</sup> FWS-249 (T 4414).

<sup>1078</sup> FWS-249 (T 4523).

<sup>1079</sup> See par 376, *supra*.

<sup>1080</sup> Ekrem Zekovi} (T 3443).

meant an important additional meal.<sup>1081</sup> The Trial Chamber is not satisfied that it has been demonstrated that he was forced to work in the metal workshop. The desire for additional food, by itself and without more, did not deny his choice as to whether he would work.

388. FWS-144 worked in the metal workshop from August 1992 until his release in 1994.<sup>1082</sup> On being asked whether he joined the group of metal workers voluntarily, the witness answered as follows: "It looked voluntary. If you look at it, people were asking to leave these cells because they were starving. It seemed that we were all struggling for these jobs to work outside the compound. Nevertheless, this was forced labour. However, we all struggled on account of our hunger because this gave people an extra meal, all of those who were in these work groups".<sup>1083</sup> He expressed the opinion that the detainees had no possibility of refusing to work once Todovi} directed them to do so, because that would have worsened their position in the camp.<sup>1084</sup> The evidentiary value of this expressed view has already been considered by the Trial Chamber.<sup>1085</sup> Again, the Trial Chamber does not consider that, by itself and without more, the desire for additional food denies to a detainee his choice as to whether he would work. Accordingly, the Trial Chamber is not satisfied that it has been established that FWS-144 was forced to work during the Accused's administration.

389. Muhamed Lisica started working at the end of April or early May 1992, and he worked until his release in October 1994.<sup>1086</sup> He testified that work in general was voluntary, in the sense that it was better than being locked up, since a worker could expect extra food, cigarettes, contact with Serbs and information.<sup>1087</sup> He said that working helped him to survive the conditions in the KP Dom. He had also been told by Slavko Ivanovi}, in about June 1992, that the working detainees were protected.<sup>1088</sup> Although he enjoyed the benefits that came with working, as a result he was exhausted all the time, sometimes more, sometimes less, depending on whether he could go to the hospital to get more food. In

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<sup>1081</sup> Ekrem Zekovi} (T 3496).

<sup>1082</sup> FWS-144 (T 2311).

<sup>1083</sup> FWS-144 (T 2311-2312). The only evidence with respect to his hunger whilst in the KP Dom, is his answer in response to a question whether he suffered physically – he said he was starved and famished: FWS-144 (T 2326-2327).

<sup>1084</sup> FWS-144 (T 2316, 2335).

<sup>1085</sup> See par 376, *supra*.

<sup>1086</sup> Muhamed Lisica (T 4833, 4854, 4864).

<sup>1087</sup> Muhamed Lisica (T 4860-4863).

<sup>1088</sup> Muhamed Lisica (T 4862-4863).

addition, he found metalworking difficult, for a myriad of reasons.<sup>1089</sup> The Trial Chamber is not satisfied that this evidence establishes that Lisica was forced to work in the metal workshop.<sup>1090</sup>

390. With respect to the other detainees allegedly forced to work in the metal workshop, the Prosecution failed to adduce any evidence concerning the kind or conditions of work or whether they were forced to work. As such, it has not been established that these detainees were forced to work in the metal workshop during the Accused's administration.

391. Uzeir Aganovi} worked in the metal workshop during 1992 and 1993, as did Berberki} or Berberovi}, a tinsmith,<sup>1091</sup> and Munib Had`i}.<sup>1092</sup> Munib Had`i} was in the working group until he was exchanged.<sup>1093</sup> Other detainees who spent periods of time working in the metal workshop included FWS-249,<sup>1094</sup> Suad Islamba{i},<sup>1095</sup> Ismet "Karasi" or "Karas" Karahasanovi},<sup>1096</sup> Sefko Kubat <sup>1097</sup> and Asim and Ramiz Maljanovi}, two half-brothers. FWS-77 and "Dule" Djurovi} also worked in the metal workshop, but they are not listed on Schedule E.<sup>1098</sup> FWS-249 claimed that all of these persons had to work without explaining why he had come to that conclusion.<sup>1099</sup>

392. The Trial Chamber is not satisfied that it has been established that the detainees in the workshop also repaired looted cars. FWS-249 gave evidence that he saw Zoran Vukovi} coming to the metal department in a truck owned by Senad Sahinpasi}, a Muslim, and that Vukovi} had probably taken it after Sahinpasi} left it in Fo-a.<sup>1100</sup> Vukovi} brought it to the KP Dom to have it serviced.<sup>1101</sup> The evidence is equivocal, since it cannot be concluded beyond reasonable doubt either when this incident took place or that the truck was without legal title in the hands of someone else.

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<sup>1089</sup> Muhamed Lisica (T 4913-4914).

<sup>1090</sup> The incident leading to him being sent to solitary confinement (T 4880-4881) is addressed at par 375, *supra*.

<sup>1091</sup> Muhamed Lisica (T 4915, 4930). This may be E 10.

<sup>1092</sup> Muhamed Lisica (T 4917).

<sup>1093</sup> FWS-249 (T 4453-4454).

<sup>1094</sup> Muhamed Lisica (T 4919). They may be E 42 and/or E43.

<sup>1095</sup> Muhamed Lisica (T 4918); FWS-249 (T 4415, 4454-4455); Ekrem Zekovi} (T 3490-3491).

<sup>1096</sup> Muhamed Lisica (T 4918); FWS-249 (T 4415, 4455); Ekrem Zekovi} (T 3615). He may be E 31.

<sup>1097</sup> FWS-249 (T 4415, 4427, 4431); Rasim Taranin (T 1727); Milosav Krsmanovi} (T 6688); FWS-249 gave evidence that at some point in 1994, and thus after the Accused's administration, Sefko Kubat had an operation on a stomach ulcer. Todovic told not to take long recuperate so that he could return to work (T 4423).

<sup>1098</sup> FWS-249 (T 4423).

<sup>1099</sup> FWS-249 (T 4456).

<sup>1100</sup> FWS-78 (T 2117-2118).

<sup>1101</sup> FWS-78 (Ex P 161, p 2172).

(c) Par 5.44 and forced labour

393. In par 5.44 of the Indictment, it is alleged that the detainees were forced to work on the farm at the prison outpost Brioni.<sup>1102</sup> The Trial Chamber is not satisfied that this allegation has been established.

394. Some KP Dom detainees started working on the farm in the first half of 1992.<sup>1103</sup> They included FWS-66, FWS-73, FWS-89, Muhamed Lisica, FWS-249 and FWS-71.<sup>1104</sup> In addition, most of the Serb convicts worked on the farm.<sup>1105</sup> Various crops were grown at the farm outpost which also had livestock, including cows, pigs and chickens.<sup>1106</sup> The work performed by the detainees included working on the cornfields, sowing and planting various crops, cleaning chicken coops and pigsties and digging holes.<sup>1107</sup> The detainees also undertook seasonal work away from the farm, such as collecting hay for the cows and going out to the meadows to cut grass.<sup>1108</sup> These tasks were performed under the supervision of Novica Majovi},<sup>1109</sup> the supervisor of the farm.<sup>1110</sup> At the time the detainees worked, the farm operated at about 30 percent of its pre-war capacity.<sup>1111</sup> The foremen of the farm were Rade Begenisi}<sup>1112</sup> and Vojlko Kova-<sup>1113</sup> They were employed by the KP Dom and sometimes wore civilian, sometimes military, clothes.<sup>1114</sup> In both 1993 and 1994, Radojica Tesovi} came to the farm on occasion to see how their work was progressing.<sup>1115</sup> Vojislav Maksimovi} once came to the farm, and possibly Todovi} showed him around.<sup>1116</sup> Some of the detainees saw the Accused at the farm.<sup>1117</sup> He came to inspect their work, and he told the detainees to take care not to get hurt.<sup>1118</sup> The Accused was observed on occasion

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<sup>1102</sup> Indictment, par 5.44.

<sup>1103</sup> D`evad Lojo (T 676).

<sup>1104</sup> FWS-66 (T 1125); FWS-73 (T 3223); FWS-89 (T 4671-4672); FWS-249 (T 4433); FWS-71 (T 2896); Muhamed Lisica (T 4896); The Accused testified that about twelve to fifteen Muslim detainees worked on the farm from time to time (T 7693).

<sup>1105</sup> Ex P 46A, p 16, Ex D 85, Ex D85A.

<sup>1106</sup> FWS-89 (T 4672).

<sup>1107</sup> FWS-66 (T 1125); FWS-73 (T 3223); FWS-89 (T 4671); FWS-89 (T 4672). There is some evidence that the eggs, milk, meat and other food from the farm went to not only the KP Dom, but also to the people then living in Fo-a: FWS-89 (T 4673); Zoran Mijovi} (T 6236); Milosav Krsmanovi} (T 6623).

<sup>1108</sup> See findings with respect to these tasks at pars 416-417, *infra*.

<sup>1109</sup> Zoran Mijovi} (T 6222); The Accused (T 7694, 7921).

<sup>1110</sup> The Accused (T 7693).

<sup>1111</sup> Bo`o Drakul (T 7278-7279).

<sup>1112</sup> P 3, person no 77.

<sup>1113</sup> P 3, person no 39.

<sup>1114</sup> FWS-89 (T 4675-4676).

<sup>1115</sup> FWS-89 (T 4676-4677).

<sup>1116</sup> FWS-89 (T 4679).

<sup>1117</sup> FWS-89 (T 4679-4680).

<sup>1118</sup> FWS-89 (T 4707).

walking around either on his own or with Rasevi} or Todovi}.<sup>1119</sup> The farm was guarded and one of the guards was identified as Zoran Mijovi}.<sup>1120</sup> The farm workers received more eggs, meat and milk than the rest of the detainees.<sup>1121</sup>

395. It has not been established that any of the detainees were forced to work. The only evidence before the Trial Chamber with respect to the work that FWS-66 did on the farm is that he worked in the cornfields from time to time.<sup>1122</sup> It has not been established that he was forced to do this work.<sup>1123</sup> FWS-89 was taken to the farm to work in the spring of 1993 and stopped working there in September 1993.<sup>1124</sup> There is no evidence that he was forced to work. He was not even asked whether he worked voluntarily or not. Lisica occasionally did metal work on the farm, and the finding that he was not forced to work there has already been made.<sup>1125</sup> FWS-249 also worked, perhaps ten times, on the farm.<sup>1126</sup> Not only is there no evidence as to what he did on the farm, but it is also unclear when he worked there. The only evidence with respect to Mujo Dudi} is that he did at some time work at the farm.<sup>1127</sup> This is insufficient to establish that he was forced to work. Nor has it been established to the satisfaction of the Trial Chamber that FWS-198, FWS-73 and FWS-71 worked on the farm at all during the Accused's administration.<sup>1128</sup>

396. It is alleged that the detainees were forced to work in mills and in the Miljevina mine.<sup>1129</sup> This allegation has not been established. The only evidence is that of FWS-86,<sup>1130</sup> which was of the most indirect nature and it did not establish what was involved in

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<sup>1119</sup> Muhamed Lisica (T 4897).

<sup>1120</sup> Zoran Mijovi} (T 6222, 6237, 6239).

<sup>1121</sup> FWS-89 (T 4706-4707). None of the witnesses who worked on the farm as KP Dom detainees gave evidence to corroborate the testimony of Zoran Mijovi} (T 6279-6280) that, since the farm was fairly big and difficult to secure, the Serb convicts and KP Dom detainees working there may have been able to play truant and drink at night.

<sup>1122</sup> FWS-66 (T 1125).

<sup>1123</sup> See par 394, *supra*.

<sup>1124</sup> FWS-89 (T 4671-4672). He returned to working on the farm in the spring of 1994 (T 4672).

<sup>1125</sup> See par 389, *supra*.

<sup>1126</sup> FWS-249 (T 4433).

<sup>1127</sup> Muhamed Lisica (T 4916).

<sup>1128</sup> FWS-198 appears to have worked on the farm only during 1994, or at the earliest from about October 1993, after the Accused has left the KP Dom: FWS-198 (T 982, 1027-1028). See finding with respect to the incident when FWS-73 was allegedly kicked to work (T 3224, 3354) at par 375, *supra*. It is unclear when FWS-71 worked on the farm. He testified that he had to do different kinds of work irregularly during 1992 and permanently in 1993, without any further specification: FWS-71 (T 2896).

<sup>1129</sup> Indictment, par 5.44.

<sup>1130</sup> FWS-86 is the only witness who testified that during his time in the KP Dom – mid-April till the end of August 1992 – one of the occasional jobs was performed in a sawmill in Brod: FWS-86 (T 1487). He was not a member of such a group.

that work. The work by detainees in the Miljevina mine was done after the Accused's administration.<sup>1131</sup>

397. It is alleged that the detainees were forced to clean up the rubble of damaged buildings at various places in Fo-a.<sup>1132</sup> This allegation has not been established to the satisfaction of the Trial Chamber. There was no evidence adduced by the Prosecution to show that this was forced work.<sup>1133</sup>

398. With respect to the allegation that, during the winter of 1992 to 1993, detainees were forced to repair the private house of the Accused,<sup>1134</sup> the Chamber is not satisfied that it has been established.

399. The Accused's house, which was burnt down at the beginning of the fighting in Fo-a, was located in the Donje Polje neighbourhood.<sup>1135</sup> Sometime towards the end of 1992,<sup>1136</sup> and in early 1993,<sup>1137</sup> some KP Dom detainees intermittently worked on this house.<sup>1138</sup> The group of Muslim detainees working on the house included Ekrem Zekovi}, FWS-144, Muhamed Lisica, FWS-250, FWS-73, Mustafa Telo, Aziz Telo, "Zanga" Hajri}, Atif Jasrevi}, a Dzemo or Dzemal and "Polani".<sup>1139</sup> Two, and perhaps more, Serb civilian craftsmen, including Bogdan Kostic}, also worked at the house or gave advice on work to be done.<sup>1140</sup> KP Dom guards drove the Muslim detainees from the KP Dom to the house and back.<sup>1141</sup> Amongst other things, the roof was worked on, rubble was removed, the walls were covered and metal railings and a staircase were made.<sup>1142</sup> Milosav Krsmanovi} removed the rubble from the house with a truck.<sup>1143</sup> Four Muslim men, including Mustafa

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<sup>1131</sup> Prosecution Final Trial Brief, par 168.

<sup>1132</sup> Indictment, par 5.44.

<sup>1133</sup> Only the Accused (T 7694) and Bo`o Drakul (T 7264, 7285) respectively referred to Muslim detainees cleaning an area around the old school in town and cleaning up the rubble in town.

<sup>1134</sup> Indictment, par 5.44.

<sup>1135</sup> FWS-144 (T 2319).

<sup>1136</sup> Ekrem Zekovi} (T 3446); Muhamed Lisica (T 4881-4882); D`evad Lojo (T 677-678); FWS-250 (T 5056, 5065); Slavica Krnojelac (T 7501); The Accused (T 8056).

<sup>1137</sup> Muhamed Lisica (T 4881-4882).

<sup>1138</sup> FWS-250 (T 5056-5057); FWS-144 (T 2319).

<sup>1139</sup> Ekrem Zekovi} (T 3446); FWS-144 (T 2317); Muhamed Lisica (T 4882-4883); FWS-250 (T 5056-5057, 5118); Miladin Matovi} (T 6461-6462, 6569); Witness B (T 6736-6737).

<sup>1140</sup> Miladin Matovi} (T 6462, 6569-6571); Milosav Krsmanovi} (T 6693); Witness B (T 6716-6717); The Accused (T 8055).

<sup>1141</sup> Miladin Matovi} (T 6461-6462); FWS-144 (T 2318); Muhamed Lisica (T 4882); FWS-250 (T 5058-5059).

<sup>1142</sup> D`evad Lojo (T 677); Slavica Krnojelac (T 7501, 7523-7524); The Accused (T 7698-7699); The Accused (T 7700).

<sup>1143</sup> Milosav Krsmanovi} (T 6628).

Telo, his son, and the restaurant owner, "Polani", loaded the rubble.<sup>1144</sup> Krsmanovi} also took construction material, including sand, gravel and cement, to the house where it was unloaded.<sup>1145</sup> Zekovi}, FWS-144 and Lisica made a metal staircase and railing at the KP Dom, which they later installed in the house.<sup>1146</sup> Relja Goljanin told FWS-144 to make metal doors at the KP Dom for the house, which he and a fellow Muslim detainee later mounted. He also made a metal skeleton for a bar on the ground floor of the house.<sup>1147</sup> The work on the house usually started at around 7.30 or 8.00 am and lasted till about 5.00 or 5.30 pm.<sup>1148</sup> Spomenko Krnojelac, the son of the Accused, was always present at the house,<sup>1149</sup> apparently guarding the detainees.<sup>1150</sup> He sometimes wore a camouflage uniform,<sup>1151</sup> and he may have had a pistol.<sup>1152</sup> A KP Dom guard or guards may also have been present on occasion.<sup>1153</sup> Bo`idar Krnojelac, the other son of the Accused, was seen at the house on occasions.<sup>1154</sup> The Accused went to the house a few times.<sup>1155</sup> The Muslim detainees who worked at the house were not mistreated at any time while working there.<sup>1156</sup> One witness described his interaction with the Accused as good and decent, with the conversation relating exclusively to the work they were doing.<sup>1157</sup> Another witness gave evidence that, when the Accused went to the house, he would ask whether any material was needed and strike up conversations with them while they were waiting for the vehicle which would take them back to the KP Dom.<sup>1158</sup> Another said that, although Goljanin gave him his tasks, he also approached the Accused when he was there or his sons to discuss the work. He said that he was glad to see his friend Spomenko Krnojelac, and he often talked

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<sup>1144</sup> Milosav Krsmanovi} (T 6628, 6694).

<sup>1145</sup> Milosav Krsmanovi} (T 6691, 6693). The roof tiles, a gift, were taken from Maglic to the KP Dom and then on to the Accused's house; the wood from Maglic, which was also a present, was taken directly to his house: The Accused (T 8046, 8054).

<sup>1146</sup> Ekrem Zekovi} (T 3446); FWS-144 (T 2318); Muhamed Lisica (T 4882).

<sup>1147</sup> FWS-144 (T 2317-2318).

<sup>1148</sup> FWS-250 (T 5058).

<sup>1149</sup> Slavica Krnojelac (T 7524); Miladin Matovi} (T 6462); Witness B (T 6732). According to Ekrem Zekovi}, a son may have passed by (T 3447).

<sup>1150</sup> FWS-144 (T 2318); Witness B (T 6732); The 30 to 35 year old son of the Accused guarded them: FWS-250 (T 5058-5059, 5064-5065); Miladin Matovi} (T 6462, 6569-6571); Milosav Krsmanovi} (T 6693-6694).

<sup>1151</sup> FWS-250 (T 5064-5065); FWS-144 (T 2319); Witness B (T 6732).

<sup>1152</sup> FWS-144 (T 2319); Witness B (T 6732).

<sup>1153</sup> Ekrem Zekovi} (T 3446-3447); Miladin Matovi} (T 6462, 6569-6571); Milosav Krsmanovi} (T 6693-6694).

<sup>1154</sup> FWS-144 (T 2319).

<sup>1155</sup> Muhamed Lisica (T 4885); FWS-144 (T 2319); Once according to Ekrem Zekovi} (T 3446-3447); FWS-250 (T 5059-5060); Twice according to his own account: The Accused (T 8057-8058).

<sup>1156</sup> Ekrem Zekovi} (T 3447).

<sup>1157</sup> FWS-144 (T 2319).

<sup>1158</sup> FWS-250 (T 5059-5060).

with him about how the work should be done.<sup>1159</sup> The detainees agreed that working on the Accused's house was generally better than working elsewhere. They received better and more food and drinks, including coffee, from the Accused's wife, Slavica Krnojelac.<sup>1160</sup> In addition, some of them also received beer,<sup>1161</sup> brandy<sup>1162</sup> and cigarettes.<sup>1163</sup> At the time, food was not widely available in the shops,<sup>1164</sup> and what Slavica Krnojelac prepared for the detainees came from the countryside, sent by her brother-in-law, or was received by her as aid from the Red Cross and the Orthodox church.<sup>1165</sup> Giving those visiting and working on one's house coffee or brandy is a sign of hospitality in Bosnia and Herzegovina,<sup>1166</sup> but this does not detract from the good treatment which the Muslim detainees received from the Krnojelac family while working on the Accused's house.

400. With respect to the work carried out by detainees on the Accused's house, the Prosecution failed to eliminate the reasonable possibility that their labour was legitimately provided by the municipality, and they were not forced to work by the Accused. The Accused testified that he went to see a municipal official, Radovi}, who was in charge of displaced persons and refugees. He requested that he be supplied with plastic or tarpaulin to cover the remains of his house to stop it from being further damaged.<sup>1167</sup> At the time, the municipality had begun to receive humanitarian aid, so he applied for assistance in having his house repaired.<sup>1168</sup> The Accused was told that, although there was no such material available at the time, the municipal officer would inquire further and keep him informed.<sup>1169</sup> Following this, the Accused was told that people were taken to his house to work on it. He did not know who decided to send the workers, but he concluded that it most probably was the civilian defence staff and the municipality.<sup>1170</sup> The evidence of other witnesses supported the Accused's claim. Slavica Krnojelac gave evidence that she thought that the work on the house was organised through the municipality.<sup>1171</sup> Miladin Matovi} thought

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<sup>1159</sup> Muhamed Lisica (T 4883-4884).

<sup>1160</sup> FWS-144 (T 2319); Muhamed Lisica (T 4886); FWS-250 (T 5059); Slavica Krnojelac (T 7501, 7524); Witness B (T 6738); Miladin Matovi} (T 6461-6462); Milosav Krsmanovi} (T 6629); Witness B (T 6717-6718, 6738-6739).

<sup>1161</sup> Witness B (T 6717-6718, 6738-6739).

<sup>1162</sup> Muhamed Lisica (T 4886).

<sup>1163</sup> Miladin Matovi} (T 6461-6462); Milosav Krsmanovi} (T 6629); The Accused (T 8061).

<sup>1164</sup> Slavica Krnojelac (T 7524-7525); Witness B (T 6738).

<sup>1165</sup> Slavica Krnojelac (T 7524-7525).

<sup>1166</sup> Slavica Krnojelac (T 7501, 7524); Witness B (T 6738); The Accused (T 8061-8062).

<sup>1167</sup> The Accused (T 7699, 7965-7967, 8052).

<sup>1168</sup> The Accused (T 8052).

<sup>1169</sup> The Accused (T 7699, 7965).

<sup>1170</sup> The Accused (T 7699, 8055-8056); Ex P 46A, pp 20-21).

<sup>1171</sup> Slavica Krnojelac (T 7501).

that the Crisis Staff and municipal authorities issued an order that detained persons be used to carry out works on the repair of damaged houses,<sup>1172</sup> and his evidence on this point was not challenged by the Prosecution.<sup>1173</sup> Spomenko Krnojelac told Witness B, a mason, that he received some help from the executive committee of the municipality to repair the house.<sup>1174</sup> His evidence on this issue was also not challenged by the Prosecution.

