



Ref. number: X-KR-06/200-1
Sarajevo, 21 April 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, Section I for War Crimes of the Criminal Division of the Court, sitting in the Panel comprising Judge Šaban Maksumić as the Presiding Judge, and Judges Pietro Spera and Marie Tuma as members of the Panel, with the participation of the Legal Officer Manuel Eising as the Minutes-Taker, in the criminal case against the accused Dušan Fuštar for the criminal offense of Crimes against Humanity in violation of Article 172 (1) (h) of the Criminal Code of Bosnia and Herzegovina (CC of BiH) as read with Articles 180 (1) and 29 of the CC of BiH, based on the Indictment filed by the Prosecutor's Office of Bosnia and Herzegovina Ref. number: KT-RZ-91/06 on 27 March 2008, having examined the Plea Agreement and having held a public sanctioning hearing attended by the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Peter Kidd, and the Accused, Dušan Fuštar, with his Defense Counsel, Zlatko Knežević, on 21 April 2008, rendered and publicly announced the following:

VERDICT

ACCUSED:

Dušan FUŠTAR, son of Jovan, mother's name Zdravka, born on 29 June 1954 in Bačko Dobro Polje, Municipality of Vrbas, Vojvodina, Republic of Serbia, formerly resident of Prijedor Municipality, of Serb ethnicity, citizen of the Republic of Serbia, mechanic by occupation, married, father of one child, no prior convictions, no other criminal proceedings, no rank or decoration, poor financial standing

IS GUILTY

Of the following:

From 30 April 1992 to the end of 1992, during an armed conflict in the Republic of Bosnia and Herzegovina and in the context of a widespread or systematic attack on Bosnian Muslim, Bosnian Croat and other non-Serb civilian populations of the Prijedor municipality by members of the Army of Republika Srpska, Territorial Defense, police and paramilitary formations ("Serb forces") and armed civilians, a plan was executed to permanently remove Bosnian Muslims, Bosnian Croats and other non-Serb inhabitants from the territory of the planned Serbian state in Bosnia and Herzegovina; as part of this plan non-Serb civilians from the area of this municipality, among them particular

intellectuals, business and political leaders as well as wealthy citizens, were systematically captured and taken to and arbitrarily confined at, inter alia, the Keraterm camp between 24 May 1992 and 5 August 1992 which was established and operated under the direction of the Crisis Staff of the Prijedor municipality; the accused participated in the persecution of these captured non-Serb civilians in a manner that:

- i. The detainees held in the Keraterm camp were systematically ill-treated and persecuted through various forms of physical and mental violence namely killings, torture, beatings, harassment, humiliations, and inhumane conditions of detention such as inadequate food, drinking water and medical care, and unhygienic and cramped conditions.
- ii. Between mid to late June 1992 and 5 August 1992 ("the relevant period") the accused was leader of one of the three guard shifts in the Keraterm camp and was in a position of sufficient authority and influence to prevent or halt abuses on his shift by guards and visitors and to improve the daily living conditions for the detainees.
- iii. By performing the role of shift leader, and by failing to assert his authority and influence to protect the detainees and to improve their daily living conditions when on duty, the accused contributed to and furthered the described system of ill-treatment and persecution during the relevant period.
- iv. During the relevant period, detainees were killed at the Keraterm camp on all three shifts by guards or visitors in furtherance of the described system of ill-treatment and persecution, including the following; Drago Tokmadžić (beaten to death); Jovo Radočaj (beaten to death); Jasmin (aka "Zvezdas") (beaten to death); Džemal Mešić (beaten to death); Dževad Karabegović (beaten to death); Besim Hergić (beaten to death); Fikret Avdić (beaten to death); and a number of detainees including Ismet Bajrić, Behzad Behlić, and a man named Šolaja, who were called out and shot dead in late July 1992.
- v. During the relevant period detainees were beaten or otherwise physically abused at the Keraterm camp on all three shifts by guards or visitors in furtherance of the described system of ill-treatment and persecution, including the following: Zejro Čaušević; Meho Kapetanović; one person named Katlak; Ismet Kljajić; a number of detainees from the Brdo region upon their arrival in July; Enes Crljenković; K016; K015; Esad Islamović; Edin Ganić; Suad Halvadžić; the Ališić brothers (Jasmin, Armin Edin and Feha); K010; K013; Šaban Elezović; K05; Suad Bajrić and Zijad Krivdić.
- vi. In his capacity as shift leader, the accused participated in keeping the detainees in the camp and thus participated in arbitrarily depriving the detainees of their liberty during the relevant period.

Thus, as described above, within a widespread or systematic attack against a civilian population from the wider territory of Prijedor municipality, with knowledge of such attack, and knowing that he was participating in it, Dušan Fuštar by his acts a

omissions participated in the joint criminal enterprise of the Keraterm Camp during the relevant period to ill-treat and persecute Bosnian Muslims, Bosnian Croats, and other non-Serbs held in the camp through various forms of physical and mental violence and is therefore responsible for the crimes as described above committed in Keraterm Camp, all of which were committed within the object of the joint criminal enterprise.

Whereby:

The Accused Dušan FUŠTAR committed the criminal offence of the Crime against Humanity of Persecution under Article 172(1) per sub-clause h), in connection with Articles 29 and 180 (1) of the CC of BiH.

Therefore, applying Articles 39, 42, 48, 49 and 50 of the CC of BiH, the Court of BiH

SENTENCES

him to imprisonment for a term of 9 (nine) years.

Pursuant to Article 56 of the CC of BiH, in connection with Article 2 (4) of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH ("Law on Transfer"), the time which the Accused spent in custody ordered by the International Criminal Tribunal for Former Yugoslavia (ICTY) and the Court of BiH, from 31 January 2002 onwards, shall be credited towards the sentence of imprisonment imposed on him.

I

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

II

Pursuant to Article 198 (2) of the BiH CPC, the injured parties are referred to civil action concerning their claims under property law.

Reasoning

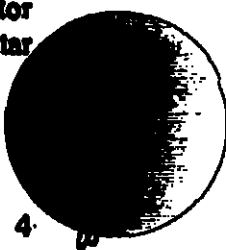
Procedural History

The Indictment of the Prosecutor's Office of Bosnia and Herzegovina Ref. number KT-91/06 dated 7 July 2006, taken over as confirmed by the ICTY pursuant to the Law on Transfer, and adapted to the provisions of the Criminal Procedure Code of Bosnia and Herzegovina (BiH CPC), charged the accused Dušan Fuštar, together with Željko Mejakić, Momčilo Gruban and Duško Knežević, with the criminal offense of Crimes against Humanity under Article 172 (1) (a), (h) and (k) of the CC of BiH as read with Article 180 (1) and (2) of the CC of BiH. At the Arraignment Hearing held on 28 July 2006, the accused Dušan Fuštar, as well as all his co-accused, pleaded not guilty to the charges in the Indictment.

Following the completion of the Prosecution case and prior to the beginning of the Dušan Fuštar's Defense case in the proceeding conducted under Ref. number: X-KR-06/200, Prosecutor of the Prosecutor's Office of BiH on one side and the accused Dušan Fuštar and his Defense Counsel, attorneys-at-law John Ostojić and Zlatko Knežević, on the other side, on 27 March 2008 entered a Plea Agreement which was filed with the Court for examination. Pursuant to Article 275 of the BiH CPC, enclosed with the said Plea Agreement, the Court also received the Prosecutor's Office of BiH Amended Indictment Ref. number: KT-RZ-91/06 dated 21 March 2008, which charges Dušan Fuštar with the criminal offense of Crimes against Humanity under Article 172 (1) (h) of the CC of BiH in conjunction with Articles 180 (1) and 29 of the CC of BiH. Following the Prosecution motion and upon the consent of all the accused persons and their defense counsel, at the hearing held on 17 April 2008, the case against the accused Dušan Fuštar was bifurcated and registered under Ref. number: X-KR-06/200-1.

