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

COURT OF BOSNIA AND HERZEGOVINA

Case No.: **X-KR-05/24**

Date: **Delivered 29 July 2008**
Published 13 January 2009

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

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MILOŠ STUPAR, MILENKO TRIFUNOVIĆ, BRANO DŽINIĆ, ALEKSANDAR RADOVANOVIĆ, SLOBODAN JAKOVLJEVIĆ, VELIBOR MAKSIMOVIĆ, DRAGIŠA ŽIVANOVIĆ, BRANISLAV MEDAN and MILOVAN MATIĆ

FIRST INSTANCE VERDICT

Counsel for the Prosecutor's Office of Bosnia and Herzegovina:

Mr. Ibro Bulić
Mr. Kwai-Hong Ip

Counsel for the Accused Miloš Stupar:

Ms. Ozrenka Jakšić
Mr. Radivoje Lazarević

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Counsel for the Accused Milenko Trifunović:

Mr. Rade Golić
Mr. Petko Pavlović

Counsel for the Accused Brano Džinić:

Ms. Suzana Tomanović
Mr. Boriša Ilić

Counsel for the Accused Aleksandar Radovanović:

Mr. Dragan Gotovac
Ms. Nada Mandić

Counsel for the Accused Slobodan Jakovljević:

Mr. Boško Čegar
Mr. Slavko Aščerić

Counsel for the Accused Velibor Maksimović:

Mr. Danilo Mrkaljević
Ms. Vera Lazić

Counsel for the Accused Dragiša Živanović:

Mr. Stanko Petrović
Mr. Ratko Gengo

Counsel for the Accused Branislav Medan:

Mr. Borislav Jamina
Mr. Zoran Kisin

Counsel for the Accused Milovan Matić:

Mr. Miloš Perić
Mr. Ratko Jovičić

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IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, in the Panel composed of Judge Hilmo Vučinić, as the Presiding Judge, and Judges Shireen Avis Fisher and Paul Melchior Brilman as the Members of the Panel, and Dženana Deljkić-Blagojević as the Legal Adviser, in the criminal case against the accused Miloš Stupar *et al.* for the crime of Genocide referred to in Article 171 of the Criminal Code of BiH (CC of BiH), deciding upon the Indictment of the Prosecutor's Office of BiH no. KT-RZ-10/05 dated 12 December 2005, amended in the course of the main trial and confirmed on 9 July 2008, following a public main trial that was partly closed to the public, in the presence of the Prosecutors of the Prosecutor's Office of BiH Ibro Bulić and Kwai Hong Ip and the Accused Miloš Stupar and his defense team, attorneys Ozrenka Jakšić and Radivoje Lazarević, the Accused Milenko Trifunović and his defense team, attorneys Rade Golić and Petko Pavlović, the Accused Brano Džinić and his defense team, attorneys Suzana Tomanović and Boriša Ilić, the Accused Aleksandar Radovanović and his defense team, attorneys Dragan Gotovac and Nada Mandić, the Accused Slobodan Jakovljević and his defense team, attorneys Boško Čegar and Slavko Aščerić, the Accused Velibor Maksimović and his defense team, attorneys Danilo Mrkaljević and Vera Lazić, the Accused Dragiša Živanović and his defense team, attorneys Stanko Petrović and Ratko Gengo, the Accused Branislav Medan and his defense team, attorneys Borislav Jamina and Zoran Kisin, and the Accused Milovan Matić and his defense team, attorneys Miloš Perić and Ratko Jovičić, following a deliberation and voting session on 29 July 2008, publicly issues and pronounces the following

VERDICT

ACCUSED:

1. **STUPAR MILOŠ, a.k.a. "MIŠO",** son of Miroslav and Slavojka nee Ninić, born on 7 December 1963 in Tišće, Šekovići where he is holding permanent residence, of Serb ethnicity, citizen of BiH, police officer, married, father of four, served the Army in 1982 in Niš, decorated, average financial situation, with no previous conviction, criminal proceedings are being conducted against him for a criminal offence of Light Bodily Injury.

2. **TRIFUNOVIĆ MILENKO, a.k.a. "ČOP",** son of Ivan and Milojka nee Obradović, born on 7 January 1967 in the village of Kostolomci, Srebrenica Municipality, residing in Skelani bb, of Serb ethnicity, citizen of BiH, completed Secondary Vocational Trade School, unemployed, married, father of three minors, served the Army in 1987 in Peć and Prizren, with no military rank or medal, registered in military records of Srebrenica, indigent financial situation, no other criminal proceedings are being conducted against him, with no previous conviction,

4. **DŽINIĆ BRANO a.k.a. "ČUPO",** son of Ratomir and Dragica nee Erkić, born on 28 June 1974 in the village of Jelačići, Kladanj Municipality, residing in Vlasenica, Srpskih ranjenika 14, of Serb ethnicity, citizen of BiH, police officer by profession, single, no children, with no previous conviction, no other criminal proceedings are being conducted against him,