401. The Accused paid for the metal doors made at the KP Dom and for something else, which may have been some furniture or for the manual labour involved in making the staircase, although this is unclear.<sup>1175</sup> He did not pay for the rest of the work.<sup>1176</sup>

402. It has not been established to the satisfaction of the Trial Chamber that any of the detainees were forced to work on the Accused's house or that, if there were any form of compulsion, it was the responsibility of the Accused. Ekrem Zekovi} testified that he volunteered for work in order to get an additional meal, and, as with respect to his work in the metal workshop, the Trial Chamber is accordingly not satisfied that he was forced to work on the Accused's house.<sup>1177</sup> Similarly, the Trial Chamber is not satisfied that FWS-144 or Muhamed Lisica were forced to work on the Accused's house, for the reasons expressed in relation to their work in the metal workshop. FWS-144 acknowledged that detainees requested to be assigned to work and that it was his opinion that they could not refuse to work.<sup>1178</sup> Lisica testified that work at the KP Dom was better than being locked up without contact and without sufficient food, and that it was better than staying in the room. The Trial Chamber is satisfied that this applies also to the work performed on the Accused's house.<sup>1179</sup>

403. The Trial Chamber is not satisfied that FWS-73, Aziz Telo, Atif Jaserevi} and Mustafa Telo were forced to work on the Accused's house. FWS-73's evidence that he was

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<sup>1172</sup> Miladin Matovi} (T 6462, 6569).

<sup>1173</sup> Risto Ivanovi}, although he testified that the work done on the Accused's house was approved by the executive committee of Fo-a, could not give any explanation as to how he came to know that (T 6148). He also could not explain why in this instance the executive committee granted approval and Savo Todovi} signed the permit approving this work by the detainees, when usually, as he claimed, it was the military command that approved the use of detainees outside the KP Dom, other than saying that for him that those two authorities co-operated in granting war assignments (T 6150). His testimony, at least with respect to this matter, is not credible.

<sup>1174</sup> Witness B (T 6715-6716).

<sup>1175</sup> Slavica Krnojelac (T 7525-7526); Bo`o Drakul (T 7286-7287); The Accused (T 7699-7700, 8046-8049, 8054).

<sup>1176</sup> Bo`o Drakul (T 7285-7286); The Accused (T 7699, 8055-8056).

<sup>1177</sup> See par 387, *supra*.

<sup>1178</sup> See par 388, *supra*.

<sup>1179</sup> See T 4860-4861; see also par 389, *supra*.

kicked to work once for having refused to work has already been addressed. It is not clear what work it was to which that evidence related,<sup>1180</sup> and there is no other relevant evidence in relation to his work on the Accused's house. Apart from the evidence given that Aziz Telo and Atif Jasrevi} worked on the Accused's house, there is no evidence as to whether they were forced to work. With respect to Mustafa Telo, the only evidence is that of Milosav Krsmanovi}, who claimed that this detainee had told him that he volunteered for the work and that he had words of praise for the entire Krnojelac family.<sup>1181</sup> FWS-250, "Zanga" Hajri}, Dzemo or Dzermal and "Polani" are not listed in Schedule E, and as such no findings are made as to whether they were forced to work.

404. With respect to the allegation that detainees were forced to install a bar in the house of one of the Accused's sons,<sup>1182</sup> the Trial Chamber is not satisfied that it has been established. FWS-73 gave evidence that he and a fellow detainee and plumber, "Zenga" Hajri},<sup>1183</sup> were working on water pipes for about two or three days in a café of Bo`idar Krnojelac.<sup>1184</sup> It is unclear whether this was the café on the ground floor of the Accused's house. It is probable that it was, as there was no evidence that Bo`idar Krnojelac owned a café separate from the business he operated from the Accused's home. However, FWS-73's evidence makes no reference to when this work was done. Other evidence of a bar being worked on by KP Dom detainees clearly relates to the bar in the café on the ground floor of the burnt down house of the Accused.<sup>1185</sup> This work was part of the work done on the Accused's house and the findings made with respect to that work also apply here.<sup>1186</sup>

405. With respect to the allegation that detainees were forced to furnish a store for one of the sons of the Accused,<sup>1187</sup> the evidence was ambiguous and there is no evidence as to when this work was undertaken.<sup>1188</sup> There was no evidence given in support of the allegation that the detainees were forced to do it. The Trial Chamber is not satisfied that this allegation has been established.

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<sup>1180</sup> See par 375, *supra*.

<sup>1181</sup> Milosav Krsmanovi} (T 6629).

<sup>1182</sup> Indictment, par 5.44.

<sup>1183</sup> He is not listed in Schedule E.

<sup>1184</sup> They were taken to the café by the Accused: FWS-73 (T 3226, 3230).

<sup>1185</sup> The Accused testified that the work involved the straightening and welding of, presumably, the coffee bar counter in the café: The Accused (T 7700); FWS-144 made a metal skeleton for a bar on the ground floor of the house: FWS-144 (T 2317-2318).

<sup>1186</sup> The Accused (T 7700).

<sup>1187</sup> Indictment, par 5.44.

<sup>1188</sup> FWS-73 (T 3227).

406. FWS-144 gave evidence that, at some time, Relja Goljanin directed him to make metal shelves for the office or outlet of Bo`idar Krnojelac which was located in the centre of Fo-a.<sup>1189</sup> Muhamed Lisica assisted in making the metal shelves in the workshop.<sup>1190</sup> FWS-144 went to the outlet on one occasion to take the measurements for the shelves, but neither he nor Lisica mounted the shelves.<sup>1191</sup> Bo`idar Krnojelac gave evidence that he was allocated business premises in around May 1994, from where he sold foodstuffs.<sup>1192</sup> He said that he received second-hand shelves for this shop from a company owned by a Fo-a soccer referee, Zale.<sup>1193</sup> Sometime after May 1994, when the Accused was unemployed, he asked Goljanin whether the shelves could be straightened at the KP Dom, work he claimed that he paid for.<sup>1194</sup> Whether or not the work was paid for, it was not done during the Accused's administration. Bo`idar Krnojelac denied that Muslim detainees from the KP Dom made the shelves or rack or took measurements for them.<sup>1195</sup> FWS-73 gave evidence that he and a fellow detainee and plumber, "Zenga" Hajri},<sup>1196</sup> were taken by the Accused to a shop owned by Bo`idar Krnojelac to do some "little things" for about an hour or two.<sup>1197</sup> Bo`idar Krnojelac and the Accused were present in both the café and shop.<sup>1198</sup> Conversation between all present took place, and the Accused gave FWS-73 brandy to drink.<sup>1199</sup> The Trial Chamber is not satisfied that this evidence establishes the allegation made.

407. It is alleged in the Indictment that the detainees were ordered by prison staff to assist Serb soldiers in looting Muslim houses and mosques.<sup>1200</sup> This allegation has not been established to the satisfaction of the Trial Chamber. During the first half of May 1992, a group of about seven to twelve detainees went to pull down a multi-ethnic school next to the health centre in Alad`a, near the former Alad`a mosque.<sup>1201</sup> Rasim Taranin sometimes assisted in this work.<sup>1202</sup> They demolished the school, taking off the roof tiles and timber

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<sup>1189</sup> FWS-144 (T 2326).

<sup>1190</sup> Muhamed Lisica (T 4886).

<sup>1191</sup> FWS-144 (T 2326); Muhamed Lisica (T 4886).

<sup>1192</sup> Bo`idar Krnojelac (T 7389-7390, 7392).

<sup>1193</sup> Bo`idar Krnojelac (T 7390-7391, 7460).

<sup>1194</sup> Bo`idar Krnojelac (T 7390-7392, 7461, 7486).

<sup>1195</sup> Bo`idar Krnojelac (T 7461).

<sup>1196</sup> He is not listed in Schedule E.

<sup>1197</sup> FWS-73 (T 3226-3227, 3230). The shop used to belong to Saja Sahinpasi}; FWS-73 (T 3226-3228).

<sup>1198</sup> FWS-73 (T 3228).

<sup>1199</sup> FWS-73 (T 3231-3232).

<sup>1200</sup> Indictment, par 5.44.

<sup>1201</sup> Rasim Taranin (T 1711-1712).

<sup>1202</sup> A guard took him to join them. He could not refuse: Rasim Taranin (T 1710).

and other construction materials, apparently to build a church.<sup>1203</sup> Their work lasted for about eleven or twelve days, during which time the Alad`a mosque was destroyed on 15 May 1992.<sup>1204</sup> FWS-249 gave evidence that vehicles with looted or stolen items from an unidentified source came to the KP Dom.<sup>1205</sup> On about five or six unidentified occasions, Relja Goljanin brought people from the metal workshop to collect machinery from Muslim shops.<sup>1206</sup> A kiosk belonging to a friend of his, Fahma Odobasi}, was also brought to the KP Dom.<sup>1207</sup> Assuming that the work on the school can be brought under the allegation made in the Indictment, the evidence adduced does not establish to the satisfaction of the Trial Chamber that the school was looted. With respect to the evidence of FWS-249, there is no indication as to just when these incidents are alleged to have taken place.

(d) Par 5.45 and forced labour

408. In par 5.45 of the Indictment, it is alleged that detainees were taken to the front lines to perform work, such as digging trenches or building barracks.<sup>1208</sup> The Trial Chamber is not satisfied that this allegation has been established. Two witnesses testified concerning different incidents where KP Dom detainees were supposedly made to work on the front lines. After his detention in the KP Dom, D`evad S Lojo<sup>1209</sup> was told that a group of four or five detainees were taken sometime in September or October 1992 for about 20 days to military positions facing Gora`de.<sup>1210</sup> It is alleged that there they made dugouts as part of preparations for the fortification of lines for the forthcoming winter.<sup>1211</sup> It was his view that, "in a manner of speaking", there was no coercion to make detainees work and that the group referred to was not physically ill-treated.<sup>1212</sup> Muhamed Lisica heard that the group had been close to the front lines where they gathered hay for the farm and that they drove trucks.<sup>1213</sup> He also gave evidence that Mujo Hodzi} was taken away with a group of 15 or

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<sup>1203</sup> Rasim Taranin (T 1711).

<sup>1204</sup> Rasim Taranin (T 1710).

<sup>1205</sup> FWS-78 (T 2120).

<sup>1206</sup> FWS-78 (T 2121).

<sup>1207</sup> FWS-78 (T 2121).

<sup>1208</sup> Indictment, par 5.45.

<sup>1209</sup> D`evad S Lojo (T 2525, 2533).

<sup>1210</sup> D`evad S Lojo (T 2607).

<sup>1211</sup> D`evad S Lojo (T 2607). He testified that one of those detainees was "Uzeir Alic, Mehmedalija Lojo from my room.": D`evad S Lojo (T 2607). Neither of these names appears in Schedule E.

<sup>1212</sup> D`evad S Lojo (T 2607-2608).

<sup>1213</sup> Muhamed Lisica (T 4914).

20 people during the autumn of 1992.<sup>1214</sup> When they returned two months later, Hodzi} told him that they had been taken to the front line to dig some trenches and that they had to sleep with Serb soldiers in barracks.<sup>1215</sup> The nature of this particular hearsay evidence is insufficient to make a finding beyond reasonable doubt. For example, it is not known what the exact nature of the alleged work was, where exactly it was done, and whether the detainees were exposed to any danger – all of which are factors which may go to the issue of whether any of the detainees were forced to work. The Accused denied having any knowledge of detainees having been taken to the front lines to perform work such as digging trenches or building barracks.<sup>1216</sup>

409. With respect to the allegation that, from around June 1992 until October 1992, the detainee FWS-141 had to drive soldiers and material to the front lines,<sup>1217</sup> no evidence was presented in support of this allegation, and it has therefore not been established.

410. With respect to the alleged mine clearing work done by FWS-109 and GK, or Goran "Go{a" Kukavica,<sup>1218</sup> the Trial Chamber is satisfied that they were forced to work. On 18 September 1992, a KP Dom guard called out FWS-109 and Kukavica, together with twelve other detainees to be exchanged.<sup>1219</sup> On arriving at the gate of the KP Dom compound, Todovi} told FWS-109 that, instead of being exchanged, FWS-109 and his friend, Kukavica, were to be used as drivers.<sup>1220</sup> In a statement to OTP investigators, FWS-109 stated that he did not see the Accused in the KP Dom on the day that they were taken to Kalinovik.<sup>1221</sup> The two detainees were taken by troops to Kalinovik in an army truck and were then separated from the other twelve and taken to the police station. There they were kept in the prison and required to drive vehicles for the detection of landmines.<sup>1222</sup> During the six months that he was kept at that police station, on five or six occasions military policemen had FWS-109 drive a truck ahead of columns of other vehicles as a mine detector.<sup>1223</sup> Kukavica, who was kept at the police station for longer than six months,

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<sup>1214</sup> Formerly FWS-110.

<sup>1215</sup> Muhamed Lisica (T 4914).

<sup>1216</sup> Ex P 46A, p 17.

<sup>1217</sup> Indictment, par 5.45.

<sup>1218</sup> Indictment, par 5.45, detainees E 14 and E 38 respectively.

<sup>1219</sup> FWS-109 (T 2404).

<sup>1220</sup> FWS-109 (T 2406).

<sup>1221</sup> FWS-109 (T 2419-2420).

<sup>1222</sup> FWS-109 (T 2406, 2420); FWS-86 also testified that FWS-109 and Goran Kukavica had to do mine clearing work (T 1496-1497).

<sup>1223</sup> FWS-109 (T 2406-2407). He also maintained and repaired vehicles whilst kept at that police station (T 2407).

performed this task more often as he was younger. On one occasion, he missed a landmine which was subsequently set off by the third vehicle in the convoy.<sup>1224</sup> Both of the detainees survived, but they worked under a lot of pressure, saying goodbye to each other as if they were never going to see each other again every time they had to leave for mine detection work.<sup>1225</sup> It is not clear from FWS-109's testimony whether the allocation of this task was determined in Fo-a, or whether the detainees were given the assignment in Fo-a in response to a request from the Kalinovik authorities.<sup>1226</sup> The Accused denied having any knowledge about this work.<sup>1227</sup>

411. The nature of the work done by FWS-109 and Kukavica is such that it is prohibited under both Articles 3 and 5 of the Statute, so that any supposed consent to it would be irrelevant. The Trial Chamber is satisfied that it was Todovic who told the detainees that they would be drivers. However, there is no evidence whatsoever that the Accused at the time or later knew or should have known that these two detainees, having been discharged from the KP Dom in order to be exchanged, ended up at the Kalinovik police station to be used for land mine clearing. In these circumstances, it is unnecessary to consider whether these instances of forced labour constituted enslavement, in the sense that there was an intentional exercise of the powers relating to the right of ownership over these two men.

412. It is alleged that, in the winter of 1992-1993 a group of detainees, including Mujo Hodzi},<sup>1228</sup> was taken to the front lines in Previla to cut wood and take it to the trenches, and that Hodzi} had to lay telephone lines to connect the trenches.<sup>1229</sup> This allegation has not been established. A single witness, FWS-249, testified that a group of detainees were taken to Previla in the winter of 1992/1993 to work on the front lines.<sup>1230</sup> Upon their return, the other detainees could see that their hands were frozen and swollen.<sup>1231</sup> FWS-249 could not recall whether they did something in addition to chopping firewood, and he could recall only the last name of one of these detainees as being Zametica.<sup>1232</sup> Too little is known about this alleged incident, as to what were the real nature and conditions of work, to make

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<sup>1224</sup> FWS-109 (T 2406-2407).

<sup>1225</sup> FWS-109 (T 2407).

<sup>1226</sup> FWS-109 (T 2408).

<sup>1227</sup> Ex P 46A, p 17.

<sup>1228</sup> Formerly FWS-110.

<sup>1229</sup> Indictment, par 5.45.

<sup>1230</sup> FWS-249 (T 4440-4441).

<sup>1231</sup> FWS-249 (T 4441).

<sup>1232</sup> FWS-249 (T 4441): This may or may not have been Ahmet Zametica, listed in Schedule E.

a finding as to whether these detainees were forced to work. The Accused gave evidence that he never heard from anyone that Muslim detainees were used for trench digging at the front line.<sup>1233</sup>

(e) Findings with respect to remaining allegations of forced labour

413. Certain alleged incidents of work about which evidence was given are not explicitly referred to in the Indictment. In the view of the Trial Chamber, the wording of par 5.41 of the Indictment limits the enslavement charges to the incidents of forced labour explicitly charged.<sup>1234</sup> Moreover, the Trial Chamber is not satisfied that the Defence was adequately put on notice during the Prosecution's case that the Prosecution was extending its case beyond the specific allegations of forced labour with respect to the detainees listed in Schedule E to the Indictment.<sup>1235</sup> In any event, the evidence of these other incidents is unclear – both as to the nature of the incidents themselves and as to whether they took place during the time the Accused was warden.

414. Murid "Hrusco" Islambasi},<sup>1236</sup> Saban Karup,<sup>1237</sup> and Omer Bav-i}<sup>1238</sup> may have done mine clearing work, but it is unclear whether they did it during the Accused's administration. The Accused himself testified that he has never heard from anyone that Muslim detainees were used for looking for mines by driving trucks in front of Serb troops.<sup>1239</sup> There is some evidence that Muhamed Ahmetkadi}<sup>1240</sup> and Muhamed Alikadi}<sup>1241</sup> had to do mine clearing work, but they are not listed in Schedule E.

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<sup>1233</sup> The Accused (T 7698).

<sup>1234</sup> Indictment, par 5.41.

<sup>1235</sup> See *Kupre{ki}* Appeal Judgment, pars 88, 114.

<sup>1236</sup> After his release, Islambasi} told FWS-109 that he did mine clearing work. No indication as to when this might have happened was given: FWS-109 (T 2404); After their release, Islambasi} told FWS-182 that he did mine clearing work. No indication as to when this might have happened was given: FWS-182 (T 1647-1648); After his release, Islambasi} told FWS-249 that he did minesweeping work during the war. No indication of when this was supposedly done was given: FWS-249 (T 4449-4450); Islambasi} told FWS-86 that he did mine clearing work. No indication as to when this might have happened was given: FWS-86 (T 1496-1497).

<sup>1237</sup> FWS-73 (T 3234-3236); Ekrem Zekovi} (T 3534-3536). No indication as to when this might have happened was given. FWS-249's testimony in this regard is equivocal (T 4441-4442).

<sup>1238</sup> Ekrem Zekovi} (T 3535-3536).

<sup>1239</sup> The Accused (T 7698).

<sup>1240</sup> Ekrem Zekovi} (T 3535-3536).

<sup>1241</sup> The evidence with respect to Muhamed Alikadi} is conflicting, one account being that he did mine clearing work by driving in front of other vehicles: FWS-73 (T 3234-3236) and another being that he was tied to the driver's seat of a truck and made to drive on a certain road to expose the firing positions of Muslim snipers: FWS-249 (T 4446-4450). No indication as to when this might have happened was given.

415. Some of the Muslim detainees – including FWS-198, FWS-73, FWS-66 and FWS-77 – chopped and piled firewood in the compound during the Accused’s administration.<sup>1242</sup> However, there is an issue as to whether they were forced to do so. With respect to FWS-198, the Trial Chamber has already stated that it is not satisfied that he was forced to work.<sup>1243</sup> That conclusion also applies to this work. Although the piling and carrying of the firewood was hard work for FWS-66, he asked to do any kind of work so as not to be locked in his room,<sup>1244</sup> thus volunteering to work. FWS-73 also chopped wood in the compound, but it is unclear when he did this. FWS-77 is not listed in Schedule E.<sup>1245</sup>

416. Some of the detainees – including FWS-66 and FWS-89 and D`evad [o{evi} – collected hay outside Fo-a.<sup>1246</sup> There is an issue as to whether any of these detainees were forced to do this work during the Accused’s administration. With respect to FWS-66 and D`evad [o{evi}, it is also unclear when they did this work and therefore whether it was during the Accused’s administration.

417. Some of the detainees – including FWS-198, FWS-71, FWS-73, Atif Jasarevi}, D`evad [o{evi} and FWS-89 – cut grass and chopped wood outside Fo-a.<sup>1247</sup> Apart from the extra food that they received, they would get five to ten cigarettes as well.<sup>1248</sup> There is an issue as to whether they were forced to do this, or whether they did this work during the Accused’s administration. The Trial Chamber has already stated that it is not satisfied that FWS-198 was forced to work,<sup>1249</sup> but in any event there is no evidence as to when he did this work.<sup>1250</sup> It is unclear when FWS-71 felled wood in a forest,<sup>1251</sup> or when FWS-73 cut grass and worked in the forest.<sup>1252</sup> Except for FWS-249’s reference to Atif Jasarevi} and FWS-77 having worked in the forest and cut grass, no more details about their work are known.<sup>1253</sup> Muhamed Lisica testified that [o{evi} cut grass but gave no further

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<sup>1242</sup> FWS-198 (T 976-978); FWS-66 (T 1123-1125); FWS-73 (T 3223); FWS-249 (T 4450).

<sup>1243</sup> See pars 375, 382, 395, *supra*.

<sup>1244</sup> FWS-66 (T 1123-1125).

<sup>1245</sup> Reference was made to FWS-77 having been involved in working in the kitchen, at the metal workshop, in the forest, at the farm, cutting grass and in the laundry: FWS-249 (T 4450); Rasim Taranin (T 1727).

<sup>1246</sup> FWS-66 (T 1125); FWS-89 (T 4679-4680, 4706-4707); Muhamed Lisica (T 4920).

<sup>1247</sup> See *also* findings with respect to allegation that detainees were forced to do work on the front lines par 412, *supra*.

<sup>1248</sup> FWS-198 (T 985).

<sup>1249</sup> See pars 375, 382, 395, *supra*.

<sup>1250</sup> FWS-198 (T 985).

<sup>1251</sup> FWS-71 (T 2896).

<sup>1252</sup> FWS-73 (T 3223).

<sup>1253</sup> FWS-249 (T 4450, 4455).

information.<sup>1254</sup> FWS-89 saw the Accused whilst cutting grass and chopping wood near Kopilovi,<sup>1255</sup> but no further details about his work have been put before the Chamber.

418. There is an issue as to whether Rasim Taranin and FWS-182 were forced to unload flour, or whether FWS-182 did this during the Accused's administration. Sometime in 1992, Rasim Taranin loaded and unloaded flour for about four days with 15 to 20 detainees in Ustikolina, Perucica and at the Livade warehouse.<sup>1256</sup> They were taken there by a guard or policeman from the KP Dom and were guarded by KP Dom policemen.<sup>1257</sup> When asked whether he had a choice in working, he simply said: "I didn't even try anything. I didn't dare say anything".<sup>1258</sup> No further explanation was given. FWS-182 unloaded flour at Brod Na Drini, but just when this happened is not mentioned.<sup>1259</sup>

419. There is an issue as to whether the following detainees were forced to work at the bakery or whether they worked there during the Accused's administration. FWS-71 worked at the bakery, but there is no indication as to when he did this or what the work entailed.<sup>1260</sup> FWS-73 also unloaded flour for the bakery, falling over because of the heavy sacks. He considered it to be forced work, but he gave no indication as to when the work took place or whether he unloaded flour more than once.<sup>1261</sup> FWS-89 unloaded flour at a bakery sometime in 1993,<sup>1262</sup> but it is unclear as to whether he did this while the Accused was still at the KP Dom. Slobodan Solaja, a baker, appears to have asked for work platoons to help him unload flour on more than one occasion,<sup>1263</sup> one of which was on 23 June 1993, when, upon his request, Muslim detainees helped him to transport flour.<sup>1264</sup>

420. Allegations were made that detainees worked on the apartment of Bo`idar Krnojelac during the Accused's administration, or were forced to make some kind of exercise machine for him. With respect to the work adapting the apartment for his disability,<sup>1265</sup> Bo`idar

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<sup>1254</sup> Muhamed Lisica (T 4920).

<sup>1255</sup> FWS-89 (T 4679-4680, 4706-4707).

<sup>1256</sup> Rasim Taranin (T 1701-1702); FWS-86 testified that during his time in KP Dom – mid-April 1992 until the end of August 1992 – one of occasional jobs performed by others was the transfer of flour from the silos in Ustikolina to Perucica and Gornje Polje (T 1487).