By the said Agreement, the accused Dušan Fuštar pleaded guilty to the commission of the criminal offense charged in the amended Indictment, which also proposed the sentence of 9 (nine) years imprisonment. In addition to that, the Agreement also states that the accused is aware that he may be required to reimburse the costs of the criminal proceeding. At the hearing held on 21 April 2008, the Prosecution did not present the request for the reimbursement of the costs of the criminal proceeding, while the Defense Counsel for the accused moved the Court to relieve the accused of the duty to reimburse the costs due to his difficult financial situation resulting from his lengthy custody. In addition to that, the Agreement also states that the accused accepts all the consequences of entering this Plea Agreement, including the consequences related to claims under property law for damages to property filed by the victims of the criminal offense to which the accused pleaded guilty by this Agreement.

At the Plea Agreement Hearing held on 21 April 2008, the Prosecutor of the Prosecutor's Office of BiH submitted that, when entering this Agreement, he took into consideration the gravity of the offense with which the accused was charged in the Amended Indictment, circumstances surrounding the commission of that offense, as well as the willingness of the accused to plead guilty to the charges. The Prosecutor pointed out that the Amended Indictment no longer charged the accused Dušan Fuštar



with personal active involvement in the killings or maltreatment of the camp inmates in Keraterm and that it is limited to Article 180 (1) of the CC of BiH as a form of the perpetration of the offense. Also, the Prosecution submitted that, as a particularly extenuating circumstance, they found the accused's confession, his remorse for the commission of the offense, and his commitment to future cooperation with the Prosecutor's Office. In order to additionally support the proposed sentence of 9 years imprisonment, the Prosecutor compared this proposed sentence with the sentences imposed by the ICTY on the perpetrators of the same offenses as those with which Dušan Fuštar is charged, in the case of *Dušan Sikirica et al.* (ICTY number: IT-95-8), also imposed based on plea agreements. The Prosecutor submitted that, in *11-bis* cases, the Court of BiH was in no way bound by the ICTY penal policy, but that, on the other hand, based on the general principles of human rights, in terms of sanctioning the co-perpetrators there should be adequate proportionality between the individual punishments.

The Defense Counsel for the accused, attorney Zlatko Knežević, stated that he had informed his client about all consequences of entering the Plea Agreement and that the accused had signed the Agreement knowingly and voluntarily, as well as the Annexes to the Agreement. With regard to this issue, Counsel Zlatko Knežević further stated that the plea bargaining with the Prosecutor, which preceded the entering into Plea Agreement, was conducted by attorney John Ostojić, who also had represented the accused in the proceeding before the ICTY, which implies that the Defense team and the accused himself were fully informed about the course of the plea bargaining, the contents of the final documents and the consequences of signing the documents. In addition to that, the Defense Counsel pointed out that the Amended Indictment reflected the results of the evidentiary proceedings with regard to his client, and that the evidence that would be adduced by the Defense should the trial continue would correspond to the evidence adduced by the Prosecution. The Defense Counsel specifically pointed out the fact that the Amended Indictment no longer included the charges of direct active involvement of his client in the killings and the maltreatment of the detainees in the Keraterm Camp, and according to the Defense Counsel, particularly extenuating circumstances in respect to the accused are reflected in the facts that he had confessed the perpetration of the respective criminal offense, that he had expressed his remorse and committed himself to cooperate with the Prosecutor's Office.

At the hearing held on 21 April 2008, the accused Dušan Fuštar declared that he had read and fully understood the Plea Agreement including the Annexes, signed it knowingly and voluntarily, that he had been advised of the possible consequences of entering into this Agreement, including the consequences related to claims under property law and costs of the criminal proceeding. In addition to that, the accused reaffirmed his confession as to everything he was charged with by the Indictment, and his understanding that by signing this agreement he was waiving the right to trial and that he had no right of appeal against the criminal sanction that would be imposed on him, in case the Court accepted the Agreement. He entirely supported the arguments presented by his Counsel, supporting the Prosecution arguments as well.

Following the hearing, the Court accepted the full Agreement to Enter Plea of Guilty to the Proposed Amended Indictment of the Prosecutor's Office of BiH, having found the

all requirements set forth in Article 231 (4) of the BiH CPC had been met. The Court found that the accused Đukan Fuštar had understood the Amended Indictment, both in factual and in legal terms, that during the plea bargaining with the Prosecutor, he had sufficient time and adequate professional assistance of his Defense Counsel in understanding and considering all relevant circumstances, facts and evidence connected with the entering into the Agreement, whereupon he entered into the Agreement voluntarily, consciously and with understanding, having first been advised of the possible consequences, including the consequences related to possible claims under property law and costs of the criminal proceeding. Finally, the Court found that the accused was aware of the recommended sentence, whereupon the accused pleaded guilty to the facts and legal definition from the Prosecutor's Office of BiH Indictment Ref. number: KT-RZ-91/06 dated 21 March 2008.

Evidence

In the course of the Prosecutor's Office of BiH Case-in-Chief, the Court heard the following witnesses: Fadil AVDAGIĆ, Asmir BALTIC, Emir BEGANOVIĆ, Said BEŠIĆ, Saud BEŠIĆ, Zlata CIKOTA, Enes CRLJENKOVIĆ, Izet DŽEŠEVIĆ, Sakib JAKUPOVIĆ, Enes KAPETANOVIĆ, Senad KAPETANOVIĆ, Kerim MEŠANOVIĆ, Azedin OKLOPČIĆ, Mustafa PUŠKAR, Nuzret SIVAC, Ermin STRIKOVIĆ, Anto TOMIĆ, and witnesses with the following pseudonyms: K01, K03, K05, K07, K08, K09, K010, K013, K014, K015, K016, K017, K018, K019, K022, K023, K027, K029, K033, K034, K035, K036, K037, K040, K041, K042, K043 i K044.

Following their request accompanied with a reasoned Prosecution Motion and having informed themselves of the Defense position, the Court granted protective measures to most of the above mentioned witnesses pursuant to the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses (Witness Protection Law), where most of the witnesses testified under pseudonyms, and the majority testified in the courtroom without voice or face distortion, while the courtroom audience was removed to a different room where they were able to follow just the audio streaming of the trial. At the stages of these witnesses' testimonies when there was a possibility that the responses to questions posed, due to their specific nature, could jeopardise the confidentiality of the witnesses' identities, the trial was closed for the public pursuant to Article 235 of the BiH CPC.

As regards the witnesses with pseudonyms who also requested to testify in closed sessions, following their request and having heard the reasons, or more precisely the submissions of the parties and the Defense Counsel, pursuant to Article 235 of the BiH CPC, the Court ordered that the witnesses give their full evidence in closed session.

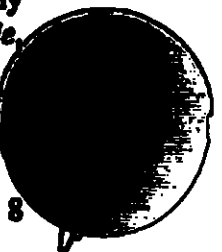
The Panel finds that all measures mentioned above were necessary to protect the interests of witnesses, given the fact that the witnesses personally requested protective measures because due to their testimonies in this case they feared for their personal safety, the safety of their family members who frequently visit the area of Prijedor Municipality or have returned to live there, as well as the safety of their property.

For technical reasons, the Court heard the evidence of witnesses Enes Crljenković and Ante Tomić, as well as the evidence of four witnesses who testified under pseudonyms, via video link. The parties, Defense and the Court were ensured unobstructed direct and cross examination of these witnesses, and thus followed the testimonies of these witnesses through direct video and audio streaming.

In the course of the evidentiary proceedings based on the original Indictment dated 7 July 2006, with respect to the four accused, the Prosecutor's Office of BiH introduced the following documentary evidence under following numbers: 1A – photograph: aerial view of Omarska Mine (ICTY number: 0100-2444), 1B- photograph of Administration Building, Omarska Mine (0109-7404), 1C- photograph of Hangar Building, as seen from the Administration Building (0109-7407), 1D- photograph of the right side of the Hangar Building, as seen from the Administration Building (0109-7408), 1E- photograph of the White House (0109-7413), 1F- photograph of the Administration Building (0203-0311), 1G- Photograph of the Kitchen/Restaurant (0109-7406), 1H- photograph of detainees in Omarska Camp in canteen (0104-8435), 1I- photograph of restaurant in Omarska Camp (0105-6517), 1J- photograph of Kerim Mešanović in the glass house (0045-2452), 1K- aerial photograph of Omarska Camp (0107-2772), 1L- photograph of TAM truck (0039-3770), 1M- photograph of pump and Administration Building (0039-3300), 2- Model of Omarska Camp, 3- ICTY Statement of Witness K017, 1998 and 1999, 4A- Decision on termination of employment of Zlata Cikota (0020-2870), 5- photograph of Miroslav Šolaja's clothes (0326-1687), 7- Newspaper Article *Bećir Medunjanin and His Family*, Kozarski vjesnik, 12 June 1992 (0031-9260-7 (BHS), 0096-3674 (ENG)), 8A- photograph of Keraterm Camp (reception house, entrance) (0200-6266), 8B- photograph of Keraterm Camp (Rooms 2, 3, 4, toilets) (0200-6270), 8C- photograph of Keraterm Camp (garage, Room 1) (0336-4943), 10- photograph of Goran Kardum and another person (0105-6516), 10A- Exhibit 8A as marked by K014, 10B- Exhibit 8C as marked by K014, 11A- photograph of Keraterm Camp, with garbage dump and hangar (0200-6264), 11B- photograph of Keraterm Camp, shows where post-room 3 executions took place (0200-6270), 11C- photograph of Keraterm Camp, showing booth behind which according to witness light machine gun was placed for post-room 3 executions (0200-6268), 12A- photograph of Keraterm Camp, witness shows where garbage dump was on which bodies were thrown (0200-6264), 12B- photograph of Keraterm Camp, witness shows where victim I. Budimlić was beaten to the left of the weigh station (0200-6266), 13A- photograph of Keraterm Camp, witness shows Rooms 1 and 2, and weigh station where his brother was beaten (0200-6265), 13B- photograph of Keraterm Camp – cabin and weigh station where witness's brother was beaten (0200-6266), 13C- photograph of Keraterm Camp, different view, witness shows Rooms 3 and 4, where table with machine gun was set up before Room 3 massacre (0200-6262), 14- List of detainees handwritten by K016 (0068-2509), 15A- photograph of Keraterm Camp, witness shows where dead bodies were dumped (0200-6262), 15B- photograph of Keraterm Camp, witness shows rooms 1 and 2 and kitchen (0336-4943), 16A- photograph of Keraterm Camp, witness shows weigh station and where Fućtar would be sitting (0200-6263), 16B- photograph of Keraterm Camp, witness shows where school desks and machine guns were located before Room 3 massacre (0200-6265), 17- Order of Simo Drijača, Chief of Prijedor SJB /Public Security Station/, for the establishment of Omarska Camp, 31 May 1992 (00633763-00633766), 18- List of workers requiring special passes who provide



security at the Omarska Collection Center, Željko Mejakić, Commander of Omarska Wartime Police Station 21 June 1992, 19- Prijedor Crisis Staff Order No. 01-023-49/92, 2 July 1992, 20- Official Note signed by Duško Sikirica about Zoran Žigić visiting Keraterm and beating prisoners who subsequently died, 4 July 1992, 21- List of 1st category persons, Omarska Collection Center, 28 July 1992, 22- Prijedor SJB Dispatch, No. 11-12-2169, 1 August 1992, 23- Prijedor SJB letter to Banja Luka CSB Security Services Center/ No. 11-12-38, 4 August 1992, 24- Letter entitled *Selection of Prisoners of War for the Manjača POW Camp*, 1st Krajina Corps HQ, 6 August 1992, 25- Prijedor SJB Dispatch No. 11-12-2188, addressed to the Chief of the CSB in Banja Luka, 9 August 1992, 26- Prijedor SJB Report on reception centers and on resettlement of citizens from the municipality, 14 August 1992, 27- Banja Luka CSB Report on the situation and issues concerning prisoners, collection centres, resettlement and the role of the SJB and connection with these activities, 18 August 1992, 28- Prijedor SJB Official Note regarding list of persons sent from Omarska to Manjača, 17 August 1992, 29- Prijedor SJB communication to Banja Luka CSB Chief regarding the documentation of prisoners transferred from Omarska to Manjača, 23 August 1992, 30- Prijedor SJB Dispatch on nonexistence of camps, prisons and collection centers in Prijedor Municipality No. 11-12-2223, 28 August 1992, 31- Report on the activities of Prijedor SJB in the third quarter, September 1992, 32- Report on the work of the Prijedor SJB during the last nine months of 1992, Prijedor SJB, January 1993, 33- Memorandum by Stojan Župljanin, Banja Luka CSB Chief, to all Public Security Stations No. 11-1/01-57, 19 August 1992, 34- List of Prijedor PS employees who signed and those who did not sign the solemn declaration, 29 May 1992, 35- Decision on the Organization and Activities of the Prijedor Municipal Crisis Staff, dated 20 May 1992, Prijedor Municipality Official Gazette, Year I, Issue 2/92, 25 June 1992, 36- Solemn Declaration of Dušan Fuštar, Prijedor SJB, 8 May 1992, 37- Reserve police payroll for May 1992, Prijedor II Reserve Police Station, Prijedor PSS, 38- Reserve Police payroll for June 1992 (employed), Prijedor II Reserve Police Station, Prijedor SJB, 39- Reserve police payroll for June 1992 (unemployed), Prijedor II Reserve Police Station, Prijedor SJB, 40- List of members of Prijedor Reserve Police Force in August 1992; Prijedor II Reserve Police Station, August 1992, 41- Census of the Prijedor municipality by the local communities, No. 02-074-1-16/91, 1991, 42- Results of 1993 census in Prijedor municipality (by local communities), undated, 43- Overview of citizens who have moved out and into the area covered by the Sector, Banja Luka SNB Sector, 1 May 1993, 44- Overview of data on the number and ethnic structure of population by municipalities in the area of Banja Luka RDB /Regional Department of State Security/ Center for 1991 and 1995, February 1995, 45- Security assessment for Prijedor Municipality, operative Duško Jelisić, SNB Sector, Banja Luka CSB, 23 October 1992, 46- Report on the work of the Prijedor Municipal Red Cross for the period from 5 May 1992 until 30 September 1992, 30 September 1992, 47- Decisions of the Autonomous Region of Krajina Crisis Staff dated 22 May 1992, Autonomous Region of Krajina Official Gazette No. 2, 48- Decision on the release of prisoners, Prijedor Crisis Staff, 2 June 1992, 49- Prijedor Municipal Crisis Staff Conclusion No. 02-111-191/92 dated 12 June 1992, Prijedor Municipality Official Gazette, Year I, No. 2/92, 25 June 1992, 50- List of reserve operatives from the National Security Service hired to work in the Omarska and Keraterm collection centers in June 1992, 51- Prijedor SJB letter listing employees of the *Dr M. Stojanović* Medical Center, located in refugee camps, 11 July 1992, 52- *Foreign Journalists Visited Collection Centers in Omarska and Trnopolje*.



Kozarski vjesnik, 14 August 1992, 53- List of persons to be taken to the Omarska Collection Center, listed in the register on 24 July 1992, 54- List of persons to be taken to Omarska Collection Center, 6 – 8 July 1992, 55- List of persons to be taken to Omarska Collection Center, 23 July 1992.

By Decision dated 22 August 2007, this Panel partly granted the Prosecution Motion to accept facts established in the ICTY judgments.

Application of Substantive Law

The issue of applicability of the criminal offense of Persecution as Crimes against Humanity under Article 172 (1) (h) of the CC of BiH, which as such was not explicitly prescribed by the Criminal Code of the Socialist Federative Republic of Yugoslavia (SFRY), which was the applicable law at the time of the perpetration of the respective criminal offenses, has been resolved in the caselaw of the Court of BiH in the first instance verdict in the case against *Dragoje Paunović*, which has been upheld in the second instance proceeding.¹ The position taken by the Court of BiH with respect to the legality of application of the CC of BiH to the criminal offenses committed during the war was also confirmed by the Constitutional Court of Bosnia and Herzegovina in their Decision in the *Abduladhim Maktouf* case which notes that the application of the Criminal Code of BiH in the cases of crimes against humanity and values protected by the international law is in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the BiH Constitution.²

Elements of the Criminal Offense of Crimes against Humanity

Based on the proffered evidence, the Court has found that all elements of the criminal offense of Crimes against Humanity under Article 172 of the CC of BiH in the form of persecution under sub-paragraph (h) have been met.