<sup>1257</sup> Rasim Taranin (T 1702).

<sup>1258</sup> Rasim Taranin (T 1702).

<sup>1259</sup> FWS-182 (T 1647).

<sup>1260</sup> FWS-71 (T 2896).

<sup>1261</sup> FWS-73 (T 3225).

<sup>1262</sup> FWS-89 (T 4708).

<sup>1263</sup> Slobodan Solaja (T 5514, 5516).

<sup>1264</sup> Slobodan Solaja (T 5516).

<sup>1265</sup> He approached the then president of the executive committee or head of the municipal government, Radojica Mladjenovi}, to organise the adaptation: Bo`idar Krnojelac (T 7383-7384).

Krnojelac, sometime in 1994, and before moving into the apartment, found a Muslim KP Dom detainee, Atif Jasarevi}, two others whom he supposed were also detainees and a guard at his apartment.<sup>1266</sup> One or more of them or another KP Dom detainee, it is not known whom, may also have painted this apartment.<sup>1267</sup> One Prosecution witness testified that someone in the metal workshop may have made some kind of exercise machine for Bo`idar Krnojelac.<sup>1268</sup> The Accused's son, however, flatly denied any knowledge of such a machine,<sup>1269</sup> and his mother, Slavica Krnojelac, also denied that he ever had such a machine.<sup>1270</sup>

421. The three remaining incidents raise issues as to whether the detainees were forced to work and whether the work was done during the Accused's administration. Regarding the first incident, the evidence was that Lazar Divljan, the warehouse clerk from April until August 1992, had Muslim detainees, in addition to Serb convicts, assist him at the warehouse loading and unloading goods.<sup>1271</sup> They were always volunteers, and he gave them some cigarettes.<sup>1272</sup> With respect to the second incident, FWS-172 testified that some detainees worked at the fish farm in Jelec sometime in April or May 1992. No further evidence was given as to what this work entailed.<sup>1273</sup> Regarding the last incident, one witness, FWS-73, testified that he and three other detainees were forced to dig a grave for a mechanic who was a Muslim.<sup>1274</sup> There is no indication when this alleged incident took place.

(f) Remaining Schedule E detainees and forced labour

422. With respect to eleven of the sixty listed detainees, the Prosecution conceded that insufficient evidence was adduced in support of the original charge.<sup>1275</sup> The Trial Chamber accordingly is not satisfied that the following detainees were forced to work: Adil Bali},

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<sup>1266</sup> Bo`idar Krnojelac (T 7383-7384).

<sup>1267</sup> Muhamed Lisica (T 4887, 7457-7458).

<sup>1268</sup> Muhamed Lisica (T 4887-4888).

<sup>1269</sup> Bo`idar Krnojelac (T 7456-7457, 7465-7466).

<sup>1270</sup> Slavica Krnojelac (T 7525).

<sup>1271</sup> Lazar Divljan (T 6008).

<sup>1272</sup> Lazar Divljan (T 6056).

<sup>1273</sup> FWS-172 (T 4596-4597).

<sup>1274</sup> FWS-73 (T 3224).

<sup>1275</sup> Prosecution Final Trial Brief, Schedule E.

[ufin Be-irb{i}, Fehim Isanovi}, Rasim or Asim Krkali}, Faruk Kre-ni}, Junuz Pecelj, Ifet [ahovi}, Nusret Teletovi}, Ramiz [alaka and Reko Taib.<sup>1276</sup>

423. There are a number of detainees with respect to whom the only relevant evidence is that they were “made” to work, were in a working group or did odd jobs, without any further description of the nature of the work they did. It was for the Prosecution to make its case clear, and it did not do so. Accordingly, the Trial Chamber is not satisfied that they were forced to work. These detainees are Mustafa Ahmetkadi},<sup>1277</sup> Mustafa Barina,<sup>1278</sup> D` afer Bojand` ija,<sup>1279</sup> Rasim D` ubur,<sup>1280</sup> Suljo Pijad` er,<sup>1281</sup> Ramiz [undo,<sup>1282</sup> Izet “Zibac” ^au{evi},<sup>1283</sup> Enver ]emo,<sup>1284</sup> and Safet Dudi}.<sup>1285</sup>

424. With respect to the remaining detainees listed in Schedule E, Asim Had` i}<sup>1286</sup> and Asim Gogalija,<sup>1287</sup> the Trial Chamber is not satisfied they were forced to work during the Accused’s administration because of a lack of sufficient evidence.

### 3. The responsibility of the Accused

425. On the basis of the findings made above, the Trial Chamber makes the following findings with respect to the Accused’s alleged responsibility under Articles 7(1) and 7(3) of the Statute.

426. It has not been established, within the meaning of Article 7(1) of the Statute, that the Accused committed enslavement. With respect to the specific basis for the enslavement charges in this case, it has not been established that he personally forced detainees to work.

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<sup>1276</sup> Prosecution closing argument (T 8296-8298).

<sup>1277</sup> He was in the working group: FWS-249 (T 4451).

<sup>1278</sup> He “worked” and was a member of the working group: FWS-249 (T 4451-4452).

<sup>1279</sup> He “worked”: FWS-249 (T 4452).

<sup>1280</sup> He “worked”: FWS-249 (T 4453).

<sup>1281</sup> He was a member of the “working group”: FWS-249 (T 4457).

<sup>1282</sup> He was in the “work platoon”: FWS-249 (T 4457).

<sup>1283</sup> FWS-249 thought that Izet “Zibac” ^au{evi} was one of more people who “were pulled out to do odd jobs [...]” (T 4452). Muhamed Lisica also testified that Izet “Zibac” ^au{evi} “worked”, that he was a jack of all trades without a specific job (T 4916).

<sup>1284</sup> FWS-249 thought that Enver ]emo “was known to go out to work as well.” (T 4452-4453). Muhamed Lisica also testified that Enver ]emo worked, that he was a jack of all trades, that he “worked at the farm and in the compound, different things.” (T 4916).

<sup>1285</sup> He “also worked a bit around the compound”: Muhamed Lisica (T 4916).

<sup>1286</sup> A Hosic Asam, which may or may not be Asim Had` i}, was told to go and work in the mine: FWS-198 (T 976); thus after the Accused’s administration.

<sup>1287</sup> Asim Gogalija may have been one of two Gogalijas in the KP Dom, one of whom worked at the furniture factory: Muhamed Lisica (T 4916-4917).

427. With respect to common purpose liability under Article 7(1) of the Statute, the Prosecution has failed to prove the Accused's membership of any joint criminal enterprise which may have existed to enslave the non-Serb detainees. Accordingly, the Trial Chamber is not satisfied that the Accused was responsible for having participated in any joint criminal enterprise to do so.

428. With respect to aiding and abetting liability under Article 7(1) of the Statute, the Trial Chamber is not satisfied that the Accused had any knowledge of the involuntary nature of the work done by Goran Kukavica and FWS-109, the only two detainees shown to have been forced to work. Accordingly, even assuming that that work did amount to enslavement, the Accused did not aid and abet that enslavement.

429. With respect to superior responsibility under Article 7(3) of the Statute, it has not been established to the satisfaction of the Trial Chamber that the Accused knew or had reason to know that Goran Kukavica and FWS-109 were forced to work. Even assuming that that work did amount to enslavement, the Trial Chamber is not satisfied that the Accused can be held responsible as a superior.

430. There is thus no basis for the charges of enslavement, and the Accused is accordingly acquitted on counts 16 and 18.

## F. Persecution

### 1. The law

431. Persecution is charged pursuant to Article 5(h) of the Statute. The Trial Chamber is satisfied that the general requirements for crimes against humanity have been met, as set out above.<sup>1288</sup> The crime of persecution consists of an act or omission which:<sup>1289</sup>

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<sup>1288</sup> See pars 60-64, *supra*.

<sup>1289</sup> The elements of the *actus reus* and the *mens rea* set out in this paragraph and the gravity test set out in par 434, *infra*, represent a consolidation of the requirements set out in *Tadic* Trial Judgment, par 715; *Kupreskic* Trial Judgment, par 621; *Kordic and Cerkez* Trial Judgment, pars 189, 195.

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).<sup>1290</sup>

432. Previous Tribunal jurisprudence, including the first judgment to address the issue, has required a discriminatory element as part of the *actus reus*,<sup>1291</sup> that is, the act or omission must in fact have discriminatory consequences rather than merely be done with discriminatory intention. Discriminatory intent by itself is not sufficient. A different approach was recently taken in the *Kvočka* Trial Judgment, rejecting the need for discriminatory consequences.<sup>1292</sup> No authority was cited for this approach, and this Trial Chamber does not find that judgment persuasive. In addition to the Tribunal's own jurisprudence, logic argues in favour of a requirement that the act be discriminatory in fact. Without such a requirement, an accused could be convicted of persecution without anyone actually having been persecuted. In addition, the distinction between the crime of persecution and other crimes would be rendered virtually meaningless by depriving the crime of persecution of the qualities that distinguish it from other prohibited acts, such as murder and torture, which have as their object the protection of individuals irrespective of any group association.<sup>1293</sup> Although the Statute does not expressly require that the

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<sup>1290</sup> In addition, the accused must have the requisite *mens rea* for crimes against humanity, set out in par 436, *infra*. With respect to the requirement of intent to discriminate on one of the listed grounds, see *Kordic and Cerkez* Trial Judgment, par 211; see also *Tadic* Appeal Judgment, par 305, which found discriminatory intent to be an indispensable ingredient of persecution. Although the Statute refers to the listed grounds in the conjunctive, it is settled in the jurisprudence of the Tribunal that the presence of discriminatory intent on any one of these grounds is sufficient to fulfil the *mens rea* requirement for persecution: see *Tadic* Trial Judgment, par 713.

<sup>1291</sup> The *Tadic* Trial Judgment requires "the occurrence of a *persecutory act or omission* and a discriminatory basis for that act or omission on one of the listed grounds" (emphasis added), par 715; the *Kupreskic* Trial Judgment requires that the *act* of persecution be done "on discriminatory grounds", par 621, as distinct from the requirement of discriminatory intent detailed later in that judgment, par 633; the *Kordic and Cerkez* Trial Judgment requires the occurrence of a "*discriminatory act or omission*" (emphasis added), par 189, and expressly incorporates the requirement "on discriminatory grounds" into the *actus reus* of the offence, par 203.

<sup>1292</sup> "[I]f a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate", par 195. The existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of *attempted* persecution, but no such crime falls within the jurisdiction of this Tribunal.

<sup>1293</sup> The crime of persecution, the only crime in the Statute which must be committed on discriminatory grounds (see *Tadic* Appeal Judgment, par 305), has as its object the protection of members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups. If a Serb deliberately

discrimination take place against a member of the targeted group, this is a necessary implication of the occurrence of an act or omission on a discriminatory basis.<sup>1294</sup>

433. The act or omission constituting the crime of persecution may assume different forms.<sup>1295</sup> However, the principle of legality requires that the Prosecution must charge particular acts amounting to persecution rather than persecution in general.<sup>1296</sup> While a comprehensive list of such acts has never been established,<sup>1297</sup> it is clear that for the purposes of this Tribunal persecution may encompass acts which are listed in the Statute<sup>1298</sup> as well as acts which are not listed in the Statute.<sup>1299</sup> The persecutory act or omission may encompass physical and mental harm as well as infringements upon individual freedom.<sup>1300</sup> Although persecution usually refers to a series of acts, a single act may be sufficient.<sup>1301</sup>

434. Not every act or omission denying a fundamental human right is serious enough to constitute a crime against humanity.<sup>1302</sup> While acts or omissions listed under other subparagraphs of Article 5 of the Statute are by definition serious enough, others (either listed under other articles of the Statute or not listed in the Statute at all) must meet an additional test. Such acts or omissions must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute. This test will only be met by gross or blatant denials of fundamental human rights.<sup>1303</sup> When invoking this test, acts should not be considered in isolation but rather should be examined in their context and with consideration

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murders someone on the basis that he is Muslim, it is clear that the object of the crime of persecution in that instance is to provide protection from such discriminatory acts to members of the Muslim religious group. If it turns out that the victim is not Muslim, to argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance (Muslims).

<sup>1294</sup> The argument in the *Kvočka* Trial Judgment at par 197 that “discriminatory grounds form the requisite criteria, not membership in a particular group” would appear to deny the interests protected by the crime. Even the relevant discriminatory intent necessarily assumes that the victim is a member of a political, racial or religious group.

<sup>1295</sup> *Kupreškic* Trial Judgment, par 568; *Blaškic* Trial Judgment, par 218.

<sup>1296</sup> *Kupreškic* Trial Judgment, par 626.

<sup>1297</sup> *Tadic* Trial Judgment, par 694; *Kupreškic* Trial Judgment, par 567; *Blaškic* Trial Judgment, par 219; *Kordic and Cerkez* Trial Judgment, par 192.

<sup>1298</sup> *Kupreškic* Trial Judgment, par 605; *Kvočka* Trial Judgment, par 185.

<sup>1299</sup> *Tadic* Trial Judgment, par 703; *Kupreškic* Trial Judgment, pars 581, 614; *Blaškic* Trial Judgment, par 233; *Kordic and Cerkez* Trial Judgment, pars 193-194; *Kvočka* Trial Judgment, par 185.

<sup>1300</sup> *Blaškic* Trial Judgment, par 233.

<sup>1301</sup> *Kupreškic* Trial Judgment, par 624.

<sup>1302</sup> *Kupreškic* Trial Judgment, par 618; *Kordic and Cerkez* Trial Judgment, par 196; *Kvočka* Trial Judgment, par 185.

<sup>1303</sup> *Kupreškic* Trial Judgment, par 621. The Trial Chamber does not concur with the view expressed in the *Kordic and Cerkez* Trial Judgment, at par 195, that the “gross or blatant” quality of the denial amounts to a distinct requirement with respect to seriousness.

of their cumulative effect.<sup>1304</sup> Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.<sup>1305</sup>

435. The crime of persecution also derives its unique character from the requirement of a specific discriminatory intent.<sup>1306</sup> It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.<sup>1307</sup> While the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one. There is no requirement under persecution that a discriminatory policy exist or that, in the event that such a policy is shown to have existed, the accused has taken part in the formulation of such discriminatory policy or practice by a governmental authority.<sup>1308</sup>

436. The discriminatory intent must relate to the specific act charged as persecution rather than the attack in general, even though the latter may also in practice have a discriminatory aspect. This is clear from the definition of persecution which requires an *act or omission* that is in fact persecutory.<sup>1309</sup> There is no requirement, either under the crime of persecution or under the general requirements for crimes against humanity, that the attack in general be discriminatory.<sup>1310</sup> In practice, the law has on occasion been applied by this Tribunal on the basis that an attack on discriminatory grounds is a sufficient basis from which to infer the necessary discriminatory intent for persecution.<sup>1311</sup> While such an approach would probably reach the correct conclusion for most acts occurring within the context of a discriminatory attack, there may be certain acts committed within the context of the attack either on discriminatory grounds not listed in the Statute, or for purely personal

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<sup>1304</sup> *Kupreškic* Trial Judgment, pars 615(e), 622.

<sup>1305</sup> *Kvočka* Trial Judgment, par 186.

<sup>1306</sup> *Kordic and Cerkez* Trial Judgment, par 217; *Blaškic* Trial Judgment, par 235; *Tadic* Appeal Judgment, par 305. The *Tadic* Appeal Judgment, par 305, and the *Akayesu* Appeal Judgment, par 469, both state that not all crimes against humanity require discriminatory intent. Although this jurisprudence states that it is discriminatory intent that makes the crime of persecution unique, this Chamber finds that it is the discriminatory elements of both the *actus reus* and the *mens rea* which achieve this result.

<sup>1307</sup> *Kordic and Cerkez* Trial Judgment, par 217.

<sup>1308</sup> *Kupreškic* Trial Judgment, par 625. In this respect, the Trial Chamber agrees with the submission in the Prosecution Final Trial Brief, par 567.

<sup>1309</sup> See par 431, *supra*.

<sup>1310</sup> *Blaškic* Trial Judgment, par 260.

<sup>1311</sup> See *Tadic* Trial Judgment, par 652; *Kvočka* Trial Judgment, par 195. Although arising in the context of a genocide charge, the *Jelisić* Trial Judgment also appears to support this approach to proving discriminatory intent, par 73.

reasons.<sup>1312</sup> Therefore, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts.<sup>1313</sup>

## 2. Findings

437. In the Indictment, the Prosecution has charged six different types of acts as persecution.<sup>1314</sup> Several of these acts have also been charged separately in relation to the underlying offence, and have been dealt with above. In relation to those acts established to have taken place, the Trial Chamber must also consider the additional criteria necessary to render such acts persecutory. Those underlying acts not already examined in the context of separate charges (deportation and expulsion) will necessarily be addressed in greater detail before the Trial Chamber turns to consider whether the requisite criteria for the crime of persecution have been met.

### (a) Imprisonment as persecution

438. The Prosecution charges “the prolonged and routine imprisonment and confinement within the KP Dom facility of Muslim and other non-Serb male civilian inhabitants of Foca municipality and its environs” as persecution.<sup>1315</sup> This act is separately charged as imprisonment, a crime against humanity pursuant to Article 5(e) of the Statute,<sup>1316</sup> and as such is of sufficient gravity to constitute persecution. The Trial Chamber is satisfied that the imprisonment and confinement of non-Serbs at the KP Dom was carried out with the intent to discriminate on religious or political grounds. The Trial Chamber has already found that, during the time period relevant to this Indictment, non-Serbs were illegally imprisoned at the KP Dom and that this imprisonment was effected primarily or solely with the intent to discriminate against them because of their religious or political affiliations.<sup>1317</sup>

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<sup>1312</sup> The latter possibility is acknowledged in the *Kvočka* Trial Judgment, par 203.

<sup>1313</sup> Par 203 in the *Kvočka* Trial Judgment (“In instances in which an accused has raised a question as to whether an act was committed on discriminatory grounds or without the knowing or wilful participation of the accused, the Trial Chamber will consider whether the Prosecution has established that the grounds were discriminatory.”) is unfortunately worded, as it may be misinterpreted as placing some onus of proof upon the accused. It appears to mean that, where there arises on the evidence an issue as to whether the act was done for reasons other than the discriminatory ones apparent from the attack upon a particular group within the civilian population, the Trial Chamber must determine whether the Prosecution has established that the intent with which the act was done was the discriminatory one alleged.

<sup>1314</sup> Par 5.2 of the Indictment.

<sup>1315</sup> Par 5.2(a) of the Indictment.

<sup>1316</sup> Count 11.

<sup>1317</sup> See pars 118-124, *supra*.

The discriminatory nature of the imprisonment itself is clear from the evidence given.<sup>1318</sup> 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 offences during the conflict. By contrast, the non-Serbs were not detained on any legal ground, nor was their continued confinement subject to review.

(b) Inhumane conditions as persecution

439. The Prosecution charges “the establishment and perpetuation of inhumane conditions against Muslim and other non-Serb civilian detainees within the KP Dom detention facility” as persecution.<sup>1319</sup> The establishment and perpetuation of inhumane conditions is separately charged as inhumane acts, a crime against humanity pursuant to Article 5(i) of the Statute<sup>1320</sup>, and as cruel treatment, a violation of the law or customs of war pursuant to Article 3 of the Statute, and as such is of sufficient gravity to constitute persecution.<sup>1321</sup>

440. The Trial Chamber has already found that the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom,<sup>1322</sup> as a result of which numerous individuals have suffered lasting physical and psychological problems.<sup>1323</sup> Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies.

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<sup>1318</sup> FWS-250 (T 5022); FWS-33 (Ex P 106, p 483); Safet Avdic (Ex P 123, pp 680-681); FWS-249 (Ex P 161, p 2111); FWS-104 (T 2193, 2200); FWS-73 (T 3206-3207).

<sup>1319</sup> Par 5.2(e) of the Indictment.

<sup>1320</sup> Count 15.

<sup>1321</sup> Count 13.

<sup>1322</sup> See pars 133-143, *supra*.

<sup>1323</sup> See par 144, *supra*.

Emergency health cases were not dealt with quickly enough. The camp conditions were psychologically exhausting for the non-Serbs. They were terrified by the sounds of torture and beatings over a period of months. Since they could not identify any criteria for the selection, many non-Serb detainees suffered a continuing fear that they would be taken away next for similar treatment.

441. The Trial Chamber is satisfied that, in contrast, the general conditions for Serb military detainees or convicts were much better.<sup>1324</sup> Serbs were not locked into their rooms and were free to move around within their building.<sup>1325</sup> They had access to the compound and were allowed to play sports.<sup>1326</sup> They were allowed to watch television and to listen to the radio.<sup>1327</sup> Serbs were mostly housed on the farm.<sup>1328</sup> They had access to the bathroom and to hot water, and received clean linen and towels.<sup>1329</sup> Their rooms had stoves to keep them warm during the cold winters.<sup>1330</sup> They were able to compensate for a shortage of hygienic products by receiving toiletries and clothes from visiting family members.<sup>1331</sup> Serbs were allowed frequent family visits.<sup>1332</sup>

442. Perhaps the most marked contrast between the treatment of Serbs and non-Serbs was with regard to food, both in quantity and in quality. While the Trial Chamber is satisfied that there were certain restrictions on the quantity and quality of food available during the conflict, it finds that the food available was not distributed equally among the detainees.<sup>1333</sup> Serbs received more food and of better quality than that given to non-Serbs. Serbs were allowed second helpings at meals and weight loss was negligible during the period of their detention.<sup>1334</sup> In addition, while the food was cooked in the same cauldron for all detainees and convicts, nutritious ingredients were added to enrich the meals of the Serbs who ate

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<sup>1324</sup> FWS-138 (T 2062); FWS-159 (T 2467-2469); FWS-73 (T 3219-3221, 3352); Ekrem Zekovic (T 3527); Dr Amir Berberkic (T 3749); FWS-69 (T 4065-4066); FWS-89 (T 4661-4662).

<sup>1325</sup> FWS-139 (T 330); FWS-162 (T 1360-1361); FWS-109 (T 2369); D' evad S Lojo (T 2557, 2562); Ekrem Zekovic (T 3528, 3621); FWS-69 (T 4066); FWS-89 (T 4662).

<sup>1326</sup> FWS-215 (T 885); FWS-162 (T 1360-1361); FWS-69 (T 4662).

<sup>1327</sup> FWS-215 (T 885); FWS-162 (T 1360-1361); FWS-69 (T 4066).

<sup>1328</sup> FWS-109 (T 2368).

<sup>1329</sup> D' evad S Lojo (T 2562).

<sup>1330</sup> D' evad S Lojo (T 2557).

<sup>1331</sup> Zoran Vukovic (T 5783).

<sup>1332</sup> FWS-215 (T 885); FWS-182 (T 1616); FWS-08 (T 1772); FWS-138 (T 2065); D' evad S Lojo (T 2562); Ekrem Zekovic (T 3528).

<sup>1333</sup> See par 139, *supra*.

<sup>1334</sup> Lazar Stojanovic (T 5717, 5749); Zoran Vukovic (T 5771, 5784-5785).

after the non-Serbs.<sup>1335</sup> Further, unlike the non-Serb detainees, they were permitted to supplement their diet with supplies brought by relatives.<sup>1336</sup>

443. The Trial Chamber is satisfied that the establishment and perpetuation of inhumane conditions, constituting inhumane acts and cruel treatment of the non-Serb detainees, was carried out with the intent to discriminate against the non-Serbs detainees because of their religious or political affiliations. Accordingly, the Trial Chamber is satisfied that the crime of persecution has been established.