Existence of a Widespread or Systematic Attack against the Civilian Population

As regards the definition of this general prerequisite for the criminal offense of Crimes against Humanity, this Panel relies on the Reasoning of the Court of BiH first instance verdict in the *Nikola Kovačević* case, which is based on the analysis of the ICTY case law.³ Thus, this Panel accepts the following: (1) that an attack, which is generally

¹ First instance verdict in the case against *Dragoje Paunović* No. X-KR-05/16 dated 26 May 2006, pgs. 19-23; Second instance verdict, No. X-KRŽ-05/16 dated 27 October 2006, pgs. 8-9.

² Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Meritum in the *Abduladhim Maktouf* case, number: AP 1785/06, dated 30 March 2007, see paragraphs 11, 60-79 and 80-89.

³ Court of BiH first instance verdict in the *Nikola Kovačević* case, number: X-KR-05/40, dated 3 November 2006, pgs. 20-21, upheld by the second instance verdict number: X-KRŽ-05/40, dated 22 June 2007, pgs. 5-6.

understood as conduct during which violence occurs, need not necessarily take place as part of an armed conflict; 2) that as factors of the widespreadness of the attack the following should be taken into consideration: the consequences of the attack on the targeted population, the number of victims, the nature of the acts and the cumulative effect of a series of inhumane acts or a single effect of one act of a large scale; (3) according to this interpretation, as factors of systematicity of the attack the following fact should be taken into consideration: regular repetition of the offense which is not accidentally similar in character, or mutual organization of a series of acts and small probability that the perpetration of those acts was random; (4) Article 172 (2) (a) of the CC of BiH requires an additional element, which according to the ICTY caselaw is not required, that the attack is committed "pursuant to or in furtherance of a state or organizational policy", which can be interpreted as an additional differentiation between the actions of individuals and the actions undertaken as part of a larger organizational unit, which only as such gains a certain security significance requiring a specific criminalization at the international level and within Chapter XVII of the CC of BiH; (5) as regards the issue of determining the character of the group which would be targeted by such an attack, the Court accepts the position expressed, inter alia in the ICTY Trial Judgement in the *Radoslav Brđanin* case, according to which it is not required that every single member of that population be a civilian, it is enough if it is predominantly civilian in nature, and may include individuals *hors de combat*.⁴

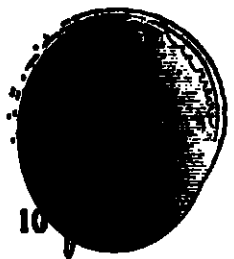
As regards the existence of a "widespread or systematic attack", the Panel was guided by the facts that had already been established in the ICTY judgments in the cases of *Duško Tadić*, *Miroslav Kvočka et al*, *Milomir Stakić* and *Radoslav Brđanin*, which facts, following the Prosecutor's Office of BiH Motion, were partly accepted by this Court.⁵ In addition to that, in the introductory sections of their testimonies, most of the examined witnesses provided the Panel with a broader picture and overview of the events in the Prijedor Municipality at the time period covered by the amended indictment.

The examined witnesses unanimously stated that, with the take-over of power in Prijedor Municipality by the Serb Democratic Party on 30 April 1992, the conditions of life of the non-Serb population changed. Following the outbreak of the armed conflicts on individual locations of the Prijedor Municipality in late May 1992, the situation worsened in terms of freedom of movement, dismissals from companies and public institutions, and the security situation of the non-Serb population, and that the said situation finally culminated in organized mass arrests of the non-Serb population and their imprisonment on several locations including the Keraterm Camp.⁶ This way, the first three of the previously described prerequisites for a situation to be characterized as a widespread or systematic attack were met.

⁴ ICTY Trial Judgement in the *Radoslav Brđanin* case, ICTY-number: IT-99-36-T, dated 1 September 2004, paragraph 134.

⁵ See *Decision on Adjudicated Facts*, number: X-KR-06/200, dated 22 August 2007, accepted facts number: 41-47, 49-54, 66-101, 103-132 and 135-137.

⁶ See *Decision on Adjudicated Facts*, accepted facts number: 15-26 and 29-36.



The treatment of the non-Serb population as described above was established and organized by the Serb authorities, more precisely the Crisis Staff of the Prijedor Municipality, which issued orders to the administration and the police forces and cooperated with the command of the Army and Territorial Defense in connection with the carrying out of the operations described above, and harmonized its policy with the Banja Luka Regional leadership,⁷ all of which confirms that the attack was in furtherance of the policy of the Serb authorities in that area.

Although a certain number of former camp inmates, who testified in this case, confirmed that, prior to their arrest, they were members of the Territorial Defense, or professional or reserve police, the statements of all witnesses show that the Serb forces, having rounded up the population on certain locations in the Prijedor town, specifically separated men from women, children and the elderly, and then took the entire group of non-Serb men to camps without further checking their possible involvement in combat activities. In addition to that, the classification of camp inmates into three groups following their interrogation in all camps in the territory of Prijedor Municipality, one group which was considered dangerous because they allegedly had put up an armed resistance against the Serb forces or because they were leading figures of the Muslims and Croats, the second group which for some reason was unsuitable, and the third group which was considered neutral and security-wise uninteresting, which is why they enjoyed a milder treatment, indicates that the staff of the camps were also aware that the majority of those persons had in no way, direct or indirect, been involved in the military activities. Therefore, everything described above indicates that in this case it was an attack on non-Serb civilian population.

The mere fact that, throughout the entire period of the existence of the Keraterm and Omarska camps, new individuals that had been arrested were brought there, which is also clear from the statements of all examined witnesses, shows that this was an attack against the non-Serb civilian population, which the Court is satisfied, ceased only when the non-Serb families finally left the Prijedor area, which was also done forcibly.

Based on the facts mentioned above, resulting from the evidentiary proceedings and included in the Annex A of the accepted Plea Agreement, the Court found that, at the relevant time, there was a widespread or systematic attack against the non-Serb civilian population of the Prijedor Municipality.

Criminal Offenses Committed in the Keraterm Camp

The Amended Indictment charges the accused Dušan Fuštar with the criminal offense of Persecution under Article 172 of the CC of BiH. According to the definition in Article 172 (2) (g) and the caselaw, the criminal act of Persecution may include all individual criminal offenses under sub-paragraphs (a) through (g) and (j) through (k) of 172 (1) of the CC of BiH, as well as other criminal offenses which this Court has the jurisdiction

⁷ See Decision on Adjudicated Facts, accepted facts number: 38, 132 and 140.



over, if the offenses have been committed against certain victims because of their ethnic or religious origin.⁸

1) General Situation at the Keraterm Camp

The Keraterm Camp consisted of premises and facilities of the ceramic factory in Ćirkin Polje, in the Prijedor suburbs, and was operational between 24 May 1992 and 5 August 1992, when, according to the witnesses, around 1,000 and 1,500 detainees were confined there.

All examined witnesses unanimously stated that the living conditions in the camp were below human dignity, which is specifically reflected in the fact that the detainees were given only one meal a day⁹, while some were not given any¹⁰. The food that the inmates ate was of very poor quality and it was not distributed in sufficient quantities, so that a meal for a whole day usually consisted of one or two slices of bread with broth or soup which the detainees described as "warm water with cabbage leaves"¹¹ or baked beans¹², and many detainees were not given any food for periods of even up to 10 days during the time they spent in the camp.¹³ Normally, the detainees were not given sufficient time to eat, and sometimes it would be limited to seconds.¹⁴ The detainees were never allowed access to food that their friends and relatives tried to pass to them, but it rather depended on the good will of some guards whether and when they would pass the food to the camp inmates, so the detainees were practically starved throughout their entire detention in the Keraterm camp.¹⁵ Because of everything described above the detainees lost significant amounts of weight, sometimes even more than half the weight they had before their detention.¹⁶

The rooms where the detainees were kept were squalid and overcrowded, without sufficient air and sleep space. The detainees in the Keraterm camp were confined in four rooms, where Room 1 had cement floor and later on wooden pallets, but since 300 – 400 people were confined there, the detainees did not have sufficient sleep space.¹⁷ The

⁸ Discrimination also includes targeting on the grounds of politics, race, ethnic origin, sex or other grounds which is universally accepted as impermissible in the international law.