(c) Torture, inhumane acts and cruel treatment as persecution

444. The Prosecution charges “the repeated torture and beatings of Muslim and other non-Serb male civilian detainees at KP Dom” as persecution.<sup>1337</sup> These acts are separately charged as torture (a crime against humanity pursuant to Article 5(f) and a violation of the laws or customs of war pursuant to Article 3 of the Statute),<sup>1338</sup> inhumane acts (a crime against humanity pursuant to Article 5(i) of the Statute)<sup>1339</sup> and cruel treatment (a violation of the laws or customs of war pursuant to Article 3 of the Statute),<sup>1340</sup> all of which have been dealt with above.

445. The Trial Chamber has already found that a number of acts of torture and beatings did occur as charged under Articles 3 and 5 of the Statute.<sup>1341</sup> Those acts amounting to torture or inhumane treatment under Article 5 of the Statute are as such of sufficient gravity to constitute persecution. The acts of torture and cruel treatment under Article 3 have also been found to amount to torture and inhumane acts under Article 5 and may therefore be considered to be of equal gravity. Those acts which took place but which the Chamber found above were not sufficiently serious to amount to cruel treatment, inhumane acts or torture, will be examined to determine whether they may nonetheless amount to persecution. For these acts to amount to persecution they must be of the same gravity as other crimes against humanity enumerated under Article 5 of the Statute.<sup>1342</sup>

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<sup>1335</sup> See par 139, *supra*.

<sup>1336</sup> FWS-111 (T 1229); FWS-08 (T 1772); FWS-142 (T 1840-1841); FWS-138 (T 2063-2066); FWS-71 (T 2945, 2952); FWS-162 (T 1361); FWS-66 (T 1083-1084); Lazar Stojanovic (T 5738).

<sup>1337</sup> Par 5.2(b) of the Indictment.

<sup>1338</sup> Counts 2 and 4 respectively.

<sup>1339</sup> Count 5.

<sup>1340</sup> Count 7.

<sup>1341</sup> See pars 189-306, *supra*.

<sup>1342</sup> See pars 433-434, *supra*.

446. The jurisprudence of the Second World War cases establishes that acts which, on their own, are insufficiently serious to be characterised as crimes against humanity can nevertheless still reach the required threshold of gravity by virtue of the context in which those acts occurred. In the Second World War cases, that context was one in which discrimination against and the extermination of the Jewish people on grounds of race was the official State policy of the Nazi Government.<sup>1343</sup> An act which infringed upon an individual's fundamental rights which was not in and of itself inhumane was nevertheless considered to be inhumane in that context, and as such to be a crime against humanity

447. The Trial Chamber does not accept that the discriminatory imprisonment established is sufficient to characterise acts, which in and of themselves do not amount to inhumane acts or cruel treatment, as sufficiently serious as to amount to crimes against humanity. Such a context is not in the present case sufficient to establish the required degree of gravity implied in Article 5 of the Statute. Further, and related to this issue, the Trial Chamber does not accept the Prosecution's argument that the confinement of men on the discriminatory basis that they were non-Serb is sufficient grounds for establishing that all of those acts established as crimes against humanity, or of equal gravity to, were perpetrated on the ground that the victims were non-Serbs.<sup>1344</sup> For reasons already set out,<sup>1345</sup> each of these acts must be considered on its merits to determine whether it amounts to persecution.

448. The Trial Chamber has already found that detainees were beaten on their way to or from the canteen, by guards of the KP Dom and soldiers from outside the camp (**par 5.7**).<sup>1346</sup> The Trial Chamber is satisfied that Dr Amir Berberkic and Dževad S Lojo were assaulted by soldiers on religious grounds after the two detainees had left the canteen (**par 5.12**).<sup>1347</sup> When the soldiers approached them, they shouted "Balijas", the derogatory term for Muslims carrying religious connotations.<sup>1348</sup> The Trial Chamber has already determined, however, that the beating of Dr Amir Berberkic and Dževad S Lojo did not reach the required level of severity to establish the underlying offences of cruel treatment or

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<sup>1343</sup> The jurisprudence of the World War II cases is considered in the *Tadic* Trial Judgment, pars 699-710.

<sup>1344</sup> Prosecution Pre-Trial Brief, par 356.

<sup>1345</sup> See par 436, *supra*. The Trial Chamber considers that the same reasons for which it is not safe to rely on the discriminatory nature of the attack to reach conclusions as to the discriminatory nature of individual acts which form part of that attack, also prevent it from deriving conclusions as to the discriminatory nature of acts subsequent to imprisonment from the discriminatory nature of the initial imprisonment.

<sup>1346</sup> See pars 193-209, *supra*.

<sup>1347</sup> See pars 203-204, *supra*.

<sup>1348</sup> D'evad S Lojo (T 2565).

inhumane acts.<sup>1349</sup> The Trial Chamber is not satisfied that the particular context in which these beatings occurred is sufficient to increase the severity of the acts so as to become crimes against humanity. Accordingly, the Trial Chamber finds that these acts are of insufficient severity to support a finding of persecution.

449. The Trial Chamber is not satisfied that other incidents concerned with the canteen (which do not amount to inhumane acts and cruel treatment)<sup>1350</sup> have been established as having been carried out on discriminatory grounds. In October 1992, detainees lined up for lunch were beaten by five armed soldiers from Trebinje over a period of half an hour (**par 5.8 and 5.13**).<sup>1351</sup> A detainee nicknamed "Pace" was slapped and kicked because he carried his lunch tray in one hand (**par 5.10**).<sup>1352</sup> FWS-137 was beaten for unknown reasons by soldiers in the compound when returning from breakfast (**par 5.11**).<sup>1353</sup> There is no safe basis in the evidence which establishes that these acts were discriminatory in nature or done with discriminatory intent.<sup>1354</sup> There is therefore no need to consider whether any of these acts were of sufficient gravity as to amount to persecution.

450. The Trial Chamber is not satisfied that the incident concerning Edhem Gradisic has been established as being carried out on discriminatory grounds<sup>1355</sup> Edhem Gradisic, a disabled detainee who suffered from epilepsy, was beaten and taken to an isolation cell after complaining about the small portions of food (**par 5.9**).<sup>1356</sup> There is nothing in the evidence to establish that this act was carried out with a relevant discriminatory intent.

451. A number of arbitrary beatings were also established, as set out above (**par 5.14**).<sup>1357</sup> The Chamber is satisfied that, in one of these incidents, the beating was conducted on political grounds and amounted to persecution. D'emo Balic was severely beaten and locked in solitary confinement, which resulted in him becoming deaf in one ear (**par 5.15**).<sup>1358</sup> Balic told another detainee after the beating that the principal offender said to

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<sup>1349</sup> See pars 203-204, *supra*.

<sup>1350</sup> Pars 5.8/5.13, 5.10, 5.11 were found not to be serious enough to establish the underlying offences of inhumane acts and cruel treatment; see pars 195-196, 199-204, *supra*.

<sup>1351</sup> See pars 195-196, *supra*.

<sup>1352</sup> See pars 199-200, *supra*.

<sup>1353</sup> See par 201-202, *supra*.

<sup>1354</sup> See par 445, *supra*.

<sup>1355</sup> See par 197, *supra*.

<sup>1356</sup> See pars 197-198, *supra*.

<sup>1357</sup> See par 205, *supra*.

<sup>1358</sup> See pars 206-207, *supra*.

him "You are the one who had promised to Alija eight kilos worth of Serbian eyes".<sup>1359</sup> With respect to the other arbitrary beatings, it has not been established that these took place on any discriminatory grounds, and the Trial Chamber is not satisfied that they amounted to persecution. On different occasions, several detainees were beaten inside, in front of, or after they had been taken from their rooms or isolation cell, including FWS-71 (**par 5.16**),<sup>1360</sup> Muharem Caušević (**A 2**),<sup>1361</sup> and Ahmet Duric (**A 7**).<sup>1362</sup> Kemo Kajgana (**A 10**) and Fikret Kovacevic (**A 12**) were taken out of an isolation cell and beaten as well as forced to beat each other.<sup>1363</sup> None of these acts has been established to have been discriminatory in fact.

452. With respect to the beatings of Smajo Bacvic (**A 1**), Halim Corovic (**A 4**) and FWS-111 (**A 11**), incidents found earlier not to be of sufficient gravity to constitute inhumane acts or cruel treatment,<sup>1364</sup> there is no evidence to establish that these acts were discriminatory in nature or done with discriminatory intent and, accordingly, there is no need to consider whether any of these acts were of sufficient gravity to amount to persecution.

453. The Trial Chamber has already found that certain acts of torture or beatings were perpetrated as punishment for infringements of orders or the KP Dom rules.<sup>1365</sup> Although the Trial Chamber is satisfied that these rules were discriminatory in nature, being applied to the non-Serb detainees only, the Trial Chamber is not satisfied that these acts amount to persecution with respect to the beatings. These discriminatory rules related to the living conditions only, and the discriminatory intent has not been established with respect to the acts of beatings. FWS-54 was beaten as punishment for giving a detainee an extra slice of bread contrary to orders (**par 5.18**).<sup>1366</sup> FWS-71, FWS-76, FWS-08 and D'evad Cosovic were beaten and placed in isolation cells as punishment for stealing food (**par 5.20**).<sup>1367</sup> Following the failed escape attempt by Ekrem Zekovic, his work colleagues, including FWS-73, FWS-110, FWS-144 and FWS-210, were beaten as punishment (**par 5.21**).<sup>1368</sup> Similarly, the Trial Chamber found above that Avdo Muratovic, Fahrudin Malkic and Sacic

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<sup>1359</sup> FWS-69 (T 4082). The Trial Chamber understands that "Alija" is a common Muslim name.

<sup>1360</sup> See pars 208-209, *supra*.

<sup>1361</sup> See par 213, *supra*.

<sup>1362</sup> See par 214, *supra*.

<sup>1363</sup> See par 215, *supra*.

<sup>1364</sup> See par 211, *supra*.

<sup>1365</sup> See pars 216-258, *supra*.

<sup>1366</sup> See pars 218-220, *supra*, stating that the beatings amounted to cruel treatment and inhumane acts.

<sup>1367</sup> See pars 223-225, *supra*.

<sup>1368</sup> See pars 226-236, *supra*.

were slapped as punishment for passing messages to one another contrary to orders, although this did not amount to torture, inhumane acts or cruel treatment (**par 5.19**).<sup>1369</sup> The Trial Chamber is not satisfied in respect of any of these acts of beating that the victims were discriminated against on grounds of race, religion or politics.

454. Other acts of torture or beatings took place during interrogations, often with the purpose of obtaining information or extracting confessions. The Trial Chamber has already found that FWS-03, Halim Dedovic and Hajro Sabanovic were tortured by military policeman at the KP Dom in order to obtain information or confessions (**par 5.23**). In the case of FWS-03, targeted because of his SDA affiliations,<sup>1370</sup> the Trial Chamber is satisfied that he was tortured on the basis of politics and that this amounts to persecution. There is no evidence, however, that Halim Dedovic (also **B 13**) or Hajro Sabanovic were SDA supporters. The Trial Chamber is not satisfied that it is sufficient of itself that a detainee was merely asked about something political in order to establish persecution on political grounds.<sup>1371</sup> Therefore the Chamber is not satisfied that either of these men were tortured on any listed discriminatory ground.<sup>1372</sup>

455. The Trial Chamber has already found that Nurko Nisic, Zulfo Veiz and Salem Bico were all severely beaten by guards of the KP Dom or policemen in June or July 1992 (**par 5.27**).<sup>1373</sup> The Trial Chamber is not satisfied that any of these three detainees were tortured on any of the listed grounds. All three men appear to have been policemen prior to the conflict,<sup>1374</sup> and two of them (Nisic and Veiz) were questioned about weapons or military activities.<sup>1375</sup> There is some evidence that former colleagues selected them for beatings,<sup>1376</sup> and that Nisic was beaten during questioning about what happened to a Serb

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<sup>1369</sup> See pars 221-222, *supra*.

<sup>1370</sup> See pars 239-242, *supra*. FWS-03 was questioned whether he was an SDA activist. When he denied this, stating that he was merely a party member, the guards accused him of lying and beat him, later calling on Halim Dedovic to identify FWS-03 as an SDA activist; FWS-03 (T 2237).

<sup>1371</sup> See par 432, *supra*, requiring that the act of persecution be discriminatory in fact.

<sup>1372</sup> See par 445, *supra*.

<sup>1373</sup> See pars 249-253, *supra*.

<sup>1374</sup> Concerning Nurko Nisic, see FWS-111 (T 1238); FWS-54 (T 767); FWS-85 (T645); FWS-119 (T 1953). Some witnesses also testified that Nisic had a job connected with the municipal authorities: FWS-215 (T 889); FWS-71 (T 2830); FWS-250 (T 5042); FWS-65 (T516). Concerning Zulfo Veiz, see FWS-66 (T 1097-1098); FWS-86 (T 1518); FWS-113 (Dzevad Lojo) (T 2581); FWS-71 (T 2862); FWS-73 (T 3275); Dr Amir Berberkic (T 3810); FWS-69 (T 4123). Concerning Salem Bico, see FWS-54 (T 769); FWS-71 (T 2864); FWS-73 (T 3269); FWS-69 (T 4122); D'evad S Lojo (T 2583); Slobodan Jovancevic (T 6172).

<sup>1375</sup> For Nurko Nisic: see par 250, *supra*. For Zulfo Veiz: see par 251, *supra*.

<sup>1376</sup> For Nurko Nisic: FWS-119 (T 1953). For Zulfo Veiz: FWS-182 (T 1616).

soldier named or nicknamed "Bota".<sup>1377</sup> There is no satisfactory evidence with respect to the reasons why Salem Bico (also **B 5**) was selected to be beaten.

456. On an unknown date in the summer of 1992, Salko Mand' o (aka Kelta) was mistaken for another detainee and tortured by guards of the KP Dom (**par 5.28, B 36**).<sup>1378</sup> The Trial Chamber is not satisfied that this act of torture amounts to persecution. The intended victim was Salko's brother Fuad,<sup>1379</sup> an SDA member who had protected SDA leaders in Donje Polje.<sup>1380</sup> There is no evidence that Salko Mand' o was an SDA supporter and, therefore, no safe basis which establishes that this act was in fact discriminatory against Salko Mand' o on the ground of politics.

457. Vahida D' emal, Enes Uzunovic, Aziz Šahinovic and Elvedin Cedic were beaten and kept in solitary confinement on at least two occasions (**par 5.29**).<sup>1381</sup> There is no evidence that the treatment of these detainees was carried out on any discriminatory ground, and therefore it does not amount to persecution. Enes Uzunovic was president of the Foca youth (a youth activist body) before the war,<sup>1382</sup> and then joined the SDA,<sup>1383</sup> but there is no evidence that he was beaten on these grounds. There is some evidence that Aziz Šahinovic was tortured for information about DM 36,000 which had gone missing from the bank where he worked.<sup>1384</sup> One of the Defence witnesses asserted that Šahinovic was a Muslim soldier.<sup>1385</sup> D' emal Vahida was a policeman.<sup>1386</sup> There is nothing in the evidence which establishes any of the requisite discriminatory grounds.

458. The Trial Chamber found that D`emo Balic was repeatedly and severely beaten and mistreated while being interrogated about SDA membership and Muslims who might have

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<sup>1377</sup> See par 250, *supra*; FWS-250 heard a guard yell "Get up Nurko, this is no way to defend Bosnia" (T 5049). Without some greater detail, the Chamber is not satisfied that this can be said to establish beyond reasonable doubt an intent to discriminate on political grounds, because it is reasonably open to an innocent interpretation as a jocular but inappropriate remark.

<sup>1378</sup> See par 254-255, *supra*.

<sup>1379</sup> FWS-138 (T 2080); FWS-142 (T 1830); FWS-66 (T 1104).

<sup>1380</sup> FWS-66 (T 1104).

<sup>1381</sup> See pars 256-258, *supra*.

<sup>1382</sup> FWS-86 (T 1514); FWS-66 (T 1109); FWS-215 (T 888).

<sup>1383</sup> FWS-86 (T 1514).

<sup>1384</sup> FWS-71 (T 2826); Dr Amir Berberkic (T 3925).

<sup>1385</sup> Slobodan Jovancevic (T 5598).

<sup>1386</sup> FWS-66 (T 1110); FWS-111 (T 1258); FWS-139 (T 367); FWS-71 (T 2866); FWS-73 (T 3259); FWS-58 (T 2704); FWS-137 (T 4758).

weapons (**B 4**).<sup>1387</sup> The Chamber is not satisfied that these beatings did in fact discriminate on the ground of politics or any other listed ground. There is some evidence that Balic was forced to sign a statement that he had established some kind of “units” and that his brother was the principal of the military school in Vranica, and that this is why he was beaten.<sup>1388</sup> The evidence is not sufficiently clear, however, to allow the Chamber to establish whether D`emo Balic was in fact an SDA supporter.

459. The Trial Chamber has already found that Mehmed Sofradžija was kept in an isolation cell for seven days and subjected to severe beatings (**B 52**).<sup>1389</sup> It has not been established that these beatings amounted to persecution. While there is evidence that he may have been selected for this treatment because his brother was in the military,<sup>1390</sup> no evidence was put before the Chamber which persuades it that Mehmed Sofradžija was beaten on any of the listed discriminatory grounds.

460. On arrival at the KP Dom in January 1992, FWS-159 was locked in an isolation cell for about three months, during which time he was brutally beaten by Serb soldiers and KP Dom guards on at least ten occasions (**B 57**).<sup>1391</sup> The Trial Chamber is not satisfied that these beatings amounted to persecution. During the beatings, FWS-159 was interrogated about military activity. The Trial Chamber concludes that, as FWS-159 was a soldier, it was reasonably possible that, as he should have some knowledge about military activity, it was on this ground that he was beaten, and not on one of the discriminatory grounds.

461. No evidence was put before the court with regard to the reasons behind the beatings of Emir Frašto (**B 21**). With respect to Ramo D`endušić (**B 20**), there was evidence that he worked prior to the conflict in the Secretariat for National Defence.<sup>1392</sup> Following an interrogation, he told one witness that he thought that he probably would not survive, as the interrogators knew quite a few things about him.<sup>1393</sup> The Trial Chamber concludes that it was a reasonable possibility that he was beaten as a result of his knowledge about military activities and, in those circumstances, it is not satisfied beyond reasonable doubt that he was

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<sup>1387</sup> See par 262 and Ex P 334a, *supra*.

<sup>1388</sup> Ekrem Zekovic (T 3474, 3648).

<sup>1389</sup> See par 300, *supra*.

<sup>1390</sup> FWS-73 (T 3282); Ekrem Zekovic (T 3524).

<sup>1391</sup> See par 305, *supra*.

<sup>1392</sup> FWS-66 (T 1107); FWS-215 (T 904-905); FWS-138 (T 2076); D`evad S Lojo (T 2582); FWS-71 (T 2884); Ekrem Zekovic (T 3495).

<sup>1393</sup> Dr Amir Berberkic (T 3809).

discriminated against on the basis of any of the listed grounds. There is therefore no need to consider whether any of these acts were of sufficient gravity as to amount to persecution.

462. The Trial Chamber has already found that several detainees were taken out of their rooms to the administration building where they were beaten by soldiers and guards of the KP Dom, after which they did not return to their rooms.<sup>1394</sup> The Trial Chamber is not satisfied that in any of these cases the beatings took place on one of the listed discriminatory grounds. With respect to the beatings carried out in this manner, no evidence was adduced to show the reasons for which Kemo Dželilovic (**B 19**),<sup>1395</sup> Nail Hodžić (**B 28**), Halim Konjo (**B 33**), Husein Rikalo (**B 46**), Mithat and Zaim Rikalo (**B 48**), or Munib Veiz (**B 59**) were selected for this treatment. Adnan Granov (**B 22**) was accused by the interrogators of having been in possession of a radio transmitter,<sup>1396</sup> as well as having travelled abroad before the war in order to obtain weapons, allegedly in Germany.<sup>1397</sup> Mustafa Kuloglija (**B 34**) told a fellow detainee that he had a fight with a Serb before the war and suspected that revenge was the reason he was beaten so much.<sup>1398</sup> The Trial Chamber concludes that it was a reasonable possibility that Granov was beaten as punishment for having allegedly been involved in military activities, while Kuloglija was beaten for revenge. In those circumstances, it is not satisfied beyond reasonable doubt that the necessary discriminatory intent was present.

463. The Trial Chamber has already found that Emir Mand' o was beaten after being mistaken for his brother Fuad, an SDA supporter, like the incident involving Salko Mand' o (**B 37**).<sup>1399</sup> There is no evidence that Emir Mand' o was also an SDA supporter, and therefore no safe basis which establishes that Emir Mand' o was in fact discriminated against on political grounds.

464. The Chamber is not satisfied that the beatings of any of the following individuals were carried out on any of the listed discriminatory grounds. Remzija Delic (**B 14**), Ned' ad Delic (**B 15**) and Hasan D' ano (**B 18**) were all beaten by former schoolmates or neighbours.<sup>1400</sup> Juso D' amalija (**B 17**) was beaten because his son was a policeman in Foca

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<sup>1394</sup> See pars 274, 277-278, 290-293, 295, 298, 330-339, *supra*.

<sup>1395</sup> Listed as Kemal under C 7.

<sup>1396</sup> FWS-215 (T 905); Muhamed Lisica (T 4963).

<sup>1397</sup> Ekrem Zekovic (T 3501).

<sup>1398</sup> FWS-66 (T 1103); Ekrem Zekovic (T 3505).

<sup>1399</sup> See par 286, *supra*.

<sup>1400</sup> See pars 268-269, 272, *supra*. For Hasan D' ano, see also FWS-104 (T 2166).

before the war.<sup>1401</sup> Ibrahim Kafed' ic (**B 31**) told a witness that a relative of his had joined the Bosnian army and that this was the reason they beat him so badly.<sup>1402</sup> There is no evidence as to why Latif Hasanbegovic (**B 25**), Aziz Haskovic (**B 26**) and Halim Seljanci (**B 51**) (an Albanian originally from Kosovo)<sup>1403</sup> were taken out and beaten. Similarly, there is no evidence as to why Kemo Isanovic (**B 30**) was beaten.

465. In summary, the Trial Chamber is satisfied that the following acts of torture, inhumane acts or cruel treatment were carried out on discriminatory grounds: Indictment par 5.15 and 5.23 (FWS-03 only).

(d) Killing as persecution

466. The Prosecution charges "numerous killings of Muslim and other non-Serb male civilian detainees at KP Dom" as persecution.<sup>1404</sup> These killings are separately charged as murder (a crime against humanity pursuant to Article 5(a) and a violation of the laws or customs of war pursuant to Article 3 of the Statute).<sup>1405</sup> Those acts amounting to murder under Article 5 of the Statute are as such of sufficient gravity as to constitute persecution. The acts of murder under Article 3 have also been found to amount to murder under Article 5 and may therefore be considered to be of equal gravity. The Trial Chamber has already found that twenty-six non-Serbs listed in Schedule C of the Indictment were in fact murdered at the KP Dom.<sup>1406</sup>

467. For the reasons set out above in the previous section,<sup>1407</sup> the Trial Chamber is not satisfied that Hamid "Salem" Bico (**C 2**), Abdurahman Cankušic (**C 3**), Elvedin "Enko" Cedic (**C 5**), Kemal D'elilovic (**C 7**), Ramo D'endusic (**C 8**), Adil Granov (**C 9**), Halim Konjo (**C 13**), Mustafa Kuloglija (**C 15**), Fuad Mand' o (**C 16**), Nurko Nišic (**C 19**), Husein Rikalo (**C 21**), Mithat Rikalo (**C 22**), Zaim Rikalo (**C 23**), Enes Uzunovic (**C 26**), D' emal Vahida (**C 27**), Munib Veiz (**C 28**) or Zulfo Veiz (**C 29**) were selected to be killed on any of the listed discriminatory grounds.<sup>1408</sup>

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<sup>1401</sup> FWS-66 (T 1106); Dr Amir Berberkic (T 3812-3813) who heard it from Zaim Cedic.