⁹ Testimonies of witnesses K08, K013, K014 and K029.

¹⁰ Testimonies of witnesses K07 and K016.

¹¹ Testimonies of witnesses K013, K014, K029 and K044.

¹² Testimonies of witnesses K05 and K013.

¹³ Testimonies of witnesses K010 and K044.

¹⁴ Testimonies of witnesses K05, K08 and K014.

¹⁵ Testimonies of witnesses K029 and K044.

¹⁶ Testimonies of witnesses K05, K08 and K010.

¹⁷ Testimonies of witnesses K013 and K029.





²⁷ Testimonies of witnesses K03, K013 and K016.

²⁸ Testimony of witness K044.

²⁹ Testimonies of witnesses K05 and K029.

³⁰ Testimonies of witnesses K08, K010 and K044.

³¹ Testimonies of witnesses K05, K08 and K029.

³² Testimonies of witnesses Bosa Cijerovic, K08, K010 and K014.

³³ Testimonies of witnesses K08, K010 and K029.

³⁴ Testimonies of witnesses K08 and K016.

³⁵ Testimony of witness K010.

³⁶ Testimony of witness K044.

In addition to the general conditions in the Keraterm camp which are characterized as inhumane and humiliating, there was a constant atmosphere of fear due to constant humiliations, harassment, beatings, killings and psychological maltreatment.

Medical care was almost nonexistent. Some detainees were taken to the hospital, but none of them stated that they were actually treated there, but on the contrary, some were persecuted and beaten while they were trying to recover.³⁷

The time they were given for basic human and sanitary needs was limited, or else completely denied. Accordingly, the detainees were not always allowed to leave their rooms to use the toilet, instead they used whatever they had available, like barrels, plastic bottles and plastic bags.³⁸ The conditions in the toilet were also inadequate and extremely unsanitary because there was only one toilet for all detainees, and the access to it depended on the will of the guards.³⁹ The water that was provided for the detainees was not sufficient given the extreme conditions in the camp, so the detainees were dirty, and their injuries that resulted from physical maltreatment could not be adequately cleaned.⁴⁰

rooms.⁴¹ Organization of the camp did not allow the detainees the possibility to regularly leave their rooms to get fresh air despite the described situation in the Most of the time,⁴² the detainees could move only when they were explicitly ordered or witnesses compared their situation in this room with "a full box of matches".⁴³ in Room 3 was approximately 300 people, so the detainees could not sit down, and the this room, at one point during the registration, reached 512.⁴⁴ The number of detainees smaller and had ceramic tile flooring with wooden pallets. The number of detainees in would reach 30 to 40 degrees Celsius.⁴⁵ Next to Room 1 was Room 2, which was result of high temperatures during the summer-time period, the temperature in the room room had a sheet metal door, which would be closed during the night, and so, as the

2) Maltreatments in the Keraterm Camp

Many detainees were beaten during their detention in the Keraterm camp, often already on their arrival, when they would be forced to run the gauntlet of armed individuals which would beat them.²⁸ Generally, the beatings took place during the night, in the rooms or outside, close to the garbage dump or in a separate room which was used for the beatings, and after the beatings some of them would be returned to their rooms.

The beatings were carried out by the camp guards or the persons who would visit the camp, and they carried out the maltreatment individually or in groups. The visitors – usually Serb soldiers – would come to the camp alone or in groups whenever they wanted to beat the detainees.²⁹ The guards and visitors beat the detainees using their fists, feet, or assaulted them using various objects, including police batons, clubs and knives.³⁰

The guards in particular used the lunchtime to beat and humiliate the detainees, to that extent that some of them chose to stay in their rooms rather than suffer the beatings during lunch.³¹ In addition to that, the guards would also use the time when the detainees would go out to the toilet as another opportunity to beat them, especially during the night.³² In addition to this physical maltreatment, the detainees were also almost on a daily basis harassed, yelled at, often called derogatory names and their mothers were sworn, and the beatings themselves were often followed by insults on ethnic grounds.³³

The beatings also occurred during the interrogation of detainees by Serb inspectors from Banja Luka and the Prijedor PSS,³⁴ to which interrogations most of the detainees were called out and taken during their detention.³⁵ The inspectors would arrive to the camp in the morning and leave in the evening, so the interrogations took place during the regular working hours, and the beatings, threats and verbal assaults would be experienced by the detainees both on the way to and from the interrogations.³⁶

²⁸ Testimonies of witnesses Enes Crjenković, K05, K07, K08, K013, K019, K043 and K044.

²⁹ Testimonies of witnesses K013 and K014.

³⁰ Testimonies of witnesses K08, K013, K014, K016, K029 and K033.

³¹ Testimony of witness K044.

³² Testimony of witness K013.

³³ Testimonies of witnesses K05, K09, K016, K033, K043 and K044.

³⁴ Testimonies of witnesses K05, K08, K010 and K044.

³⁵ Testimonies of witnesses K05, K08, K010, K013 and K044.

³⁶ Testimonies of witnesses K09, K010, K016, K033, K043.



As regards the beatings of some detainees described in the Amended Indictment, the Court drew the following inferences in that regard:

According to a number of witnesses heard in the course of the Prosecution case-in-chief, detainee Zeiro Čaušević was a victim of severe beatings by the guards in the camp on several occasions. As a result of these beatings, according to the witnesses, his wounds became infected to that extent that during his detention in Keraterm, they even became infested with maggots.³⁷

Detainee Meho Kapetanović was, according to the witnesses who knew this victim well, also maltreated at the Keraterm Camp.³⁸

As regards the beating of a person by the name of Katlak, with his detailed evidence witness K044 convinced the Court that Katlak was severely maltreated on his way to the toilet.

In his statement, Witness K044 also described the maltreatment of detainee Ismet Kljajić, which, according to him, had especially grave consequences for the victim. The witness described that, on the accused's shift, Kljajić was forced to take all of his clothes off and then roll in the grass to make his body wet before he was beaten. As can be seen from the testimony of this witness, he and other inmates tried to help Kljajić by applying to his back the lard they got from the woman who worked as a cook in the camp. The beating of the detainee Ismet Kljajić was also confirmed by witness K016 in the evidence he gave before this Panel.

The beating of a certain number of detainees, who had been brought from the Brdo area, upon their arrival to the camp in July 1992, is described by a series of witnesses in their statements. According to the witnesses who were examined about those circumstances, in anticipation of the arrival of this group to Keraterm, it was ordered that Room 3 be vacated, and immediately upon the arrival of several busses carrying these people, a group of 15-20 guards and soldiers started maltreating them. Detainees from the Brdo area were, on that occasion, beaten with various objects, including rifle butts, bats and cables. Witness Enes Crjenković, who was in the group of the detainees from the Brdo area, described the events where, after the described initial beating, over the following three days, they were forced to lie on the asphalt, while the guards beat them from time to time.³⁹ According to this witness, the accused too was present when these maltreatments took place.

Witness K016 testified as to the circumstances surrounding the beating he personally suffered as a detainee at the Keraterm Camp. According to this witness, which the Panel finds convincing and reliable, during the time he spent at the camp, he was beaten twice by different persons. According to his statement, the first beating took place when he

³⁷ Testimonies of witnesses K05, K013, K016, K043 and K044.

³⁸ Testimonies of witnesses K09 and K044.

³⁹ Testimonies of witnesses Enes Crjenković, K07, K08, K043 and K044.



was ordered to take another detainee out from the room where they stayed together, and since that witness was unable to leave the room due to the previous beatings, instead of him, the guards started beating Witness K016. According to the witness, the second beating took place in the presence of the accused, and on that occasion, according to the witness's estimate, he was beaten for about 10 minutes by a police officer and the person who was with him.