<sup>1402</sup> Ekrem Zekovic (T 3517).

<sup>1403</sup> FWS-109 (T 2359); FWS-58 (T 2701); FWS-71 (T 2810).

<sup>1404</sup> Par 5.2(c) of the Indictment.

<sup>1405</sup> Counts 8 and 10 respectively.

<sup>1406</sup> See par 339, *supra*.

<sup>1407</sup> On torture, cruel treatment and inhumane acts as persecution.

<sup>1408</sup> See par 339, *supra*.

468. One of the detainees listed in Schedule C who was killed appears to have had political ties to the SDA. Adil Krajcin (C 14), a commercial director at the Miljevina mine,<sup>1409</sup> was identified by one witness as “some kind of party activist”.<sup>1410</sup> The Trial Chamber is not satisfied that this is sufficient basis on which to conclude that the killing was in fact discriminatory on political grounds.

469. Others appear to have been singled out because of direct or indirect connections to the military conflict. The Trial Chamber is not satisfied in any of these cases that the victims were subject to discrimination on any of the listed grounds. Mate Ivancic (C 11), a Croat nurse,<sup>1411</sup> told one witness that he was suspected of having been in Croatia and having killed Serbs there.<sup>1412</sup> Krunoslav Marinovic (C 17), a Croat television repair man,<sup>1413</sup> was also a correspondent for a Croat paper and may reasonably have been killed on this account.<sup>1414</sup> Hamid Ramovic (C 20) had a brother Abid who was a policeman and was the first victim of the conflict.<sup>1415</sup> Kemal Tulek (C 25), a former policeman in the KP Dom,<sup>1416</sup> was accused of having a weapon,<sup>1417</sup> and may have been singled out because his brother was with the Bosnian army.<sup>1418</sup> Insufficient evidence was adduced in order for the Trial Chamber to establish why Alija Altoka (C 1), Refik Cankusic (C 4), Esad Kiselica (C 12) or Ševal Šoro (C 24) were singled out.

470. Accordingly, the Trial Chamber is not satisfied that the Prosecution has established that any of the killings were carried out on discriminatory grounds.

(e) Forced labour as persecution

471. The Prosecution charges “the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom” as persecution.<sup>1419</sup> Although forced labour is not separately charged as such, it forms the basis of the charges of enslavement

<sup>1409</sup> FWS-111 (T 1255); FWS-182 (T 162); FWS-71 (T 2876).

<sup>1410</sup> FWS-69 (T 4120).

<sup>1411</sup> FWS-66 (T 1107); FWS-111 (T 1253); FWS-215 (T 905); FWS-139 (T 366); FWS-119 (T 1966); FWS-54 (T 767).

<sup>1412</sup> Ekrem Zekovic (T 3404).

<sup>1413</sup> FWS-66 (T 108); FWS-215 (T 908); FWS-85 (T 644); FWS-138 (T 2085); FWS-109 (T 2385, 2394).

<sup>1414</sup> FWS-03 (T 2251-2254); D'evad S Lojo (T 2579).

<sup>1415</sup> FWS-66 (T 1108).

<sup>1416</sup> FWS-65 (T 494); FWS-66 (T 1109); FWS-215 (T 911); FWS-139 (T 367); FWS-119 (T 1957); FWS-138 (T 2075).

<sup>1417</sup> FWS-144 (T 2307).

<sup>1418</sup> Ekrem Zekovic (T 3508).

<sup>1419</sup> Par 5.2(d) of the Indictment.

and slavery and has already been considered by the Trial Chamber in that context. In two instances, the Trial Chamber was satisfied that there was forced labour (the mine clearing by FWS-109 and Goran Kukavica).<sup>1420</sup> However, no criminal responsibility for that forced labour was attributed to the Accused. With respect to the other alleged incidents, no instances of forced labour were established. As a result, the Trial Chamber is not satisfied that there are any instances of forced labour which could support a charge of persecution.

(f) Deportation and expulsion as persecution

472. The Prosecution charges “the deportation and expulsion of Muslim and other non-Serb civilians detained in the KP Dom detention facility to Montenegro and other places which are unknown” as persecution.<sup>1421</sup> As these acts are not separately charged elsewhere in the Indictment, the Trial Chamber must now consider them.

473. Deportation is clearly prohibited under international humanitarian law.<sup>1422</sup> While some instruments prohibit deportation as a war crime,<sup>1423</sup> it is also prohibited specifically as a crime against humanity,<sup>1424</sup> and it is enumerated as such under the Statute.<sup>1425</sup> Deportation was originally prohibited as a crime against humanity in order to extend the jurisdiction of the Second World War tribunals to encompass acts committed against persons sharing the same nationality as the principal offenders.<sup>1426</sup> The content of the

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<sup>1420</sup> See pars 410-411, *supra*.

<sup>1421</sup> Par 5.2(f) of the Indictment.

<sup>1422</sup> *Krstic* Trial Judgment, par 522; Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); pp 48-49: “[T]he central elements of Article 49(1) such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories stated in Article 49(1) are declaratory of customary law even when the object and setting of the deportations differ from those underlying German World War II practices which led to the Rule set forth in Article 49.”

<sup>1423</sup> Article 6(b) of the Nuremburg Charter; Article II (1)(b) of Control Council Law No 10; Articles 49 and 147 of Geneva Convention IV; Article 85(4)(a) of Additional Protocol I; Article 20 of the International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1996) (“ILC Draft Code 1996”); Article 8(2)(a)(vii) of the Statute of the International Criminal Court.

<sup>1424</sup> Article 6(c) of the Nuremburg Charter; Article II (1)(c) of Control Council Law No 10; Article 5(c) of the Tokyo Charter; Nuremburg Judgment in which the defendant Baldur Von Schirach was convicted of deportation as a crime against humanity (pp 317-319); In Article 11 of the International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1954); deportation is an offence against the peace and security of mankind, while it is categorised specifically as a crime against humanity in Article 18 of the ILC Draft Code 1996; Article 7(1)(d) of the Statute of the International Criminal Court.

<sup>1425</sup> Article 5(d).

<sup>1426</sup> Article 6(c) of the Nuremburg Charter prohibits the deportation of “any civilian population” (emphasis added); see also Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) p 179.

underlying offence, however, does not differ whether perpetrated as a war crime or as a crime against humanity.<sup>1427</sup>

474. Deportation may be defined as the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.<sup>1428</sup> Deportation requires the displacement of persons across a national border, to be distinguished from forcible transfer which may take place within national boundaries.<sup>1429</sup> This Trial Chamber does not accept as persuasive the only previous decision of this Tribunal which states to the contrary, and it notes that this decision did not follow fully litigated trial proceedings.<sup>1430</sup> The Trial Chamber thus rejects the

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<sup>1427</sup> Acts of deportation “can be classified as both war crimes and ‘crimes against humanity’ depending on the location and nationality of the deportees”: Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), p 315.

<sup>1428</sup> *Blaskić* Trial Judgment, par 234.

<sup>1429</sup> *Krstić* Trial Judgment, par 531; Article 49 of the Fourth Geneva Convention refers to “deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country ...” and Article 70 refers to a prohibition on the deportation of nationals of the occupying power “from the occupied territory”. In the Nuremberg Judgment, it was stated that “not only in defiance of well-established rules of international law, but in complete disregard of the elementary dictates of humanity ... [w]hole populations were deported to Germany for the purposes of slave labour upon defense works, armament production and similar tasks connected with the war effort” (p 227) and Von Schirach’s conviction for deportation as a crime against humanity was for his part in the deportation of Jews from Vienna to the ghettos of the East (pp 317-319); *United States of America v Erhard Milch*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (1952) Vol 2, Concurring Opinion by Judge Phillips, p 865; “International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime”; *United States of America v Alfred Krupp et al*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (1952) Vol 9, part 2, pp 1432-1433; *United States of America v Friedrich Flick et al*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (1952) Vol 6, p 681, ILC Draft Code 1996, Article 18, commentary (13): “Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same state”; Henckaerts, *Deportation and Transfer of Civilians in Time of War*, *Vanderbilt Journal of Transnational Law*, Vol 26, 1993, p 472 (with respect to Article 49 of Geneva Convention IV); “Presumably, a transfer is a relocation within the occupied territory, and a deportation is a relocation outside the occupied territory”; Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) p 312; Hall, Crimes against humanity – para. 1(d) in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), p 136, with respect to the two terms used in Article 7 of the Rome Statute: “Unfortunately, the Statute does not expressly distinguish between deportation and transfer. However, given the common distinction between *deportation* as forcing persons to cross a national frontier and *transfer* as forcing them to move from one part of the country to another without crossing a national frontier, and given the basic presumption that no words in a treaty should be seen as surplus, it is likely that the common distinction was intended”.

<sup>1430</sup> In the *Nikolic* Rule 61 Decision, it is stated that the transfer of detainees from one camp to another within Bosnia and Herzegovina “could be characterised as deportation and, accordingly, come under Article 5 of the Statute”, par 23. No authority is cited for this proposition, and there was no examination of the authorities referred to in the previous footnote.

Prosecution submission that the mere fact that the detainees were taken *out* of the KP Dom, wherever else they may have been transferred to, constituted deportation.<sup>1431</sup>

475. Deportation is illegal only where it is forced.<sup>1432</sup> “Forced” is not to be interpreted in a restrictive manner, such as being limited to physical force. It may include the “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”.<sup>1433</sup> The essential element is that the displacement be involuntary in nature,<sup>1434</sup> where the relevant persons had no real choice.<sup>1435</sup> Forced displacement is only illegal when it occurs without grounds permitted by international law.<sup>1436</sup>

476. The Prosecution has further alleged the act of expulsion as persecution. No effort has been made to define the act of expulsion or to differentiate it from the act of deportation. While there is no clear definition of expulsion within the context of international criminal law, the concept does form part of the definition of deportation, which suggests that it requires displacement across national boundaries.<sup>1437</sup> Similarly, definitions advanced in the context of international human rights law require displacement

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<sup>1431</sup> Prosecution Pre-Trial Brief, par 349.

<sup>1432</sup> Article 49, Geneva Convention IV; *see also* *Krstic* Trial Judgment, par 528.

<sup>1433</sup> *Krstic* Trial Judgment, par 529; *see also* Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p 11. The Trial Chamber accepts the argument submitted in the Prosecution Pre-Trial Brief, par 346.

<sup>1434</sup> The Commentary to the Geneva Convention IV, Article 49, states that the Article was drafted in such a way as to authorise voluntary transfers while prohibiting forcible transfers, thus implying that any forcible transfer must be involuntary.

<sup>1435</sup> In this sense it is similar to the crime of rape, where apparent consent induced by force or threat of force is not considered to be real consent: *Kunarac* Trial Judgment, par 453.

<sup>1436</sup> The total or partial evacuation of the population is allowed “if the security of the population or imperative military reasons so demand”: (*Krstic* Trial Judgment, par 524, and Article 49 of Geneva Convention IV; *see also* Article 17 of Additional Protocol II, referring to forced displacement within national boundaries). This permission to evacuate is subject to certain qualifications, including *inter alia* that evacuees shall be transferred back to their homes as soon as hostilities in the area in question have ceased (Article 49, Geneva Convention IV).

<sup>1437</sup> This view is supported in Jennings and Watts (eds), *Oppenheim’s International Law* (1996) p 940, fn 1: “Expulsion’ is not a technical term, and is often used interchangeably with ‘deportation’: both involve the removal of a person from a state by its unilateral act”. While this definition was advanced within the context of international law during peace time, it would appear that it applies equally during armed conflict. *See* examples of States expelling enemy subjects in Lauterpacht (ed), *International Law and Treaties by Oppenheim* (1952) p 307, fn 7. In the *Kupreskic Others* Trial Judgment, the Trial Chamber referred to the organised expulsion of Bosnian Muslim civilians from Ahmici, which did not appear to entail any movement across a national border: par 629. However, no basis was given for this use of the term expulsion and it was not considered in any detail. This Trial Chamber accordingly does not find this interpretation of expulsion to be persuasive.

across national boundaries.<sup>1438</sup> The Trial Chamber considers it to be well established that forcible displacements of people within national boundaries are covered by the concept of forcible transfer.<sup>1439</sup> The Prosecution has not pleaded forcible transfers at all in the Indictment and accordingly, the Trial Chamber cannot consider that offence as founding a charge of persecution. For the purposes of this case, the Trial Chamber accepts that, insofar as it requires the forcible displacement of persons across a national border, expulsion may be treated in the same way as deportation. As the act of expulsion is not enumerated in the Statute, however, it would need (if proved) to meet the test of sufficient gravity in order to constitute persecution.

477. The Trial Chamber is satisfied that the majority of incidents alleged by the Prosecution to constitute deportation and expulsion did take place.<sup>1440</sup> These incidents may be divided into three types: transfer of detainees to other prison camps, so-called exchanges and so-called work duty.

478. The Trial Chamber is satisfied that groups of detainees were transferred from the KP Dom to other camps in Bosnia and Herzegovina, including the camps at Kula,<sup>1441</sup>

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<sup>1438</sup> See for example Council of Europe, Explanatory Report on Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms 8 (1985) (defining expulsion as “any measure compelling the departure of an alien from the territory”); *Becker v Denmark*, European Commission of Human Rights, Decision as to Admissibility of Application 7011/75, 19 YB EUR CONV on HR (1976) (defining a prohibited collective expulsion of aliens as “any measure of the competent authority compelling aliens as a group to leave the country except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”); Henckaerts, *Mass Expulsion in Modern International Law and Practice* (1995), p 109 (defining expulsion as “an act, or a failure to act, by an authority of a State with the intention and with the effect of securing the removal of a person or persons against their will from the territory of that State”). The Trial Chamber is mindful of the specificity of international humanitarian law (*Kunarac* Trial Judgment, pars 470-471) and the structural differences that exist between this body of law and human rights law, in particular the distinct role and function attributed to states and individuals in each regime (*Kunarac* Trial Judgment, pars 470-496). It is not precluded from having recourse to human rights law in respect of those aspects which are common to both regimes. In the instant case, the Trial Chamber regards the general definitions of expulsion expressed above as consistent with the concept of expulsion as used in the definition of deportation under international criminal law, insofar as they require that displacement take place across a national border.

<sup>1439</sup> *Krstic* Trial Judgment, pars 531-532; Commentary on the ILC Draft Code, p 122.

<sup>1440</sup> Paragraph 5.2 of the Indictment. These incidents are more extensively described in Annex IV (Exchanges) to the Prosecution Final Trial Brief.

<sup>1441</sup> Ahmet Hadžimusic (T 1974, 1983, 2009, 2014); Rasim Taranin (T 1700, 1737, 1740); FWS-139 (T 412); FWS-111 (T 1283); FWS-162 (T 1409); FWS-08 (T 1794); FWS-138 (T 2097); FWS-144 (T 2323); FWS-109 (T 2409); FWS-71 (T 2894, 2916); FWS-146 (T 3083); FWS-73 (T 3291, 3318, 3418); Dr Amir Berberkic (T 3970); FWS-249 (Ex P 161 T 4488); FWS-89 (T 4710); Muhamed Lisica (T 4987); Lazar Stojanovic (T 5711).

Kalinovik<sup>1442</sup> and Rudo.<sup>1443</sup> However, as the detainees were not displaced across a national border, the Trial Chamber is not satisfied that the detainees were deported or expelled.

479. The Trial Chamber is satisfied that detainees were taken out of the KP Dom on exchanges during the period relevant to the Indictment.<sup>1444</sup> These exchanges generally followed a similar pattern. A KP Dom guard or policeman would come from the gate to the detainees' rooms to call out the detainees for exchanges,<sup>1445</sup> according to a list provided by the prison administration.<sup>1446</sup> Those selected would then be taken out of the KP Dom. On some occasions they would be beaten first, by KP Dom guards or military personnel.<sup>1447</sup> While some of these exchanges were bona-fide, allowing detainees to reach territory controlled by Bosnian Muslims, many detainees taken out for exchange simply disappeared.<sup>1448</sup> Witnesses confirmed the fact that the "exchanged" detainees had disappeared after they were themselves released or exchanged, either through contact with the families of those that had disappeared,<sup>1449</sup> through other former detainees years later,<sup>1450</sup> or through attempts to get information from the ICRC about relatives.<sup>1451</sup>

480. In many of the incidents alleged by the Prosecution, the detainees taken out of the KP Dom were never heard from again. With respect to these incidents, the Chamber is not able to determine that the detainees were in fact displaced across a national border, and is therefore not satisfied that they were in fact deported or expelled. These include the so-

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<sup>1442</sup> D' evad Lojo (T 601); FWS-182 (T 1648); FWS-104 (T 2194); FWS-144 (T 2296); Dr Amir Berberkic (T 3970); FWS-69 (T 4148); FWS-137 (T 4750).

<sup>1443</sup> FWS-66 (T 1133); FWS-08 (T 1767); Dževad S Lojo (T 2591); FWS-146 (T 3079-3080); Lazar Divljan (T 6009).

<sup>1444</sup> In addition to testimony from Prosecution witnesses, witnesses for the Defence acknowledged the existence of exchanges: Lazar Stojanovic (T 5721); Radomir Dolas (T 5823); Risto Ivanovic (T 6136); Zoran Mijovic (T 6284-6285); Miloslav Krsmanovic (T 6698).

<sup>1445</sup> Safet Avdic (Ex P 123, p 522); Ahmet Hadžimusic (T 1970); FWS-159 (T 2472-2473); FWS-146 (T 3078); Ekrem Zekovic (T 3490); RJ (T 3899); FWS-69 (T 4095); FWS-172 (T 4574); FWS-137 (T 4746, 4750); FWS-215 (T 899); FWS-65 (T 522); FWS-119 (T 1967). Witnesses for the Defence witnesses state that it was military police that would come for the detainees: see Lazar Stojanovic (T 5721) and Radomir Dolas (T 5824), the latter talking of a "military truck with men in camouflage uniforms".

<sup>1446</sup> Radomir Dolas (T 5824, 5878) stated that the list was provided by Savo Todovic; FWS-111 (T 1260); FWS-215 (T 899); FWS-65 (T 522); FWS-119 (T 1967) not specifying who drew up the list.

<sup>1447</sup> Ekrem Zekovic (T 3489, 3685); FWS-69 (T 4076).

<sup>1448</sup> FWS-54 (T 775); FWS-215 (T 899) saying that some returned and others did not: FWS-182 (T 1639); FWS-08 (T 1785-1790); Ahmet Hadžimusic (T 1970); FWS-104 (T 2216-2217); FWS-144 (T 2309-2311); FWS-109 (T 2377-2378); Dževad S Lojo (T 2589-2593); FWS-146 (T 3078); Ekrem Zekovic (T 3490); Dr Amir Berberkic (T 3816); RJ (T 3868, 3900); FWS-69 (T 4121, 4127, 4139); FWS-172 (T 4574, 4577, 4586-4588, 4616); Muhamed Lisica (T 4977); FWS-250 (T 5080); FWS-66 (T 1117); FWS-111 (T 1265); FWS-85 (T 662); FWS-139 (T 371); Rasim Taranin (T 1725).

<sup>1449</sup> Safet Avdic (Ex P 123, p 524); FWS-104 (T 2216-2217); FWS-159 (T 2472, 2507); Dževad S Lojo (T 2590-2594, 2659-2666); RJ (T 3868); FWS-139 (T 435); Muhamed Lisica (T 4977).

<sup>1450</sup> Dževad S Lojo (T 2590-2592); RJ (T 3868); FWS-08 (T 1789).

<sup>1451</sup> FWS-144 (T 2311); FWS-08 (T 1785-1788).

called exchanges of 15 or 19 August 1992 (15-20 men),<sup>1452</sup> summer 1992,<sup>1453</sup> 22 August 1992 (8 men),<sup>1454</sup> 25 August 1992 (around 18-25 men),<sup>1455</sup> 31 August – 2 September 1992 (around 71 men),<sup>1456</sup> 10 September 1992 (between 10-40 men),<sup>1457</sup> 12 September 1992 (50 men),<sup>1458</sup> sometime between 11 and 16 December 1992 (7 men),<sup>1459</sup> February or March 1993 (Dr Aziz Torlak),<sup>1460</sup> and 21 March 1993 (Šucrija Softic).<sup>1461</sup>

481. The Chamber is not satisfied that the incident referred to by the Prosecution concerning 34 men from Jelec<sup>1462</sup> took place at the KP Dom, and therefore does not consider the allegation further.<sup>1463</sup>

482. 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. The group was then divided in two with approximately 20 younger men being taken away, possibly to Goražde, and never seen again. The remaining group of 35 men, of which two witnesses in this case were part,<sup>1464</sup> was taken to be exchanged in Ro' aj in Montenegro.<sup>1465</sup>

483. The Chamber is satisfied that this group of 35 men was displaced across a national border to Montenegro. However, there is general evidence that detainees wanted to be exchanged, and that those selected for so-called exchanges freely exercised their choice to

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<sup>1452</sup> Dževad S Lojo (T 2592, 2593); Ex P 215, pp 2, 5-6.

<sup>1453</sup> RJ (T 3868).

<sup>1454</sup> Ex P 215, p 2.

<sup>1455</sup> Ex P 215, pp 3, 6; RJ (T 3899-3900); Dževad S Lojo (T 2597); FWS-172 (T 4574).

<sup>1456</sup> Ex P 215 at pp 3, 6 (date listed as August 29); FWS-69 (T 4132-4139).

<sup>1457</sup> FWS-08 (T 1783-1788) estimating around 18 men; Ahmet Hadžimusic (T 1969-1970) estimating ten men; Dževad S Lojo (T 2597-2598, 2661-2663).

<sup>1458</sup> Ahmet Hadžimusic (T 1970, 2009); Dževad S Lojo (T 2597-2598, 2661-2663).

<sup>1459</sup> Dževad S Lojo (T 2557, 2601) putting the date around 16 December, Ex P 215 at p 7; Nezir Cengic (T 4694-4697) putting the number at around 13 and the date at December 15; Ahmet Hadžimusic (T 1974) referring to eight men taken on December 12,

<sup>1460</sup> FWS-146 (T 3078); Amor Masovic (T 4352-4353); FWS-66 (T 1120); FWS-139 (T 372) saying that he was taken away during the summer of 1993; FWS-138 (T 2075) unable to give a date; Risto Ivanovic (T 6192) no date.

<sup>1461</sup> Ex P 215, pp 3, 7.

<sup>1462</sup> In Annex IV to the Prosecution Final Trial Brief. The incident was not specifically pleaded in the Indictment.

<sup>1463</sup> FWS-144 (T 2309-2311).

<sup>1464</sup> FWS-54 and FWS-172.

<sup>1465</sup> FWS-54 (T 783-785, 811-812); FWS-66 (T 1119-1120, 1150); FWS-86 (T 1535-1542); FWS-08 (T 1807); Dr Amir Berberkic (T 3814-3816); RJ (T 3904, 3907); FWS-69 (T 4095-4096); FWS-172 (T 4575-4578); FWS-109 (T 2425); FWS-119 (T 1968-1969).

go and did not have to be forced.<sup>1466</sup> The Trial Chamber is not satisfied that the displacement of these individuals from Foca necessarily involved in the choice they made was involuntary. In addition, there is no direct evidence showing that the displacement was committed on one of the listed discriminatory grounds.<sup>1467</sup>

484. The Trial Chamber is satisfied that, around 17 or 18 September 1992, between 35-60<sup>1468</sup> detainees were taken out of the KP Dom in two groups, having been told that they were going to pick plums.<sup>1469</sup> It has not been established beyond reasonable doubt that these detainees were displaced across a national border, and the Trial Chamber is therefore not satisfied that their removal from the KP Dom amounted to deportation or expulsion. Detainees were first asked to volunteer for plum-picking duty,<sup>1470</sup> but they were in fact eventually selected by KP Dom guards according to a list.<sup>1471</sup> Those selected for the job were told by the guards not to take their belongings.<sup>1472</sup> Detainees who were taken away for plum picking did not return to the KP Dom and were never seen again.<sup>1473</sup> The bodies of two of those detainees, Murat Crneta<sup>1474</sup> and Halid Konjo,<sup>1475</sup> were later discovered close to the Goražde frontline near Previla in Bosnia Herzegovina in a mass grave.<sup>1476</sup>

485. Similarly, the Trial Chamber is not satisfied that detainees escorted by Pero Elez out of the KP Dom in the summer of 1992, possibly to work in the Miljevina mine, were

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<sup>1466</sup> FWS-54 (T 774); FWS-65 (T 523); Rasim Taranin (T 1725); FWS-109 (T 2399); FWS-249 (T 4483); RJ (T 3868).

<sup>1467</sup> Neither was any reason presented by one of those deported as to why the group of 35 were deported while 20 others were separated from the original group: see FWS-54 (T 785).

<sup>1468</sup> FWS-139 (T 371) saying between 50-60; Ahmet Hadžimusic (T 1972-1973) saying around 35 men; FWS-08 (T 1791) saying about 36; FWS-104 (T 2185) around 35-40.

<sup>1469</sup> FWS-104 (T 2209, 2184-2185); Ahmet Hadžimusic (T 1970-1974); FWS-139 (T 371); Safet Avdic (Ex P 123, pp 524-525); FWS-182 (T1639); FWS-08 (T 1790-1792); FWS-109 (T2401); FWS-182 (T 1639); Ekrem Zekovic (T 3495-3496, 3513); FWS-69 (T 4085-4086); FWS-137 (T 4770, 4810) stating that it took place in August 1992; Muhamed Lisica (T 4978); FWS-250 (T 5080); Risto Ivanovic (T 6185).  
<sup>1470</sup> FWS-08 (T 1791); FWS-138 (T 2094).

<sup>1471</sup> FWS-138 (T 2094); Ahmet Hadžimusic (T 1971-1975); FWS-69 (T 4085-4086); Ekrem Zekovic (T 3495); FWS-08 (T 1791); FWS-08 (T 1807); FWS-139 (T 371); Safet Avdic (Ex P 123, p 524); FWS-86 (T 1531).

<sup>1472</sup> FWS-104 (T 2210); FWS-08 (T 1792); FWS-69 (T 4085-4086); FWS-137 (T 4770); Ahmet Hadžimusic (T 1973).

<sup>1473</sup> Safet Avdic (Ex P 123, p 525); FWS-182 (T 1628); FWS-109 (T 2402); Dževad S Lojo (T 2584, 2598-2599); FWS-137 (T 4770); FWS-250 (T 5080); FWS-139 (T 371); FWS-08 (T 1792); FWS-104 (T 2187).  
<sup>1474</sup> Ekrem Zekovic (T 3497-3498).

<sup>1475</sup> FWS-182 (T 1628); Ekrem Zekovic (T 3497-3498, 3513).

<sup>1476</sup> Ex P 55/2, Section 3 (relating to Halid Konjo and the discovery of his body in a mass grave) and Section 6 relating to Murat Crneta and the discovery of his body in a mass grave); Amor Masovic (T 4235); Ex P 240/1 (map); Ex P 55/1; Jussi Kemppainen gave evidence that Halid Konjo's body was discovered during an exhumation in Podstolac-Ustikolina on 5 November 1997 (T 1167-1168, 1170-1171); Amor Masovic gave evidence of the Commission locating the bodies of Halid Konjo and Murat Crneta (T 4233-4237).

deported or expelled. They were never seen again,<sup>1477</sup> and as a result it has not been established that they were displaced across a national border.

### 3. The responsibility of the Accused

486. The Trial Chamber has considered the offences of imprisonment, inhumane conditions, torture, inhumane acts, cruel treatment, murder, forced labour, deportation and expulsion as acts of persecution. It has established that the imprisonment of the non-Serb detainees in the KP Dom, the inhumane conditions in which they were kept, the beating of Džemo Balic and the torture of FWS-03 were committed with discriminatory intent and amount to persecution.<sup>1478</sup> It is with respect to these instances only that the Trial Chamber now considers the issue of the Accused's responsibility. That responsibility is alleged to arise on different bases in relation to each of the underlying crimes established.

#### (a) Joint Criminal Enterprise

487. The Prosecution alleges that the Accused incurred criminal responsibility under Article 7(1) as a participant in a joint criminal enterprise with guards and soldiers to persecute the Muslim and other male non-Serb civilian detainees. To attach criminal responsibility to the Accused for the joint criminal enterprise of persecution, the Prosecution must prove that there was an agreement between himself and the other participants to persecute the Muslim and other non-Serb civilian male detainees by way of the underlying crimes found to have been committed, and that the principal offenders and the Accused shared the intent required for each of the underlying crimes and the intent to discriminate in their commission. The Prosecution alleges that the Accused was affiliated with the SDS and supported Serb nationalistic policies, which (it is alleged) provides direct evidence of his conscious intention to discriminate. The Trial Chamber is not satisfied that the evidence is sufficient to establish these allegations.<sup>1479</sup> Moreover, the Trial Chamber

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<sup>1477</sup> FWS-249 (Ex P 161, pp 4411, 4414, 4472-4473, 4477-4478).

<sup>1478</sup> See pars 438, 439-443, 454, 470, *supra*.

<sup>1479</sup> The Prosecution relied on the evidence of witnesses who claimed to have observed the Accused at SDS rallies and in the company of high level SDS members prior to the outbreak of the conflict: FWS-138 (T 2042-3); Žarko Vukovic (T 6803); FWS-139 (T 379); FWS-71 (T 2902); FWS-139 (T 378); FWS-85 (T 629); Ekrem Zekovic (T 3699). The Prosecution also alleged that the Accused was familiar with the members of the Crisis Staff and, although the Accused denied knowing the names of the Crisis staff members prior to hearing them in Court, he did show familiarity with their names and their functions when cross-examined: The Accused (T 7770-7774), Ex D 73. The Prosecution further asserted that only a person with nationalistic views could be entrusted with the position of warden of the KP Dom during the conflict, and this was supported by the views of the witnesses: FWS-54 (T 779-780); FWS-111 (T 1271); RJ (T 3834-3835).

has already determined that the Accused did not share the intent to commit any of the underlying crimes charged as persecution pursuant to any joint criminal enterprise.<sup>1480</sup> Accordingly, the crime of persecution cannot be established on the basis of any of these underlying crimes as part of a joint criminal enterprise in which the Accused was involved.

(b) Aiding and Abetting

488. The Prosecution alleges that the Accused also incurred individual criminal responsibility under Article 7(1) of the Statute by aiding and abetting the persecution of the non-Serb detainees, by his participation in the commission of the underlying crimes. To find the Accused guilty of aiding and abetting the persecution of the non-Serb detainees, the Prosecution must establish that the Accused had knowledge that the principal offenders intended to commit the underlying crimes and that by their acts they intended to discriminate against the non-Serb detainees, and that, with that knowledge, he made a substantial contribution to the commission of the discriminatory acts by the principal offenders.

489. *Imprisonment.* The Trial Chamber has already found that the Accused voluntarily accepted the position of warden at the KP Dom in full awareness that Muslim civilians were being illegally detained at the KP Dom because of their ethnicity, and it determined that the Accused incurred criminal responsibility for aiding and abetting that illegal imprisonment pursuant to Article 7(1).<sup>1481</sup> The Trial Chamber is also satisfied that, with respect to the

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The Prosecution also relied upon the evidence of FWS-86 that, from the end of 1991 until the beginning of 1992, anti-Muslim songs were sung in the Accused's son's café which was attached to the Accused's house: (T 1493, 1495, 1554). The Accused denied attending any SDS rallies and denied having any involvement at all with the SDS: (T 7583, T 7746). A certificate issued by the Srebrenica SDS Municipal Board on 20 October 1998, stating that the Accused has never been a member of the SDS of Republika Srpska, was produced in support of this denial (Ex D 76/1). The Trial Chamber notes that this certificate is of recent origin and, in the absence of any evidence of the basis upon which it was issued, places no weight upon it. However, the Trial Chamber is satisfied that there was a certain amount of evidence adduced by both the Defence and Prosecution showing that the Accused treated the non-Serb population in a favourable manner, and that his only political affiliation was with the Communist party: Witness A (T 5524-5528); Slobodan Jovanevic (T 5578-5580); Milomir Mihajlovic (T 5624-5625); Vitomir Drakul (T 5674-5675); Divljan Lazar (T 6012-6013); Drago Vladicic (T 6308-6309); Miladin Matovic (T 6486); Miloslav Krsmanovic (T 6705); Slavica Krnojelac (T 7503-7504, 7530); Zarko Vukovic (T 6741-6748); Arnseije Krnojelac (T 6934-6937); Svetozar Bogdanovic (T 7064); Witness C (T 7132-7142); Witness D (T 7147-7150); Desanka Bogdanovic (T 7014-7021); Svetozar Bogdanovic (T 7062-7066); Miloslav Krsmanovic (T 6705); Desanka Bogdanovic (T 7007); FWS-111 (T 1269-1270); FWS-144 (T 1468-1469, 2331-2332). The Trial Chamber is therefore not satisfied that the Accused consciously intended to discriminate.

<sup>1480</sup> *Imprisonment*, see par 127, *supra*; *Living conditions constituting inhumane acts*, see par 170, *supra*; *Beatings*, see pars 313, 346, *supra*; *Torture*, see pars 313-314, *supra*.

<sup>1481</sup> See pars 100, 124, 127, *supra*.

crime of imprisonment, it was obvious to the Accused, as it was to anyone who was at the KP Dom, that the principal offenders in imprisoning the Muslim and other non-Serb men

intended to discriminate against them on religious and political grounds. The Trial Chamber is also satisfied that the Accused knew that by his acts or omissions he was substantially contributing to the commission of the offence of imprisonment on discriminatory grounds.<sup>1482</sup> Accordingly, the Trial Chamber is satisfied that the Accused incurred criminal responsibility as an aider and abettor to the crime of persecution under Article 7(1) of the Statute with respect to the underlying crime of imprisonment.

490. *Living conditions constituting inhumane acts and cruel treatment.* The Trial Chamber has already found that the Accused had knowledge of the conditions under which the non-Serb detainees were being held and of the effects these conditions were having on the physical and psychological health of the non-Serb detainees, and it determined that the Accused incurred criminal responsibility for aiding and abetting the principal offenders in the continued maintenance of these living conditions, (constituting inhumane acts and cruel treatment) pursuant to Article 7(1).<sup>1483</sup> The Trial Chamber is also satisfied that it was obvious to the Accused, as it would have been to any one at the KP Dom, that the disparity between the treatment of the non-Serb and Serb detainees was deliberate and was effected by the intention of the principal offenders to discriminate against the non-Serb detainees on religious and political grounds. The Trial Chamber is also satisfied that the Accused knew that by his acts or omissions he was making a substantial contribution to the commission of these conditions (constituting inhumane acts and cruel treatment) on discriminatory grounds. Accordingly, the Trial Chamber is satisfied that the Accused incurred criminal responsibility as an aider and abettor to the crime of persecution under Article 7(1) of the Statute with respect to the underlying crime of inhumane acts and cruel treatment.

491. *Beatings.* With respect to the beating of Džemo Balic, the Trial Chamber has already found that the Accused was aware of the commission of beatings in general,<sup>1484</sup> and it determined that the Accused incurred responsibility as an aider and abettor of those beatings pursuant to Article 7(1), although no conviction was entered under that head of responsibility, the Trial Chamber finding his responsibility as a superior was the more appropriate head under which to record a conviction.<sup>1485</sup> However, the Trial Chamber is not satisfied that the Prosecution has established that the Accused also had knowledge that the

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<sup>1482</sup> See pars 438,443, *supra*.

<sup>1483</sup> See pars 169-173, *supra*.

<sup>1484</sup> See pars 308-313, *supra*.

<sup>1485</sup> See pars 316-321, *supra*.

beating of Džemo Balic was committed with discriminatory intent. To establish the Accused's responsibility for aiding and abetting the commission of this act as an act of persecution, the Prosecution must establish the Accused's knowledge of not only the underlying act but also of the additional fact that that act was committed with a conscious intention to discriminate. The Trial Chamber is not satisfied that the Prosecution has established that the Accused knew that the beating of non-Serb detainees was carried out with discriminatory intent, and thus the Accused cannot be found responsible for aiding and abetting the persecution of the non-Serb detainees by his acts and omissions with respect to the beating of Džemo Balic.

492. *Torture.* With respect to the torture of FWS-03, the Trial Chamber has already found that the Accused did not have knowledge of the state of mind of the principal offenders of this offence, and it determined that the Accused did not incur criminal responsibility for the torture of detainees at the KP Dom.<sup>1486</sup> Accordingly, the aiding and abetting of the crime of persecution on the basis of the offence of torture of FWS-03 cannot be established. However, although the Accused did not have knowledge of the torture of FWS-03, the Trial Chamber was satisfied he did have knowledge of the beatings of the detainees, and the Accused was found responsible for the torture of FWS-03 as inhumane acts and cruel treatment. The Trial Chamber is not satisfied, however, that the Prosecution has established that the Accused knew that the treatment of FWS-03 was committed with discriminatory intent. The aiding and abetting of the crime of persecution cannot therefore be established upon the basis of this act.

(c) Superior Responsibility

493. The Trial Chamber must also consider whether the Accused incurred superior responsibility pursuant to Article 7(3) for the persecution of the non-Serb detainees with respect to the underlying offences found to have been committed with discriminatory intent. To establish the Accused's responsibility as a superior, the Prosecution must demonstrate that the Accused knew of the commission of the underlying offence, that he knew that that offence was being committed on discriminatory grounds, or had information in his possession sufficient to put him on notice as to the commission of the underlying offence

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<sup>1486</sup> See pars 312-313, *supra*.

and its commission on discriminatory grounds, and that he failed to prevent or punish his subordinates for the commission of the underlying offence on discriminatory grounds.

494. *Imprisonment.* The Trial Chamber has already determined that the Accused held the position of warden of the KP Dom and exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom.<sup>1487</sup> However, the Trial Chamber also found that the Accused played no role in actually securing the detention of non-Serb detainees at the KP Dom, and that the most which could have been done by the Accused as a superior was to report the illegal detention of the non-Serb detainees to the very persons who had ordered it.<sup>1488</sup> Accordingly, the Trial Chamber determined that the Accused did not incur superior responsibility for the imprisonment of the non-Serb detainees.<sup>1489</sup> Without the establishment of the Accused's responsibility as a superior for the underlying offence of imprisonment, there is no basis for a finding that the Accused incurred superior responsibility for the act of imprisonment as an act of persecution.<sup>1490</sup>

495. *Inhumane living conditions constituting inhumane acts and cruel treatment.* The Trial Chamber has already found that the Accused knew that his subordinates were subjecting the non-Serb detainees to living conditions which constituted inhumane acts and cruel treatment, and it determined that the Accused incurred superior responsibility for these underlying offences,<sup>1491</sup> for his omission to take any action to prevent his subordinates from maintaining these living conditions, and his failure to punish his subordinates for the implementation of these living conditions.<sup>1492</sup> The Trial Chamber is also satisfied that it was obvious to the Accused, as it would have been to any one at the KP Dom, that the disparity between the treatment of the non-Serb and Serb detainees was deliberate and was carried out with the intention of the principal offenders to discriminate against the non-Serb detainees on religious and political grounds. Accordingly, the Trial Chamber is satisfied that the Accused incurred criminal responsibility as a superior for the maintenance of the living conditions constituting inhumane acts and cruel treatment as acts of persecution pursuant to Article 7(3) of the Statute.

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<sup>1487</sup> See par 107, *supra*.

<sup>1488</sup> See pars 106-107, *supra*.

<sup>1489</sup> See par 107, *supra*.

<sup>1490</sup> See pars 106-107, *supra*.

<sup>1491</sup> See par 173, *supra*. The Trial Chamber was also satisfied that the Accused's responsibility under Article 7(1) of the Statute had been established with respect to the offence of inhumane conditions and, in the exercise of its discretion, chose that head of liability as the more appropriate basis upon which to enter a conviction.

<sup>1492</sup> See par 172, *supra*.

496. The Trial Chamber has already determined that the Accused incurred individual responsibility for aiding and abetting the maintenance of the living conditions as acts of persecution pursuant to Article 7(1) of the Statute.<sup>1493</sup> In the exercise of its discretion, the Trial Chamber considers it more appropriate to enter a conviction under Article 7(1) as stated earlier.<sup>1494</sup> However, the Trial Chamber will take into account the Accused's position as a superior as a factor aggravating his criminal responsibility under Article 7(1).

497. *Beatings.* With respect to the beating of Džemo Balic, the Trial Chamber has already determined that the Accused incurred superior responsibility pursuant to Article 7(3) for this beating as inhumane acts and cruel treatment, as he knew that beatings were being committed and he failed to take any action to prevent or punish their occurrence.<sup>1495</sup> The Trial Chamber is satisfied that, had the Accused acted upon the information within his possession with respect to the beatings, any investigation would have made clear to him with respect to Džemo Balic the discriminatory intent of the principal offender. Accordingly, the Trial Chamber is satisfied that the Accused also incurred superior responsibility with respect to the beating of Džemo Balic constituting inhumane acts and cruel treatment found to have been committed with persecutory intent.

498. *Torture.* The Trial Chamber has already found that the Accused did not have knowledge of the tortures committed at the KP Dom.<sup>1496</sup> No superior responsibility can therefore attach to the accused for the torture of FWS-03 found to have been committed with persecutory intent. With respect to the beating of FWS-03 as inhumane acts and cruel treatment, the Trial Chamber is satisfied that, if the Accused had acted upon the information in his possession with respect to the beatings, any investigation would have made clear to him with respect to FWS-03 the discriminatory intent of the principal offender. Accordingly, the Trial Chamber is satisfied that the Accused incurred superior responsibility for the beating of FWS-03 as an act of persecution.

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<sup>1493</sup> See par 173, *supra*.

<sup>1494</sup> See par 490, *supra*.

<sup>1495</sup> See pars 312-319, *supra*.

<sup>1496</sup> See par 313, *supra*.

## VII. SENTENCING CONSIDERATIONS

499. The Accused has been found individually responsible pursuant to Article 7(1) for aiding and abetting:

- a) Count 1 – persecution as a crime against humanity (based upon imprisonment and inhumane acts relating to living conditions).<sup>1497</sup>
- b) Count 15 - cruel treatment as a violation of the laws or customs of war (based upon living conditions).

500. The Accused has also been found responsible as a superior pursuant to Article 7(3) for:

- a) Count 1 – persecution as a crime against humanity (based upon beatings).<sup>1498</sup>
- b) Count 5 - inhumane acts as a crime against humanity (based upon beatings).<sup>1499</sup>
- c) Count 7 - cruel treatment as a violation of the laws or customs of war (based upon beatings).

501. The Accused has been found not guilty under either head of responsibility for the offences of:

- a) Count 2 – torture as a crime against humanity.
- b) Count 4 – torture as a violation of the laws or customs of war.
- c) Count 8 – murder as a crime against humanity.
- d) Count 10 – murder as a violation of the laws or customs of war.

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<sup>1497</sup> Absorbed in this finding are the findings of the Trial Chamber that the Accused was individually responsible for the crimes against humanity of imprisonment (par 489) and of inhumane acts (based upon living conditions, par 490).

<sup>1498</sup> This finding covers the beating of Džemo Balic (par 5.15 of the Indictment) and FWS-03 (par 5.23 of the Indictment).

<sup>1499</sup> Those incidents which formed the basis of the persecution charge, namely the beating of Džemo Balic (par 5.15 of the Indictment) and FWS-03 (par 5.23 of the Indictment), do not form part of this conviction.

e) Count 16 – enslavement as a crime against humanity.

f) Count 18 – slavery as a violation of the laws or customs of war.

502. Cumulative convictions (convictions for different crimes against international humanitarian law based on the same conduct) are permissible only if each crime involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must enter the conviction for the more specific crime, being the crime with an additional materially distinct element.<sup>1500</sup>

503. Convictions for the crimes enumerated under Articles 3 and 5 based on the same conduct are permissible as each contains a materially distinct element.<sup>1501</sup> The materially distinct element required by Article 3 offences is the requirement that there be a close link between the acts of the accused and the armed conflict. That required by Article 5 offences is that the offence be committed within the context of a widespread and systematic attack directed against a civilian population. Applying this test to the present case, convictions for the cruel treatment and persecution charges (pursuant to Articles 3 and 5 respectively) based on the same conduct are permissible and are therefore entered. With respect to convictions for the other charges (pursuant to Article 5), it is clear that neither the crime of imprisonment nor that of inhumane acts contains an element which is materially distinct from the crime of persecution. As persecution requires the materially distinct elements of a discriminatory act and discriminatory intent, it is the more specific provision. A conviction is therefore entered for persecution, but not for imprisonment and inhumane acts, with respect to the relevant conduct found to constitute the persecution charge. Convictions for inhumane acts are entered for those incidents found to constitute acts of inhumane treatment under Article 5 of the Statute but which have not also been established as persecution under that Article.

504. The Trial Chamber imposes a single sentence of imprisonment reflecting the totality of the criminal conduct of the Accused in accordance with Articles 23(1)<sup>1502</sup> and 24(1)<sup>1503</sup>

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<sup>1500</sup> *Delali*} Appeals Judgment, pars 412-413.

<sup>1501</sup> *Jelisi*} Appeal Judgment, par 82.

<sup>1502</sup> Article 23(1) provides: "The Trial Chambers shall pronounce Judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."

<sup>1503</sup> Article 24(1) provides: "The penalty imposed by the Trial Chamber shall be limited to imprisonment[...]."

of the Statute and Rules 101(A)<sup>1504</sup> and 87(C).<sup>1505</sup> The sentence is seven and a half years of imprisonment. This section of the judgment explains the considerations which led the Trial Chamber to impose that sentence.

505. As a preliminary matter, Article 24(1) of the Statute provides, *inter alia*, that in determining the term of imprisonment the Trial Chamber “shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”.<sup>1506</sup> Although the Trial Chamber is not bound to follow the sentencing practice of the former Yugoslavia,<sup>1507</sup> recourse must be had to that sentencing practice as an aid in determining the sentence to be imposed.<sup>1508</sup> What is required must go beyond merely reciting the relevant criminal code provisions of the former Yugoslavia; the general sentencing practice of the former Yugoslavia must be considered.<sup>1509</sup>

506. Article 41(1) of the SFRY Code requires that consideration be given to:

[...] all the circumstances bearing on the magnitude of the punishment (extenuating and aggravating circumstances), and in particular, the degree of criminal responsibility, the motives from which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.<sup>1510</sup>

This Article is generally similar to the sentencing provisions of Article 24(2) of the Statute and Rule 101(B).<sup>1511</sup> Article 24(2) of the Statute directs the Trial Chamber to take into

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<sup>1504</sup> Rule 101(A) provides: “A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.”