The beating of Witness K015 followed, according to him, after he volunteered to carry inside another detainee whose maltreatment he had heard before that through the closed door to the room. This witness stated that, on that occasion, a group of 10-12 men started beating him too, and beat him until one of the shift leaders at the Keraterm Camp stopped them. These allegations were also confirmed by Witness K016.

As regards the beating of detainee Esad Islamović, a number of witnesses clearly remember his maltreatment, to which Drago Tokmadžić was also subjected in addition to the abovementioned victim. According to the statements of witnesses examined about the circumstances surrounding the beating of these two persons, both of them were professional police officers, and they were brought to the Keraterm Camp in uniforms, which was the reason why they were specially maltreated.⁴⁰

According to his statement given before the ICTY in the *Miroslav Kvočka et al. Case*, which was accepted as evidence in the respective proceeding, detainee Edin Ganić was also a victim of the beatings at the Keraterm Camp.⁴¹ The allegations of this witness were also supported by the witness K013, who was heard at the main hearing held before this Panel and who stated that he and Ganić had been beaten by a known group of visitors to the Camp, and that, together with some other victims from the room where they were kept, they were taken to the Prijedor hospital. All witnesses who personally saw the condition Edin Ganić was in after the critical incident, confirmed his allegations according to which on that occasion he sustained a serious knee injury as the result of this beating.⁴²

According to Witness K029, detainee Suad Halvadžić was called out from the common room one night and beaten by a group which also included the guard Pedrag Bašević. This witness stated that, upon his return to the room, Suad Halvadžić was in a serious condition and covered in blood, and that he was lying close to him, so that Witness K029 could directly and reliably find out and observe what had happened to this person.

The maltreatment of the Ališić brothers (Jasmin, Armin, Edin and Feha) was recounted by a certain number of witnesses who knew the Ališić family from before. These witnesses all stated that the Ališić brothers were called out one evening, whereupon the

⁴⁰ Testimonies of witnesses Anto Tomić, K09, K013 and K015.

⁴¹ Transkripti suđenja od 27.09.2000. godine iz predmeta protiv *Miroslava Kvočka i dr.*, MKSJ-broj: IT-98-30-T, strana 5907-5912.

⁴² Testimonies of witnesses K013 and K029.



sound of beating could be heard, and the next day, the Ališić brothers had visible traces of the beating from the previous night, which was committed by a group of attackers.⁴³

According to his statement, Witness K010 too was a victim of the beatings several times, and one of those beatings was witnessed by the accused Dušan Fuštar, who was nearby when this witness was taken to a separate room where he was beaten by a rather large group of direct perpetrators.

As a detainee at the Keraterm Camp, Witness K013 was also a victim of the beatings of a group of visitors to the camp, and the witnesses who confirmed this incident in their statements, especially pointed out that he had sustained an arm injury during the maltreatment.⁴⁴

The circumstances surrounding the beating of the detainee Šaban Elezović are contained in the testimony of Witness K08, who stated that this person was forced to collect money from the other inmates under death threat.

The witness who testified under the pseudonym K05 stated that he was a victim of the beatings at the Keraterm Camp on several occasions.

According to this same witness, detainees Suad Bairić and Zijad Krivdić were also subjected to severe maltreatment, and this incident, like all the other incidents mentioned in this Verdict, is covered by the Plea Agreement.

3) Deprivations of Life at the Keraterm Camp

According to the allegations in the Amended Indictment, some of the detainees were beaten to death, which was often the consequence of regular maltreatment during several consecutive days.⁴⁵ All witnesses who testified to these circumstances unanimously stated that, after a detainee would die as a result of the beating, the victim's body would be left outside and taken away the following day.⁴⁶

As regards specific individual incidents of killings of persons who died as a result of the beatings, the Court established the following beyond doubt:

⁴³ Testimonies of witnesses K09 and K029. See also the ICTY Transcript of Edin Ganić's trial testimony dated 27 September 2000 in the *Miroslav Kvočka et al.* Case, ICTY-number: IT-98-30-T, pgs. 5899-5900.

⁴⁴ Testimonies of witnesses K016 and K029. See also the ICTY Transcript of Edin Ganić's trial testimony dated 27 September 2000 in the *Miroslav Kvočka et al.* Case, ICTY-number: IT-98-30-T, pg. 5899.

⁴⁵ For examples see: consecutive beatings of Zeljko Čaušević (Testimony of Witness K013) and the beatings of the detainees from the Brdo area who arrived in July, also including Enes Crljenović (Testimony of witness Enes Crljenović).

⁴⁶ Testimonies of witnesses Anto Tomić, K08, K09, K010, K013, K014, K015, K016, K029, K033, K043 and K044. See also the ICTY Transcript of Edin Ganić's trial testimony dated 27 September 2000 in the *Miroslav Kvočka et al.* Case, ICTY-number: IT-98-30-T, pgs. 5893-5896.



According to a large number of witnesses, detainee Drago Tokmadžić was a police officer in Prijedor and he was brought to the Keraterm Camp together with his colleague from work Esad Islamović and they were both wearing police uniforms. According to the consistent statements of the examined witnesses, Drago Tokmadžić and Esad Islamović were called out from the room one night and severely beaten by a group which consisted of guards and visitors to the Camp.⁴⁷ Unlike Islamović, who survived this maltreatment, Tokmadžić died shortly after he was brought back to the room by other guards who carried him in, while some witnesses, who were not confined in the same room, stated that the next day they saw his dead body left outside of the room.⁴⁸

According to the examined witnesses, detainee Jovo Radočaj was the only Serb inmate who was detained at the Keraterm, who received a specially cruel treatment from the guards because, since he was a member of the Party of Democratic Action (SDA), they considered him a traitor to the Serb people. All witnesses examined as to the circumstances surrounding the death of Jovo Radočaj gave a detailed account of his being called out of the room, beaten in front of it, which, as usual, they could only hear. However, the examined witnesses who were confined in the room to which Jovo Radočaj was thrown in after the beating were eyewitnesses to the consequences as a result of which this victim actually died shortly after this incident.⁴⁹

The witnesses remember the person by the name of Jasmin a/k/a Zvezdaš as the son of the owner of a pastry shop in Prijedor called Crvena zvijezda, who was an Albanian. According to the witnesses, this person was called out at some point together with other Albanian detainees at the Keraterm Camp and severely beaten and after a while he was brought back to the room where he was kept. Just like in the incident described above, the witnesses eyewitnessed the consequences of the beating of the person nicknamed Zvezdaš, who died after he was brought back to the room.⁵⁰ The witnesses stated that, before he died, this person vomited yellow substance, which is why the other inmates concluded that his gall-bladder had burst as a result of the beating and that he would not survive with such injuries.⁵¹

The death of the detainee Džemal Mešić was described by the Witness K029, who was confined close to this detainee in a room in the Keraterm Camp. According to the testimony of this witness, having been called out, Džemal Mešić left the room, where he was thrown back in after a while with serious injuries, as a result of which he died that same night.⁵² The allegations of Witness K029 are supported by the testimony of

⁴⁷ Testimony of witnesses Anto Tomić, K09 and K016.

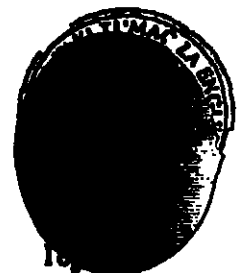
⁴⁸ Testimonies of witnesses K05, K08, K015 and K044.

⁴⁹ Testimonies of witnesses Anto Tomić, K09, K015 and K016.

⁵⁰ Testimonies of witnesses Anto Tomić, K08, K09, K016 and K043.

⁵¹ Testimonies of witnesses K09, K015 and K043.

⁵² Svjedočenje svjedoka K029.



Witness K010, who confirmed that, after Mešić was called out one night, the next day he saw his dead body in front of the room where he was kept.³³

After he was called out by the guards at the Keraterm Camp, detainee Dževad Karabegović was also brought back to the room, where he was kept, in difficult condition, given the fact that the testimony of Witness K044 shows that other detainees used a lighter to try to locate the injuries on his body and treat them, however, after a short while, Karabegović died of the injuries he had sustained, which is also confirmed by the evidence given by the witness Ismet Dizdarević before the ICTY.³⁴

In his testimony at the main hearing, Witness K010 gave a detailed account of circumstances surrounding the suffering of detainee Besim Hergić at the Keraterm Camp. Namely, Besim Hergić was detained in the same room with Witness K010, wherefrom he was called out together with a group of people, and where, upon the order of one of the guards, he was thrown back in, where shortly afterwards he died. Witness K010 confirmed that the next day he saw the dead body of Besim Hergić outside of the room.

As regards the suffering of the detainee Fikret Avdić, the witnesses stated that, after being detained in the Keraterm Camp for a short while, he was called out, beaten and taken back to the room where he was kept, and the witnesses later saw his dead body in front of the room.³⁵

As regards the group of detainees which included Ismet Bairić, Behzad Behlić and a man by the name of Šolaja, the witnesses stated that these persons had been singled out for execution by a firing squad, which was the way to punish the detainees for the escape of one of the inmates. Out of the 20 victims who were singled out and killed on that occasion, the witnesses were able to identify the three aforementioned detainees by name.³⁶ According to the statements of witnesses, when this group was called out, the accused Dušan Fuštar, in his capacity as a shift leader, was present in the room from which these victims were taken to be executed.

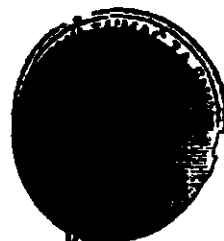
The Panel finds that the described situations at the Keraterm Camp and the individually specified cases of maltreatment of detainees and deprivations of life, represent beyond doubt the criminal offenses of murder Article 172 (1) (a) of the CC of BiH, imprisonment (sub-clause e), torture (sub-clause f) and other inhumane treatment (sub-clause k) included in the criminal offense of persecution under Article 172 (1) (h) of the CC of BiH.

³³ Svjedočenje svjedoka K010.

³⁴ Also supported by the statements of Ismet Dizdarević given to the ICTY investigators on 4 November 1995, page 3, and 2 February 2002, paragraph 7.

³⁵ Testimonies of witnesses K013 and K043.

³⁶ Testimonies of witnesses Enes Crjenković and K07.



Discriminatory Intent on the Part of the Perpetrators of Criminal Offenses

Based on the previously mentioned evidence, the Panel drew a clear and indisputable inference that all acts and actions within the attack against the civilian population in the Prijedor Municipality were aimed specifically at the Bosniak, Croat and other non-Serb population, whereas the Serb population went on with their lives undisturbed except for the difficulties caused by the war. This inference is supported by the statements of a large number of witnesses who, describing the situation in the camp, stated that, according to their estimates based on the information on the identity of the victims, many detainees were detained in the camp, beaten and killed because of their ethnic origin or their role or position in the society.⁵⁷

Criminal Offenses Committed in the Keraterm Camp Represent Part of a Widespread or Systematic Attack

The Panel is satisfied that the camps in the Prijedor Municipality area, including the Keraterm Camp, where a significant number of non-Serb civilians was detained, did represent an integral part of a widespread or systematic attack against these civilians. The Panel finds that all previously described criminal offenses that were committed as part of the existence and functioning of the camps should be treated as one legal entity, and thus all of the mentioned individual offenses can be characterized as part of a widespread or systematic attack within the Keraterm Camp.

Legal Definition of the System at the Keraterm Camp as a "Joint Criminal Enterprise"

The Court accepts the concept of the "Joint Criminal Enterprise" as a mode of criminal responsibility included in the provisions of Articles 180 (1) and 29 of the CC of BiH, according to which the entire situation in the Keraterm Camp can be legally defined as one system of organized co-perpetratorship that lasted throughout the entire existence of the camp.⁵⁸ Such organized (or systemic) manner of co-perpetratorship within one detention camp can be treated as a variant of the basic form of co-perpetratorship, or "Joint Criminal Enterprise" according to the ICTY terminology.⁵⁹

The systemic variant of the "Joint Criminal Enterprise", or the co-perpetratorship within the detention camp, as a mode of criminal responsibility is recognized by the international jurisprudence as well since the processing of the crimes committed in the

⁵⁷ Svjedočenja svjedoka K05, K09, K016, K033, K043 i K044.

⁵⁸ ICTY decisions refer to this mode of co-perpetratorship or "Joint Criminal Enterprise" as "JCE 2" or "Second Category JCE".

⁵⁹ ICTY decisions refer to the basic form of co-perpetratorship as "JCE 1" or First Category JCE". The ICTY system also uses a third category of the "Joint Criminal Enterprise" ("JCE 3" or "Third Category JCE"), where a participant in the "Joint Criminal Enterprise" can also be held responsible for the excess criminal offenses of other participants of the enterprise, if such offenses which are outside of the scope of the joint enterprise were foreseeable to the accused. In this Verdict, the Court does not go into the discussion on the applicability of this third category of the "Joint Criminal Enterprise" in the BiH legal system.





According to the principles of the international law, when it is incorporated into the national law national courts must take into consideration the provisions of the international law based on which

The Geneva Conventions themselves do not include the modes of criminal responsibility, but the so called *Martens Clause*, for example Article 2 of the Protocol I Additional to the Convention prescribes that international customary law shall be integrated in the legal system of the ratifying state in case significant humanitarian law issues are left unresolved by the Conventions.

See Appellate judgment in *Dakić Trial* case, ICTY-number: IT-94-1, dated 15 July 1999.

This conclusion, according to which *actus reus* is met by the mere fact that the accused intended the criminal plan, is supported by the fact that in a system of co-perpetration of a larger scale, such as for example the functioning of a concentration camp, it is impossible to establish the contribution of an individual was decisive in terms of *causatio sine qua non*. On the other hand, it is perfectly clear that only through the joint action of co-perpetrators it is possible to maintain the functioning of a concentration camp in a designated manner. The organization of a camp depends on day to day performance of duties on various positions within the system of the camp, see Appellate judgment in the case of *Miroslav Kvočka et al*, ICTY: IT-98-30/1-A, dated 28 February 2005, paragraph 80.

See description of situations which had to then and have to now be considered when processing cases of war crimes in the context of the provision of Article 180 of the CC of BiH, *Commentary to the Criminal Codes in Bosnia and Herzegovina*, Volume I, Sarajevo 2005, Babic/Filipovic/Markovic/Rajic, pgs. 593-594.

See judgments and information on crimes committed in the concentration camps Auschwitz, Bergen-Belsen, Dachau and Majdanek, collected by the official reporters for the United Nations Law Reports during the trials in English language, archived by the UN, on the website: <http://www.unhcr.org/refugees/ww2/>

Article 180 (1) of the CC of BiH represents a verbatim copy of Article 7 (1) of the ICTY Statute, which the legislator incorporated into the law bearing in mind the interpretation of this provision as including the "Joint Criminal Enterprise" concept that had already been formed in the ICTY decisions. Based on this fact, the Panel is satisfied that the intention of the legislator in doing that was to make the international jurisprudence of the ICTY applicable to the war crimes cases processed before the Court of BiH.

In what were the first judgments in the history of the Nazi concentration camps, the tribunals had to find an answer to the specific issues related to the establishment of personal responsibility of individuals in situations of massive commission of criminal offenses in the concentration camps during the war. These judgments established that every mode of support to the functioning of the camp, which exists for the purpose of massive commission of the criminal offenses, entails criminal responsibility, so when there is a situation where a camp is established for the purpose of unlawful detention, maltreatment and killing of people, none of the camp staff can use for their defense the argument that they were "just performing their duty". This is the foundation in the international customary law on which the ICTY bases its legal interpretation relative to the incorporation of the "Joint Criminal Enterprise" in Article 7 (1) of the ICTY Statute which regulates modes of personal criminal responsibility. Following the ratification of the Geneva Conventions and the Protocol thereto in 1977, this customary international law also became part of the legal system of the former SFRY and continued to be in effect even after the proclamation of the independence of Bosnia and Herzegovina.