<sup>1505</sup> Rule 87(C) provides: “If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.”

<sup>1506</sup> See Rule 101(B).

<sup>1507</sup> Article 24(1) of the Statute and Rule 101(B); *Prosecutor v Tadi*}, Case IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals, 26 Jan 2000 (“*Tadi*} Sentencing Appeal Judgment”), par 21; *Delali*} Appeal Judgment, par 813; *Jelisi*} Appeal Judgment, par 117.

<sup>1508</sup> *Delali*} Appeal Judgment, par 820.

<sup>1509</sup> *Kupre{ki}*} Appeal Judgment, par 418.

<sup>1510</sup> Article 41(1) of the SFRY Criminal Code (adopted on 28 Sept 1976, entered into force on 1 July 1977 (unofficial translation).

<sup>1511</sup> Rule 101 largely repeats Arts 23 and 24 of the Statute; it provides in relevant part: “[...] (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”

account the gravity of the offence and the individual circumstances of the convicted person, while Rule 101(B) directs the Trial Chamber to consider any aggravating circumstances or any mitigating circumstances.

507. All of the above factors have been taken into account in determining the sentence, but the overriding sentencing obligation considered by the Trial Chamber has been that of fitting the penalty to the individual circumstances of the Accused and to the gravity of the offences for which he has been found responsible.<sup>1512</sup> This obligation has been formulated as follows:

[...] (t)he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.<sup>1513</sup>

Only those matters which were proved beyond reasonable doubt against the Accused have been considered against him in sentencing, including the aggravating factors.<sup>1514</sup> The mitigating circumstances taken into account are those which have been established by the Accused on a balance of probabilities.<sup>1515</sup>

508. The Trial Chamber has taken cognisance of retribution – interpreted as punishment of an offender for his specific criminal conduct<sup>1516</sup> – and general deterrence.<sup>1517</sup> Both of these general sentencing factors form the backdrop against which the Accused’s sentence has been determined.<sup>1518</sup> The remaining “sentencing principles” submitted by the Prosecution to be relevant to the determination of the sentence imposed – incapacitation of

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<sup>1512</sup> *Kupre{ki}* Appeal Judgment, par 442; *Delali}* Appeal Judgment, par 717; and Art 24(2) of the Statute, which states that the Trial Chamber in imposing the sentences “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.” See also *Aleksovski* Appeal Judgment, par 182; *Jelisi}* Appeal Judgment, par 94.

<sup>1513</sup> *Kupre{ki}* Trial Judgment, par 852; see also *Jelisi}* Appeal Judgment, par 94; *Delali}* Appeal Judgment, par 731; *Aleksovski* Appeal Judgment, par 182; *Furund`ija* Appeal Judgment, par 249; *Kambanda* Judgment, 19 Oct 2000, par 125.

<sup>1514</sup> *Delali}* Appeal Judgment, par 763.

<sup>1515</sup> *Kunarac* Trial Judgment, par 847; *Prosecutor v Sikirica and Others*, Case IT-95-8-S, Sentencing Judgment, 13 Nov 2001 (“*Sikirica* Sentencing Judgment”), par 110.

<sup>1516</sup> *Kunarac* Trial Judgment, par 841; *Prosecutor v Todorovi}*, Case IT-95-9/1-S, Sentencing Judgment, 31 July 2001 (“*Todorovi}* Sentencing Judgment”), par 29.

<sup>1517</sup> The Trial Chamber has applied the principle of public deterrence in determining the sentence to be imposed, but it has taken care that it has not been accorded undue prominence in that process: See *Tadic* Sentencing Appeal Judgment, par 48; *Kunarac* Trial Judgment, par 840; *Todorovi}* Sentencing Judgment, par 30.

<sup>1518</sup> The Appeals Chamber views deterrence and retribution as the main general sentencing factors (for example, *Aleksovski* Appeal Judgment, par 185; *^elebi}i* Appeal Judgment, par 806). With respect to the former factor, it appears to focus on general deterrence only: *Kunarac* Trial Judgment, par 839.

the dangerous and rehabilitation<sup>1519</sup> – were considered by the Trial Chamber to be of little significance in this jurisdiction.<sup>1520</sup>

509. The Trial Chamber has also considered the need for the sentence to reflect the relative significance of the Accused's role in the broader context of the conflict in the former Yugoslavia.<sup>1521</sup> The Trial Chamber does not accept that the Accused played any particularly significant role in the broader context of this conflict. Although he held a fairly senior position in Foca, his crimes were geographically limited and there is no evidence that his specific offences affected other perpetrators of violations of international humanitarian law or other victims of such crimes within that broader context. That said, the Accused has been found responsible for particularly serious offences against particularly vulnerable persons. The crimes continued over a substantial period. The Trial Chamber considered this when determining the gravity of the offences.

510. The punishment which could have been imposed on the Accused in the former Yugoslavia at the relevant time is dealt with in Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code.<sup>1522</sup> It gives effect to the provisions of Geneva Convention IV and the two Additional Protocols, which are incorporated into the jurisdiction of the Tribunal by Article 2 of the Statute.<sup>1523</sup> There appears to be no provision of the SFRY Criminal Code giving specific effect to the crimes against humanity enumerated in Article 5 of the Statute, although genocide (a specific category of crimes against humanity) is dealt with in Article 141 of the SFRY Criminal Code.<sup>1524</sup>

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<sup>1519</sup> Prosecution Pre-Trial Brief, par 377.

<sup>1520</sup> For the reasons set out in the *Kunarac* Trial Judgment, pars 843, 844. Article 33 of the SFRY Criminal Code provides three reasons for the imposition of sentences, namely, "[...] (1) preventing the offender from committing criminal acts and his rehabilitation; (2) deterrent effect upon others not to commit criminal acts; (3) strengthening the moral fibre of a socialist self-managing society and influence on the development of the citizens' social responsibility and discipline."

<sup>1521</sup> *Tadić* Appeal Sentencing Judgment, par 55; *Delalić* Appeal Judgment, par 847.

<sup>1522</sup> Article 142(1) provides: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment [...], immense suffering or violation of bodily integrity or health [...] forcible prostitution or rape; application of measures of intimidation and terror, [...] other illegal arrests and detention [...]; forcible labour [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty."

<sup>1523</sup> *Prosecutor v Tadić*, Case IT-94-1-T, Sentencing Judgment, 14 July 1997, par 8.

<sup>1524</sup> Both Article 142(1) and Article 141 of the SFRY Criminal Code prescribe imprisonment for not less than five years or the death penalty upon conviction. Capital punishment was abolished by constitutional amendment in some of the republics of the SFRY, other than Bosnia and Herzegovina, in 1977, the new maximum sentence being 20 years imprisonment for the most serious offences. Article 38 of the SFRY Criminal Code concerns prison sentences, and reads in part: "(1) The punishment of imprisonment may

511. In line with recent Appeals Chamber Judgments, the Trial Chamber has not considered that crimes against humanity should in principle attract a higher sentence than war crimes.<sup>1525</sup>

512. The Prosecution has submitted that what it calls an "*in personam* evaluation" of the gravity of the crime could or should also concern the effect of that crime on relatives of the immediate victims.<sup>1526</sup> The Trial Chamber considers that such effects are irrelevant to the culpability of the offender, and that it would be unfair to consider such effects in determining a sentence.<sup>1527</sup> Consideration of the consequences of a crime upon the victim who is *directly* injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part of the definition of the offence, they may not be considered as an aggravating circumstance in imposing sentence, but the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.<sup>1528</sup>

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not be shorter than 15 days nor longer than 15 years. (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. (3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute. [...]" Official Gazette of the FRY, No 37, 16 July 1993, p 817. *Delali}i* Trial Judgment, par 1206. From Nov 1998 the law in Bosnia and Herzegovina prescribes the death penalty only in exceptional circumstances: Art 34 of the Criminal Code of the Federation of Bosnia and Herzegovina, which came into force on 28 Nov 1998, provides: "[...] (2) On an exceptional basis, for the more severe forms of criminal offences punished with long term imprisonment which were committed during the state of war or of imminent war danger, the law may exceptionally prescribe capital punishment. (3) In the case defined in paragraph 2 of this Article, the capital punishment may be pronounced and executed only during the state of war or imminent war danger." (Criminal Code of the Federation of Bosnia and Herzegovina published by "Official Gazette of Federation of Bosnia and Herzegovina", No 43-98, Nov 20, 1998). That Criminal Code also now provides for the imposition of "long term imprisonment" ranging from 20 to 40 years for the "the gravest forms of criminal offences [...] committed with intention" (Art 38).

<sup>1525</sup> *Tadi}i* Sentencing Appeal Judgment, par 69: "The Appeals Chamber has taken account of the arguments of the parties and the authorities to which they refer, inclusive of previous judgments of the Trial Chambers and the Appeals Chamber of the International Tribunal. After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case. The position is similar under the Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference. [...]" ; *Furund'ija* Appeal Judgment, pars 243, 247.

<sup>1526</sup> Prosecution Pre-Trial Brief, par 379; Prosecution Final Trial Brief, par 586.

<sup>1527</sup> *Kunarac* Trial Judgment, par 851.

<sup>1528</sup> *Ibid.*

513. The Accused has been found criminally responsible under two heads of liability. For his participation in the imprisonment of the non-Serb detainees, the Trial Chamber has found that, although the Accused did not intend that the non-Serb detainees be imprisoned, deprived of the necessities of a humane existence, or be subjected to physical and psychological assaults, he knew that this was happening at the KP Dom and he did little to try to prevent it. For these offences, the Trial Chamber has found the Accused guilty of aiding and abetting the cruel treatment and persecution of the non-Serb detainees pursuant to Article 7(1) of the Statute upon the basis that, by his failure to take any action in relation to the offences which he was aware had been committed, he knowingly contributed in a substantial way to the continued maintenance of those those offences by encouragement to the principal offenders.<sup>1529</sup> With respect to the beating of the non-Serb detainees established as cruel treatment and as inhumane acts not forming the basis of the persecution charge under Article 5(h) of the Statute, the Trial Chamber has found the Accused criminally responsible as a superior pursuant to Article 7(3) of the Statute. The Accused expressed no regret for the part he played in the commission of these offences, and only insubstantial regret that the offences had taken place.<sup>1530</sup>

514. The Trial Chamber considers that the Accused's aiding and abetting of the cruel treatment and persecution of the detainees is aggravated by the fact that he held the most senior position in the KP Dom. This is a case in which the Accused chose to bury his head in the sand and to ignore the responsibilities and the power which he had as warden of the KP Dom to improve the situation of the non-Serb detainees. The sentence in this case must make it clear to others who (like the Accused) seek to avoid the responsibilities of command which accompany the position which they have accepted that their failure to carry out those responsibilities will still be punished.<sup>1531</sup> The extent of that aggravation in the present case must nevertheless be tempered to at least some extent by two possibly countervailing factors.

515. First, prior to his appointment as warden of the KP Dom, the Accused had been

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<sup>1529</sup> See pars 171, 490, *supra*.

<sup>1530</sup> T 8377.

<sup>1531</sup> The Trial Chamber repeats that, in accordance with the *Tadic* Sentencing Appeal Judgment par 48, it has taken care not to accord undue prominence to the principle of general deterrence in determining the sentence to be imposed.

employed as a mathematics teacher for most of his working life. He was not well experienced, and perhaps not well suited, for the task he chose to undertake. He also did not have a particularly strong character, and the expert reports of both the Prosecution and the Defence were agreed that the Accused had a conformist personality.<sup>1532</sup> The Accused appears for these reasons to have felt unable to confront the authority of the military or persons of strong character such as deputy warden Savo Todovic. Secondly, unlike other persons who filled roughly similar positions as the Accused did and who have been dealt with by this Tribunal, his participation in these crimes was limited to his aiding and abetting the criminality of others.

516. The first of these matters may, in some circumstances, constitute a matter in mitigation of sentence. The Trial Chamber does not, however, consider it appropriate in the present case to mitigate the sentence of the Accused on the basis that he is the type of person who did not have the strength of character to challenge what he knew to be criminal behaviour by those over whom he had authority in the KP Dom. The Accused voluntarily accepted this position of authority, and the fact that he may have had difficulties in exercising the authority which that position gave him did not, in the circumstances, mitigate his responsibility. However, both matters to which reference has been made have led the Trial Chamber to place less weight upon the aggravating feature of the Accused's position as warden than it otherwise would have.

517. The Prosecution submitted that there were other aggravating circumstances which the Trial Chamber should accept. In relation to some of these matters (such as discriminatory motives and ethnic hatred on the part of the Accused), the Trial Chamber has already stated that it is not satisfied that they have been established in the evidence.<sup>1533</sup> Other matters put forward by the Prosecution as aggravating circumstances which have not previously been dealt with by the Trial Chamber are the allegations that the Accused acted primarily for personal gain and out of a desire for social, political and career advancement,

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<sup>1532</sup> Ex P 459; Ex D 145A.

<sup>1533</sup> See par 485, *supra* and footnote 1493, *supra*.

and that he was guilty of abuse of his authority.<sup>1534</sup> The Trial Chamber is not satisfied that these allegations have been established on the evidence. The Trial Chamber has already taken into account other matters put forward by the Prosecution as aggravating circumstances when it considered the gravity of the offences proved, such as the particular vulnerability of the direct victims, the length of time over which the crimes continued during the Accused's tenure as warden of the KP Dom, and the extent of the long term physical, psychological and emotional suffering of those victims.<sup>1535</sup> The Trial Chamber considers that it would be impermissible double counting to take these matters into account again as matters of aggravation as well.

518. There was some evidence that, in cases where the Accused was personally approached by individual detainees with particular requests, he did act to help those detainees. There was also some evidence of attempts on the part of the Accused to improve the condition of all detainees by securing more food for the KP Dom. Although these acts on the part of the Accused had limited practical effect upon the welfare of the non-Serb detainees in general, they do mitigate the criminality of the Accused when compared to that of those subordinate to him.

519. The Trial Chamber has also taken into account that, prior to his appointment as warden at the KP Dom, the Accused was a person of good character and that, since the termination of his appointment as warden of the KP Dom, the Accused returned to his teaching profession without any suggestion of further criminal conduct on his part. The Trial Chamber has also taken into account the Accused's good conduct in the Detention Unit since his arrest.

520. Finally, the Trial Chamber has given credit to the Accused for the extent to which his Counsel co-operated with it and with the Prosecution in the efficient conduct of the trial. Counsel were careful not to compromise their obligations to the Accused, but the restriction of the issues which they raised to those issues which were genuinely in dispute enabled the Trial Chamber to complete the trial in much less time than it would otherwise have taken.<sup>1536</sup>

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<sup>1534</sup> Prosecution's Final Trial Brief, par 60.

<sup>1535</sup> See pars 96, 144, *supra*.

<sup>1536</sup> The mitigation which a Trial Chamber may afford to an accused person because of the extent to which he or she co-operates in the efficient resolution of the trial should not be misunderstood as being the obverse of any

521. The Accused submitted that there were three other mitigating circumstances which the Trial Chamber should accept. The first matter was that, as the Indictment against him was sealed,<sup>1537</sup> the Accused had no reason to suspect that he had been indicted, and so was unable to surrender himself voluntarily. The Trial Chamber has not taken into account his failure to surrender himself voluntarily as a matter in aggravation. Moreover, the Trial Chamber does not accept the Accused's explanation for his possession of a false identification card at the time of his arrest,<sup>1538</sup> and accordingly does not accept that the Accused would have surrendered himself voluntarily if he had been aware of the existence of the Indictment. The Trial Chamber has treated his non-surrender as neutral. The other two matters put forward by the Accused in mitigation were the expert psychological conclusions that he has a tendency to follow orders or the opinions of others without deep analysis, and that the anxiety from which he suffers when faced with the unfamiliar diminishes his ability to assess correctly the situation in which he finds himself.<sup>1539</sup> The Trial Chamber does not consider that either of these conclusions, even if accepted, is a significant matter in mitigation in the circumstances of this case. The first conclusion does not explain the failure of the Accused to act when he should have acted to prevent the continued mistreatment of the detainees, and the second conclusion provides no excuse for his participation in these offences over a long period and when his situation was no longer unfamiliar.

522. The Appeals Chamber has stressed that the starting point in any consideration of the appropriate sentence is the gravity of the conduct of the accused in the case in question.<sup>1540</sup> As discussed earlier,<sup>1541</sup> the sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused, and the determination of that issue requires a consideration

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principle that a non co-operative accused may find his sentence aggravated for that non-co-operation. Such a principle would be entirely wrong.

<sup>1537</sup> That is to say, it had not been made public.

<sup>1538</sup> T 8202; Zarko Vukovic (T 6778-6779).

<sup>1539</sup> T 8380-8381.

<sup>1540</sup> *Aleksovski* Appeal Judgment, par 182; *Delalic* Appeal Judgment, par 731.

<sup>1541</sup> Paragraph 507, *supra*.

of the particular circumstances of the case, as well as of the form and degree of the participation of the accused in the crime.<sup>1542</sup> The nature of the actions of others for which the accused is found to be responsible is therefore relevant, but those actions are considered principally by reference to the nature of the accused's responsibility for them.

523. In the present case, the actions of others for which the Accused has been found to bear criminal responsibility either individually or as a superior may be described as follows:

(i) The imprisonment of a vast number of non-Serb civilians, the overwhelming majority of whom were Muslims, including young and elderly, ill, wounded, physically incapacitated and mentally disturbed persons. They were detained for periods ranging from four months to two and a half years. None had been charged with any offence, and their detention was unlawful.<sup>1543</sup> Their imprisonment and continued confinement was discriminatory on religious or political grounds.<sup>1544</sup>

(ii) These non-Serb civilian detainees were housed in cramped conditions making it impossible for them to move freely, or in some instances, to sleep lying down;<sup>1545</sup> they were isolated from the outside world and denied access to their families;<sup>1546</sup> they were subject to deplorable hygienic conditions;<sup>1547</sup> they were exposed to the freezing temperatures of winter 1992,<sup>1548</sup> and they were fed starvation rations which led the detainees to suffer considerable weight loss ranging from 20 to 40 kilograms.<sup>1549</sup> Many of the detainees were denied access to medical care which was available, and those requiring emergency medical attention were not handled with proper care.<sup>1550</sup> The non-Serb detainees were also subjected to a psychologically exhausting regime while detained at the KP Dom.<sup>1551</sup> They were exposed to the sounds of their fellow detainees being beaten and tortured, leading many to fear that they would be next,<sup>1552</sup> and attempts made by the detainees to improve their living conditions were punished harshly with beatings and

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<sup>1542</sup> *Kupreškic* Trial Judgment, par 852, which was quoted with approval by the Appeals Chamber in both the *Aleksovski* Appeal Judgment (at par 182) and the *Delalic* Appeal Judgment (at par 731).

<sup>1543</sup> Paragraphs 116-124, *supra*.

<sup>1544</sup> Paragraph 438, *supra*.

<sup>1545</sup> Paragraph 135, *supra*.

<sup>1546</sup> Paragraph 134, *supra*.

<sup>1547</sup> Paragraph 136, *supra*.

<sup>1548</sup> Paragraphs 137-138, *supra*.

<sup>1549</sup> Paragraph 139, *supra*.

<sup>1550</sup> Paragraphs 140-141, *supra*.

<sup>1551</sup> Paragraph 142, *supra*.

<sup>1552</sup> Paragraph 143, *supra*.

periods in the isolation cells.<sup>1553</sup> As a result of these conditions, the physical and psychological health of many of the non-Serb detainees deteriorated or was destroyed.<sup>1554</sup> The substantial cause of the death of one such detainee was the failure to provide access to medical care,<sup>1555</sup> and 19 other detainees suffered serious physical and psychological consequences as a result of the living conditions of the KP Dom.<sup>1556</sup> Most suffered severe weight loss, many spent periods in hospital after their release, and some still require constant medication and medical care. Nearly all continue to suffer from some form of psychological disorder, including anxiety attacks, sleeplessness, nightmares, depression or other nervous conditions.<sup>1557</sup>

(iii) The non-Serb civilian detainees were also systematically beaten and mistreated while detained at the KP Dom by the KP Dom guards, and by soldiers and military police coming from outside the KP Dom, for whose actions he was *not* responsible but who were permitted to enter the KP Dom in order to mistreat detainees in this way by the guards under the control of the Accused and for whose actions he *was* responsible.<sup>1558</sup> Over fifty of those incidents of beating were sufficient severity as to constitute inhumane acts and cruel treatment.<sup>1559</sup> Two further beatings of detainees had been inflicted upon religious or political grounds.

524. This has led to findings of guilt on the part of the Accused for the crimes of:

- (i) persecution as a crime against humanity based upon –
  - (a) imprisonment and inhumane acts (the living conditions), for his individual responsibility, and
  - (b) two of the beatings incidents, as a superior;
- (ii) inhumane acts as a crime against humanity based upon the beatings, as a superior;

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<sup>1553</sup> Paragraph 142, *supra*.

<sup>1554</sup> Paragraph 144, *supra*.

<sup>1555</sup> Paragraph 145, *supra*.

<sup>1556</sup> Paragraphs 147-165, *supra*. The Trial Chamber has considered only those detainees nominated by the Prosecution.

<sup>1557</sup> Paragraphs 147-165, *supra*.

<sup>1558</sup> Paragraphs 311-320, *supra*.

<sup>1559</sup> See pars 189-307, 320, *supra*. Again, the Trial Chamber has considered only those detainees nominated by the Prosecution.

(iii) cruel treatment as a violation of the laws or customs of war based upon the beatings, as a superior; and

(iv) cruel treatment as a violation of the laws or customs of war based upon the living conditions, for his individual responsibility.

Subsumed in those findings of guilt of individual responsibility for persecution, but not made the subject of cumulative convictions, are findings that the Accused was individually responsible for imprisonment and inhumane acts as crimes against humanity.

525. It was conceded by the Prosecution that the Accused had not participated in any of these criminal acts himself, and the Prosecution failed to establish that the Accused joined in the common intent of any joint criminal enterprise that these crimes should be committed. The basis of the individual criminal responsibility of the Accused has been that, throughout the period of approximately 15 months during which he was the warden or acting warden of the KP Dom, he aided and abetted in the commission of these crimes, in that he was aware that these crimes were being carried out, and that, by his failure to take any action as warden in relation to those crimes, he knowingly contributed in a substantial way to the continued maintenance of those offences by encouragement to those who carried them out.<sup>1560</sup>

526. The Trial Chamber has given consideration to the importance of consistency in the punishments which are imposed by any particular tribunal, as one of the fundamental elements in any rational and fair system of criminal justice.<sup>1561</sup> That is not to suggest that a Trial Chamber is bound to impose the same sentence in two cases simply because the circumstances are *generally* similar. That would erode the important discretion which every sentencing tribunal must exercise to ensure that the sentence imposed is appropriate to the specific circumstances of the particular case. Nevertheless, in most domestic jurisdictions a range or a pattern of sentences has been built up over the years. A court in such jurisdictions is obliged to have regard to that range or pattern, without being bound by it, in order to ensure that, in the exercise of that discretion, the sentence which it imposes in the particular case does not produce an unjustified disparity which may erode public confidence

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<sup>1560</sup> Paragraph 513, *supra*.