27
This interpretation was also supported in the commentary to Article 26 of the CC of SFRY, *Commentary to the Criminal Code of SFRY*, Sarajevska Administracija, Novi Sad 1978, Bečić/Bavcon/Bordević et al, pgs. 143-144.

⁶⁷ John DeGans *Preliminary Motion Challenging the Form of the Indictment*, dated 24 August 2006, paragraph 51.

⁶⁸ See detailed analysis of the issue of the applicable national law in BiH during the war in the first instance Verdict of the Court of BiH in the case against *Montello Kandić*, pgs. 155-156.

⁶⁹ national law was created and their interpretation by the international courts, *Principles of International Criminal Law*, Gerhard Werle, Asser Press 2005, pg. 80.

The notoriety of the Nazi crimes committed in the concentration camps during World War II and the evolution of the international Customary Law on one hand and the existence of the aforementioned provisions in the CC of SFRY on the other, show that the principle of legality under Article 3 (2) of the CC of BiH has not been violated by the application of this concept of personal criminal responsibility. The concept of co-perpetratorship in the form of the "Joint Criminal Enterprise" was objectively applicable through the international Customary Law and the cited provisions of the CC of SFRY, and also subjectively, the perpetrators of the criminal offenses within a "Joint Criminal

The Court finds an additional argument for the application of the "Joint Criminal Enterprise" concept in Article 26 of the former Criminal Code of the SFRY that was in effect at the time of the commission of the respective criminal offenses.⁶⁶ Article 26 of the CC of SFRY prescribes criminal responsibility of anybody "... creating or making use of an organization for the purpose of committing criminal acts ...; responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them ...". Contrary to the argumentation presented by the Defense Counsel for Dusan Fustar, already at the preliminary motions stage,⁶⁷ the Court does not see Article 26 of the CC of SFRY as an example of an incomplete form of a criminal offense, since the cited text of this provision clearly implies that the organizer is criminally responsible for the criminal offenses committed within the group established by him, and that, according to this article, his responsibility is not limited to the mere establishment of the group.⁶⁸ Therefore, the Court finds that Article 26 of the CC BiH does not represent a mode of criminal responsibility that could be compared with the international concept of "conspiracy", according to which the only thing punished is the establishment of a criminal group, or more precisely the planning of the criminal offense. The existence of special provisions of Articles 136, 145 and 254 of the CC of SFRY which criminalize conspiracy against the national security of SFRY (Article 136), for the purpose of instigating the commission of genocide and war crimes (Article 145), or joining for the purpose of the commission of criminal acts carrying the penalty of five years imprisonment or more (Article 254), indicates the correctness of the position taken by the Panel with respect to the interpretation of Article 26 of the CC of SFRY. Therefore, it can be considered that it indicates that the concept of co-perpetratorship, which is close to the term "Joint Criminal Enterprise," was recognized in the pre-war legislation applicable at the time of the commission of the relevant criminal offenses.

Enterprise" such as the Keraterm Camp, could foresee that their conduct entailed personal criminal responsibility.

Previous case law of the Court of BiH with respect to the issue of applicability of the concept of the "Joint Criminal Enterprise" supports this position taken by the Panel.⁶⁹

Criminal Responsibility of the Accused Dušan Fuštar Through His Participation in the "Joint Criminal Enterprise"

The Court, therefore, agrees with the argumentation according to which the mere participation of the accused Dušan Fuštar in the maintenance of the functioning of the Keraterm Camp, an organizational unit which can be legally qualified as a "Joint Criminal Enterprise", entails the criminal responsibility of the accused.

1) The Role of the Accused Dušan Fuštar in the Keraterm Camp

The witnesses confirm in their statements that Dušan Fuštar was the leader of one of the guard shifts at the Keraterm Camp.⁷⁰ Duško Sikirica was the Commander of Security at the Keraterm Camp, and this security consisted of the members of reserve police, to which the accused himself belonged. Approximately, between mid and late June 1992, the guards started being organized in three shifts and each shift consisted of no more than 15 guards. The other two shift leaders were Damir Došen, a/k/a Kajin and Dragan Kolundžija, a/k/a Kole. The shifts rotated and were approximately 12 hours long, so normally, one shift would arrive between 6 and 8 a.m. and would be on duty for 12 hours, whereupon it would be relieved sometime between 6 and 8 p.m.⁷¹

As regards the comparison of the situation on the shifts, according to the witnesses, the best shift for the detainees was the shift of Dragan Kolundžija. In terms of improvement of conditions in the camp, he did much more than the other shift leaders. He made more use of his authority in order to prevent the guards and visitors of the Keraterm Camp from mistreating the detainees, in order to give the detainees greater freedom of movement both outside and inside the rooms and allow them more frequent access to the toilets. In addition to that, he also allowed the detainees contacts with the members of their families at the main gate to the Camp. In Kolundžija's shift the calling out and the beatings during the night were fewer and the detainees could eat their meals undisturbed without physical and psychological provocations.⁷²

⁶⁹ First Instance Verdict in the *Savo Todović and Mitar Radević* case, handed down on 28 February 2008; *orbiter dictum* in the first instance Verdict against *Mončilo Mandić*, Ref. number: X-KR-05/98, dated 23 October 2007, pg. 155.

⁷⁰ Testimonies of witnesses K05, K07, K010, K013, K016, K029 and K044.

⁷¹ Testimonies of witnesses K013 and K029.

⁷² Except for the Room 3 massacre which occurred on Kolundžija's shift. However, there is evidence indicating that Kolundžija tried to prevent or reduce the killings during the massacre: see testimonies of witnesses K08, K013, K014, K016 and K044.

According to the witnesses, Dušan Fuštar's shift was particularly bad for the detainees.⁷³ A number of witnesses testified that the majority of the calling out and beatings took place on Fuštar's shift,⁷⁴ and that the detainees had less time for eating⁷⁵ and less freedom of movement on his shift than on other shifts.⁷⁶ Although a certain number of witnesses stated that Damir Došen's shift was equally bad for the detainees, this was mainly related to the fact that Predrag Banović was on that shift⁷⁷. He was one of the most violent and most aggressive guards,⁷⁸ but he would come to the camp and maltreat the detainees on all shifts including Fuštar's.⁷⁹

2) The Role of the Accused Dušan Fuštar in Specific Situations

Although the majority of witnesses stated that the accused Dušan Fuštar was not seen personally maltreating any of the detainees or committing killings, the witnesses accused him of not using his authority as the shift leader in cases of maltreatment that occurred in his presence in order to prevent that maltreatment.⁸⁰

In relation to the individual cases that have already been mentioned, evidence has been presented before the Court indicating that the beatings occurred at times when Dušan Fuštar was on duty and that he was aware of some of those beatings. The specific evidence relating to three incidents which occurred in Fuštar's presence was presented before this Court and the accused does not dispute it:

Thus, witness K016 testified as to the incident when a police officer beat him with a baton on his back, head and arms, while another man kicked him in the stomach. Although Dušan Fuštar was present while this was taking place, instead of taking reasonable measures with a view to preventing the beating, he just warned the perpetrators not to hit him on the head.

As regards the other incident that has already been described, Witness K010 stated that, one night, he was called out by the guard Kondić, while Dušan Fuštar was standing on the "pista" /*cement courtyard area between the buildings known as "pista" – translator's note*, or in other words in the close vicinity of the scene of the incident without intervening.

⁷³Testimonies of witnesses K010, K013, K016, K029 and K044.

⁷⁴ Testimonies of witnesses K05, K07, K08, K010, K013, K029 and K044.

⁷⁵ Testimony of witness K08.

⁷⁶Testimony of witnesses K010 and K016.

⁷⁷ Testimonies of witnesses K08, K09, K015, K016 and K029.

⁷⁸ Testimonies of witnesses Enes Crjenković, K08, K029 and K044.

⁷⁹ Testimonies of witnesses K08, K09 and K029.

⁸⁰ Testimonies of witnesses Enes Crjenković, K016, K029 and K044.