<sup>1561</sup> *Delalic* Appeal Judgment, par 756.

in the integrity of the administration of criminal justice.<sup>1562</sup> No such range or pattern of sentences presently exists in this Tribunal, but with time one will necessarily emerge. At the present time, it is possible for a Trial Chamber to have regard only to those sentences which have been imposed by the Tribunal in *generally* similar circumstances as to both offences and offenders. It is nevertheless appropriate for the Trial Chamber to do so, provided that it is done with considerable caution.<sup>1563</sup>

527. There are only three men already sentenced by the Tribunal who could be said to have been, at least to any significant extent, in circumstances which *could* be regarded as generally similar to those of Milorad Krnojelac. Those three are Zlatko Aleksovski,<sup>1564</sup> Zdravko Mucic<sup>1565</sup> and Miroslav Kvočka.<sup>1566</sup> Aleksovski and Mucic each held the rank of camp commandant, and Kvočka was a deputy commander who exercised the authority of the commander in his absence. The important similarity of the three cases to the present case relates to the relatively close proximity which the commandant of a prison or a camp has to the actual perpetrators of the crimes committed in those institutions. The circumstances of each of these three cases are nevertheless significantly different in some respects to the circumstances of the present case.

528. *Zlatko Aleksovski* was the commander of the Kaonik prison camp for a period of five months.<sup>1567</sup> He was found guilty of aiding and abetting the mistreatment of detainees during body searches, the mistreatment of detainees during their interrogation after the escape of a detainee, psychological terror (broadcasting recordings of screams over the public address system at night), and the use of detainees as human shields and for trench digging.<sup>1568</sup> He was also found guilty of ordering, instigating and aiding and abetting serious violence regularly inflicted on two individuals, sometimes in his presence.<sup>1569</sup> In addition, he was found criminally responsible as a superior for various acts of violence committed by guards inside the prison.<sup>1570</sup> The Trial Chamber found that his direct participation in the commission of those crimes was relatively limited, that he only had a

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<sup>1562</sup> *Ibid*, par 757.

<sup>1563</sup> *Ibid*, pars 758, 798.

<sup>1564</sup> IT-95-14/1-A.

<sup>1565</sup> IT-96-21-A.

<sup>1566</sup> IT-98-30/1-T.

<sup>1567</sup> *Aleksovski* Appeal Judgment, par 174.

<sup>1568</sup> *Ibid*, par 175.

<sup>1569</sup> *Ibid*, par 175.

<sup>1570</sup> *Ibid*, par 177.

secondary role in the totality of crimes established,<sup>1571</sup> and that he had been merely a tool in relation to the crimes committed against Bosnian Muslim civilians in the Lašva Valley.<sup>1572</sup> The Appeals Chamber pointed out, however, that Aleksovski was a warden who had personally participated in the physical violence against detainees when, by virtue of his rank, he should have taken steps to prevent or punish it; he did more than merely tolerate the crimes as a commander and, by his direct participation, he provided additional encouragement to his subordinates to commit similar crimes.<sup>1573</sup> As a commander, he had the authority to prevent such crimes and a duty not to involve himself in them.<sup>1574</sup> Aleksovski initially received a sentence which was held by the Appeals Chamber to have been manifestly inadequate.<sup>1575</sup> On appeal, he received a sentence of seven years, but this was considerably lower than what the Appeals Chamber thought should have been imposed at trial, by reason of the double jeopardy involved in a prosecution appeal.<sup>1576</sup>

529. *Zdravko Mucic* was the commander of the Celebici camp for approximately seven months. During that period, he exercised *de facto* authority over the prison-camp, the deputy commander and the guards, and he was responsible for the overall inhumane conditions in the camp.<sup>1577</sup> Mucic was found guilty pursuant to Article 7(3) for the wilful killing and murder of nine individuals, for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, one additional individual, for the torture of six others, for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, three further individuals and the inhumane and cruel treatment of seven others.<sup>1578</sup> The Trial Chamber also found that, by his direct participation in the maintenance of inhumane conditions in the camp, as well as by his failure to prevent or punish the violent acts of his subordinates, he wilfully caused great suffering or serious injury to body or health, and cruel treatment pursuant to Article 7(1).<sup>1579</sup> Finally, in the light of his failure to exercise his power as a camp commander to release detainees whom he was aware were unlawfully confined, Mucic was found responsible pursuant to Article 7(1) for unlawful

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<sup>1571</sup> *Ibid*, par 236.

<sup>1572</sup> *Aleksovski* Trial Judgment, pars 236-237.

<sup>1573</sup> *Aleksovski* Appeal Judgment, par 183.

<sup>1574</sup> *Ibid*, par 184.

<sup>1575</sup> *Ibid*, pars 183, 186-187.

<sup>1576</sup> *Ibid*, par 190.

<sup>1577</sup> *Delalic* Appeal Judgment, par 775.

<sup>1578</sup> *Delalic* Trial Judgment, par 1237.

<sup>1579</sup> This relates to Counts 46 and 47 of the Indictment for which he had also been convicted pursuant to Article 7(3).

confinement of civilians.<sup>1580</sup> With the exception of the inhumane conditions and the unlawful confinement offences, he was not found to have actively participated in any of the offences, but was held responsible for the acts of his subordinates.<sup>1581</sup>

530. The Trial Chamber held that Mucic made no effort to prevent or punish the mistreatment of prisoners. Instead, he often left the camp at night, when mistreatment was most likely to occur “in obvious neglect of his duty as commander and the fate of the vulnerable detainees”.<sup>1582</sup> He was nevertheless imputed with knowledge of their crimes because, by means of deliberate neglect of his duty to supervise his subordinates, he had enabled them to mistreat detainees.<sup>1583</sup> In full awareness of what was happening, he had encouraged the perpetrators by tolerating these conditions over the entire period when he was the commander of the Celebici camp.<sup>1584</sup> The Appeals Chamber emphasised the serious effect which this failure of supervision had had by way of encouragement of the commission of crimes by his subordinates.<sup>1585</sup> Mucic received a sentence of seven years at trial, but again a prosecution appeal was upheld. The Appeals Chamber indicated that a heavier sentence of around ten years would have been appropriate,<sup>1586</sup> but – because of the complications caused by the cumulative convictions which had wrongly been entered – the Appeals Chamber referred the issue of re-sentencing to a new Trial Chamber. The new Trial Chamber imposed a sentence of nine years on Mucic,<sup>1587</sup> who has since appealed.

531. *Miroslav Kvočka* was deputy commander of the Omarska camp and exercised authority over that camp when its commander was absent.<sup>1588</sup> He was found to have been a member of a joint criminal enterprise to commit murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions. It was accepted by the Trial Chamber that Kvočka did not actively participate in any of those crimes, but it was found that he was aware that serious crimes were being committed and that he was present when some of the crimes were committed, yet he helped to maintain the functioning of the camp, thus allowing the crimes to continue. He was not,

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<sup>1580</sup> *Delalic* Appeal Judgment, par 748.

<sup>1581</sup> *Delalic* Trial Judgment, par 1240.

<sup>1582</sup> *Ibid*, par 1243.

<sup>1583</sup> *Ibid*, par 1250.

<sup>1584</sup> *Ibid*. See also *Delalic* Appeal Judgment, par 739.

<sup>1585</sup> *Delalic* Appeal Judgment, par 740.

<sup>1586</sup> *Ibid*, par 853.

<sup>1587</sup> *Prosecutor v Delalic et al*, Sentencing Judgment, 9 Oct 2001, par 44.

<sup>1588</sup> *Kvočka* Trial Judgment, par 410.

however, the architect of the regime which had been instituted. The Trial Chamber declined to find him liable as a commander pursuant to Article 7(3) of the Statute. It is not clear to this Trial Chamber from the judgment how Kvočka was found to have shared the necessary intent for him to be a member of the joint criminal enterprise, rather than merely aiding and abetting it, but the judgment appears to proceed upon the basis that there was evidence that he had that intent. The most significant factor for present purposes in relation to Kvočka's sentence is that he worked in the Omarska camp for only 17 days. He received a sentence of seven years.<sup>1589</sup>

532. This Trial Chamber has, with considerable caution, had regard to the sentences presently imposed upon those three men, bearing in mind the substantial differences in the personal participation by each man in the offences which occurred, the number and seriousness of the underlying incidents upon which the offences were based and the length of time he held the position or exercised the responsibilities of commandant. However, the fact that Mucic and Kvočka have not yet had their cases finally disposed of within the Tribunal is a substantial qualification to the weight to be afforded to the sentences imposed upon them, particularly in relation to Kvočka, who has yet to have any consideration by the Appeals Chamber to his conviction and sentence appeal.

533. The final matter to which the Trial Chamber has had regard in sentencing is the fact that the Accused, Milorad Krnojelac, is now 62 years of age.

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<sup>1589</sup> *Ibid*, par 695.

## VIII. DISPOSITION

### A. Sentence

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the Trial Chamber finds, and imposes sentence, as follows.

534. Milorad Krnojelac is convicted upon the following counts:

Count 1 – persecution as a crime against humanity (based upon imprisonment, living conditions and beatings), both for his individual responsibility and as a superior.<sup>1590</sup>

Count 5 – inhumane acts as a crime against humanity (based upon beatings), as a superior.<sup>1591</sup>

Count 7 – cruel treatment as a violation of the laws or customs of war (based upon beatings), as a superior.

Count 15 – cruel treatment as a violation of the laws or customs of war (based upon living conditions), for his individual responsibility.

535. Milorad Krnojelac is acquitted upon the following counts:<sup>1592</sup>

Count 2 – torture as a violation of the laws or customs of war.

Count 4 – torture as a crime against humanity.

Count 8 – murder as a violation of the laws or customs of war.

Count 10 – murder as a crime against humanity.

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<sup>1590</sup> The Accused is found guilty pursuant to Article 7.1 in respect of imprisonment and living conditions, and pursuant to Article 7.3 in respect of two incidents of beating (par 5.15 of the Indictment in relation to Džemo Balic and par 5.23 in relation to FWS-03).

<sup>1591</sup> Those incidents which formed the basis of the persecution charge, namely incident 5.15 in relation to Džemo Balic and incident 5.23 with respect to FWS-03, do not form part of this conviction.

<sup>1592</sup> Counts 3, 6, 9, 12, 14 and 17, based on allegations of grave breaches of the Geneva Conventions, were withdrawn by the Prosecution on 27 Oct 2000.

Count 11 - imprisonment as a crime against humanity.<sup>1593</sup>

Count 13 – inhumane acts as a crime against humanity (based upon living conditions).<sup>1594</sup>

Count 16 – enslavement as a crime against humanity.

Count 18 – slavery as a violation of the laws or customs of war.

536. The Trial Chamber sentences Milorad Krnojelac to a single sentence of imprisonment for seven and a half years.

### **B. Credit for Time Served**

537. Milorad Krnojelac was arrested on **15 June 1998**, and he has accordingly been in custody now for three years and nine months. He is entitled to credit for that period towards service of the sentence imposed, together with the period he will serve in custody pending a determination by the President pursuant to Rule 103(1) as to the State where the sentence is to be served. He is to remain in custody until such determination is made.

Done in English and French, the English text being authoritative.

Dated this the 15<sup>th</sup> day of March 2002,  
At The Hague,  
The Netherlands.

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**Judge David Hunt  
Presiding**

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**Judge Florence Ndepele Mwachande Mumba**

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**Judge Liu Daqun**

**[Seal of the Tribunal]**

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<sup>1593</sup> On the basis that a conviction on this charge would be impermissibly cumulative.

<sup>1594</sup> On the basis that a conviction on this charge would be impermissibly cumulative.

## ANNEX I : GLOSSARY OF TERMS

Accused	Milorad Krnojelac
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
<i>Akayesu</i> Trial Judgment	<i>Prosecutor v Akayesu</i> , ICTR-96-4-T, Judgement, 2 Sept 1998
<i>Aleksovski</i> Appeal Judgment	<i>Prosecutor v Alekovski</i> , IT-95-14/1-A, Judgement, 24 Mar 2000
<i>Aleksovski</i> Trial Judgment	<i>Prosecutor v Alekovski</i> , IT-95-14/1-T, Judgement, 25 June 1999
Alad' a Mosque	The Alad' a Mosque was the oldest mosque in Foca, located in the Alad' a neighbourhood
Bosnia and Herzegovina	Republic of Bosnia and Herzegovina
<i>Blaškic</i> Trial Judgment	<i>Prosecutor v Blaškic</i> , IT-95-14-T, Judgement, 3 Mar 2000
<i>Brdanin and Talic</i> Decision on	<i>Prosecutor v Brdanin and Talic</i> , IT-99-36-PT Form of Further Amended Indictment, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001
common Article 3	Article 3 common to the four Geneva Conventions of 1949
Defence	Defence for Milorad Krnojelac
<i>Delali}</i> Appeal Judgment	<i>Prosecutor v Delali} and Others</i> , IT-96-21-A, Judgement, 20 Feb 2001
<i>Delali}</i> Trial Judgment	<i>Prosecutor v Delali} and Others</i> , IT-96-21-T, Judgement, 16 Nov 1998
European Commission	European Commission of Human Rights

European Court	European Court of Human Rights
Ex P, Ex D	Prosecution exhibit, Defence exhibit
FRY	Federal Republic of Yugoslavia
FWS	Witness in this case ( <i>Prosecutor v Krnojelac</i> , IT-97-25); see fn 6.
<i>Furund`ija</i> Appeal Judgment	<i>Prosecutor v Furund`ija</i> , IT-95-17/1-A, Judgement, 21 July 2000
<i>Furund`ija</i> Trial Judgment	<i>Prosecutor v Furund`ija</i> , IT-95-17/1-T, Judgement, 10 Dec 1998
Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICCPR	International Covenant on Civil and Political Rights, 16 Dec 1966
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRC Commentary to Geneva	Pictet (ed), Commentary: IV Geneva Convention, IV Convention Relative to the Protection of Civilian Persons in Time of War, 1958
ICRC Commentary on	Sandoz <i>et al</i> (eds), Commentary on the Additional Protocols Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTY, International Tribunal or Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of

	International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ILC	International Law Commission
Indictment	Third Amended Indictment, <i>Prosecutor v Krnojelac</i> , IT-97-25, 25 June 2001
<i>Jelisić</i> Appeal Judgment	<i>Prosecutor v Jelisić</i> , IT-95-10-A, Judgement, 5 July 2001
<i>Jelisić</i> Trial Judgment	<i>Prosecutor v Jelisić</i> , IT-95-10-T, Judgement, 14 Dec 1999
JNA	Yugoslav National Army
<i>Kayishema and Ruzindana</i> Trial Judgment	<i>Prosecutor v Kayishema and Ruzindana</i> , ICTR-95-1-T, Judgement, 21 May 1999
<i>Kordic and Čerkez</i> Trial Judgment	<i>Prosecutor v Kordic and Cerkez</i> , IT-95-14/2-T, Judgement, 26 Feb 2001
KP Dom	Fo-a Kazнено-Popravni Dom
<i>Krstić</i> Trial Judgment	<i>Prosecutor v Krstić</i> , IT-98-33-T, Judgement, 2 Aug 2001
<i>Kunarac</i> Trial Judgment	<i>Prosecutor v Kunarac and Others</i> , IT-96-23-T & IT-96-23/1-T, Judgement, 22 Feb 2001
<i>Kupreškić</i> Appeal Judgment	<i>Prosecutor v Kupreškić and Others</i> , IT-95-16-A, Appeal Judgement, 23 Oct 2001
<i>Kupreškić</i> Trial Judgment	<i>Prosecutor v Kupreškić and Others</i> , IT-95-16-T, Judgement, 14 Jan 2000
<i>Kvočka</i> Trial Judgment	<i>Prosecutor v Kvočka and Others</i> , IT-98-30/1-T, Judgement, 2 Nov 2001
<i>Martić</i> Rule 61 Decision	<i>Prosecutor v Martić</i> , IT-95-11-R61, Decision on the review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 Mar 1996
Matters not in dispute	Prosecutor's Submission Related to Rule 65ter (E)(ii) and (iii), 16 Oct 2000
<i>Musema</i> Trial Judgment	<i>Prosecutor v Musema</i> , ICTR-96-13-T, Judgement and Sentence, 27 Jan 2000
<i>Nikolić</i> Rule 61 Decision	<i>Prosecutor v Nikolic a/k/a "Jenki"</i> , IT-94-2-R61, Decision on the Review of Indictment pursuant to

	Rule 61 of the Rules of Procedure and Evidence, 20 Oct 1995
Nuremberg Charter	Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, Berlin, 6 Oct 1945
Nuremberg Judgment	Judgement of the International Military Tribunal for the Trial of the German Major war Criminals, Nuremberg 30 Sept/1 Oct 1946
Prosecution	Office of the Prosecutor
Prosecution Final Trial Brief	<i>Prosecutor v Krnojelac</i> , IT-97-25-T, Prosecutor's Final Trial Brief, 13 July 2001
Prosecution Pre-Trial Brief	<i>Prosecutor v Krnojelac</i> , IT-97-25-PT, Prosecutor's Pre-Trial Brief, 16 Oct 2000
Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993
Rome/ICC Statute	Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc A/CONF. 183/9
Rules	Rules of Procedure and Evidence of the International Tribunal
<i>Rutaganda</i> Trial Judgment	<i>Prosecution v Rutaganda</i> , ICTR-96-3-T, Judgement and Sentence, 6 Dec 1999
SDA	Party for Democratic Action
SDS	Serbian Democratic Party
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
T	Transcript of hearing in <i>Prosecutor v Krnojelac</i> , IT-97-25-T
<i>Tadić</i> Appeal Judgment	<i>Prosecutor v Tadić</i> , IT-94-1-A, Judgement, 15 July 1999
<i>Tadić</i> Sentencing Appeal Judgment	<i>Prosecutor v Tadić</i> , IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals, 26 Jan 2000

<i>Tadi}</i> Jurisdiction Decision	<i>Prosecutor v Tadic</i> , IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995
<i>Tadi}</i> Trial Judgment	<i>Prosecutor v Tadi}</i> , IT-94-1-T, Judgement, 7 May 1997
<i>Tadi}</i> Sentencing Judgment	<i>Prosecutor v Tadi}</i> , IT-94-1-T, Sentencing Judgment, 14 July 1997.
<i>Todorovi}</i> Sentencing Judgment	<i>Prosecutor v Todorovi}</i> , IT-95-9/1-S, Sentencing Judgement, 31 July 2001.
Tokyo Charter	Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946
Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984
Tribunals	ICTR + ICTY
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska

## ANNEX II – PROCEDURAL BACKGROUND

### A. Pre-trial phase

538. On 7 June 1997 the Tribunal reviewed and confirmed a sealed indictment against Milorad Krnojelac, and issued a warrant of arrest and an order for surrender.<sup>1595</sup>

539. The Accused was detained by SFOR and transferred to the Tribunal on 15 June 1998. A redacted indictment was publicly filed on the same day.<sup>1596</sup> On 17 June 1998, the President assigned the case to Trial Chamber II, then composed of Judge Cassese (presiding), Judge May and Judge Mumba.<sup>1597</sup> The Accused pleaded not guilty to all counts at his initial appearance on 18 June 1998.

540. On 16 November 1998, Judge Hunt was assigned to the case, replacing Judge May.<sup>1598</sup> Judge Cassese was replaced by Judge Pocar on 1 February 2000,<sup>1599</sup> who was in turn replaced by Judge Liu on 3 April 2000.<sup>1600</sup>

541. On 24 February 1999, the Trial Chamber directed the Prosecution to amend the indictment, following a motion challenging the form of the indictment by the Defence.<sup>1601</sup> The Prosecution submitted the amended indictment on 25 May 1999.<sup>1602</sup> Following another Defence motion challenging the form of the indictment and pursuant to a decision of the Trial Chamber of 11 February 2000,<sup>1603</sup> the Prosecution submitted a second amended indictment on 2 March 2000.<sup>1604</sup> The Trial Chamber partially upheld a Defence preliminary motion challenging the form of the second amended indictment on 11 May 2000.<sup>1605</sup> The second amended indictment charged persecution, imprisonment, inhumane acts, enslavement, torture and murder as crimes against humanity and cruel treatment, slavery,

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<sup>1595</sup> Warrant of Arrest, Order for Surrender, 17 June 1997.

<sup>1596</sup> Redacted Indictment, 15 June 1998.

<sup>1597</sup> Order of the President Assigning Case *Prosecutor v Milorad Krnojelac* to Trial Chamber II, 17 June 1998.

<sup>1598</sup> Order of the President Assigning a Judge to a Trial Chamber, 16 Nov 1998.

<sup>1599</sup> Order of the President Assigning a Judge to a Trial Chamber, 1 Feb 2000.

<sup>1600</sup> Order of the President Assigning a Judge to a Trial Chamber, 3 Apr 2000.

<sup>1601</sup> Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999.

<sup>1602</sup> Prosecutor's Submission of Amended Indictment, 25 May 1999.

<sup>1603</sup> Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000.

<sup>1604</sup> Prosecution's Submission of the Second Amended Indictment, 2 Mar 2000.

<sup>1605</sup> Decision on Form of Second Amended Indictment, 11 May 2000.

torture and murder as violations of the laws and customs of war. Counts which were charged as grave breaches were withdrawn on 27 October 2000.<sup>1606</sup>

542. Pre-trial briefs were filed by the Prosecution on 16 October 2000,<sup>1607</sup> and by the Defence on 21 October 2000.<sup>1608</sup>

543. Pursuant to Rule 75, various protective measures for witnesses were ordered by the Trial Chamber, including the use of pseudonyms, screening from the public and facial and voice distortion.<sup>1609</sup>

## **B. The trial phase**

544. The trial started on 30 October 2000. The Prosecution case lasted until 4 April 2001; the Defence case started on 1 May and lasted until 4 July 2001. The Trial Chamber sat for 76 days in total.

545. On 26 January 2001, the Trial Chamber granted leave to the Defence for a medical examination of Krnojelac.<sup>1610</sup> On 5 February 2001, it confirmed that the medical examination would be conducted by two experts, one nominated by the Defence and one by the Prosecution.<sup>1611</sup> The medical report of the Prosecution (confidential) was submitted on 17 March 2001 and that of the Defence on 28 June 2001.<sup>1612</sup>

546. Further protective measures for witnesses were ordered during the trial.

547. Forty-five Prosecution witnesses and 30 Defence witnesses were heard. In some instances, the Trial Chamber heard testimony via video conference-link. The Prosecution called one witness in rebuttal; there was no evidence in rejoinder.

548. A third amended indictment ("Indictment") was submitted on 25 June 2001.<sup>1613</sup> The Accused confirmed his pleas of not guilty in relation to all the counts in the Indictment.<sup>1614</sup>

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<sup>1606</sup> Motion to Withdraw Article Two Counts, 27 Oct 2000.

<sup>1607</sup> Prosecution Pre-Trial Brief, 16 Oct 2000.

<sup>1608</sup> Defendant's Milorad Krnojelac Pre-Trial brief, 21 Oct 2000.

<sup>1609</sup> Prosecution Motion to Protect Witnesses, 16 June 1998 and Order Granting the Prosecutor's Motion to Protect Victims and Witnesses, 6 Oct 1998.

<sup>1610</sup> Order for Medical Examination of the Accused Milorad Krnojelac, 26 Jan 2001.

<sup>1611</sup> Order Regarding Medical Examination, 5 Feb 2001.

<sup>1612</sup> Ex P 459; Ex D 145A, (T 7968).

<sup>1613</sup> Prosecution's Second Motion to File a Third Amended Indictment, 25 June 2001. This Indictment incorporates by reference all the schedules that were attached to the second amended indictment.

549. On 20 June 2001, the Prosecution filed a motion to re-open its case,<sup>1615</sup> but withdrew it on 25 June 2001.<sup>1616</sup>

550. The closing briefs were submitted on 13 July 2001, and closing arguments were heard on 19 and 20 July 2001.

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<sup>1614</sup> T 7765.

<sup>1615</sup> Motion to Re-Open the Prosecution Case, 20 June 2001.

<sup>1616</sup> T 7553.