5. **RADOVANOVIĆ ALEKSANDAR, a.k.a. "ACA",** son of Ljubiša and Jela, nee Dragišević, born on 20 June 1973 in Bujakovići-Skelani, Srebrenica Municipality

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where he is holding permanent residence, of Serb ethnicity, citizen of BiH, police officer by profession, completed secondary education, married, father of one child, with no previous conviction, no other criminal proceedings are being conducted against him,

6. **JAKOVLJEVIĆ SLOBODAN, a.k.a. "BOBAN",** son of Dobrislav and Kosa, born on 9 January 1964 in the village of Kušići, Srebrenica Municipality, residing in Žabokvica-Skelani, of Serb ethnicity, citizen of BiH, unemployed, married, father of three, indigent, with no previous conviction, no other criminal proceedings are being conducted against him,

10. **MEDAN BRANISLAV, a.k.a. "BANE",** son of Risto and Marta, nee Milić, born on 24 March 1965 in Dubrovnik, residing in Mostar, Maršala Tita 23, of Serb ethnicity, citizen of BiH, worker by profession, completed elementary education, unemployed, widower, no children, indigent, served the Army service, with no previous conviction, no other criminal proceedings are being conducted against him,

ARE FOUND GUILTY

Inasmuch as:

I. Milenko Trifunović in his capacity of Commander of the 3rd Skelani Platoon as a constituent element of the 2nd Šekovići Special Police Detachment, which he commanded, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan, as special police officers within the same Platoon, Džinić Brano as a special police officer in the 2nd Šekovići Special Police Detachment in the period from 10 July to 19 July 1995, in which the VRS and MUP carried out a widespread and systematic attack against the members of Bosniak people inside the UN protected area of Srebrenica, with the common purpose and plan to exterminate in part a group of Bosniak people by means of forced transfer of women and children from the Protected area and by organized and systematic capture and killing of Bosniak men by summary executions by firing squad, having had the knowledge of the plan to exterminate in part a group of Bosniaks, on 12 and 13 July 1995 were deployed along the Bratunac – Milići road, on the section of the road between villages Kravica and Sandići, Municipality of Bratunac, and undertook the following actions:

c) on July 13, secured the road and participated in the capture and detention of several thousand Bosniaks from the column of Bosniaks (trying to reach the territory under the control of the Army of R BiH patrols), while Trifunović encouraged them to surrender;

d) on the same day, conducted security duties in or around Sandići Meadow, Municipality of Bratunac, where they were detaining at least one thousand captured men,

e) on the same day conducted in a column more than one thousand Bosniak male prisoners into the warehouse of the Farming Cooperative Kravica and detained them together with other imprisoned Bosniak males who were brought to the warehouse on buses, the total number of whom exceeded one thousand, in the Farming Cooperative warehouse and put most of them to death in the early

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evening hours in the following manner: the Accused Milenko Trifunović and Aleksandar Radovanović, together with Petar Mitrović, fired their automatic rifles at the prisoners; Brano Džinić threw hand grenades at them and the accused Slobodan Jakovljević, Medan Branislav and Petar Mitrović (after opening rifle fire) moved to the back of the warehouse where they stood guard to prevent the prisoners from escaping through the windows;

II. Miloš Stupar, in his capacity of Commander of the 2nd Šekovići Special Police Detachment, which he commanded, with the common purpose and plan to exterminate in part a group of Bosniak people, as a superior and the person responsible for the actions of his subordinates, knew or had reason to know that on 13 July 1995 his subordinates committed the killings of imprisoned Bosniaks in the warehouse of the Kravica Farming Cooperative with the plan to exterminate in part a group of Bosniak people, failing to undertake necessary and reasonable measures to punish the perpetrators;

T h e r e f o r e, with the plan to exterminate in part a national, ethnic and religious group of Bosniak, killed the members of the Bosniak group of people

W h e r e b y:

The Accused Milenko Trifunović, Aleksandar Radovanović, Brano Džinić, Slobodan Jakovljević, and Branislav Medan, as co-perpetrators, by their acts, committed the criminal offence of Genocide in violation of Article 171(a) in conjunction with Articles 29 and 180(1) of the CC of BiH, while the Accused Miloš Stupar committed the criminal offence of Genocide in violation of Article 171(a), in conjunction with Article 180(2) of the CC of BiH;

Therefore, pursuant to Article 285 of the CPC of BiH, with application of Articles 39, 42 and 48 of the CC of BiH, the Panel of the Court of BiH

SENTENCES

1. The Accused Miloš Stupar TO THE LONG-TERM PRISON SENTENCE OF FORTY (40) YEARS;

2. The Accused Milenko Trifunović TO THE LONG-TERM PRISON SENTENCE OF FORTY TWO (42) YEARS;

3. The Accused Aleksandar Radovanović TO THE LONG-TERM PRISON SENTENCE OF FORTY TWO (42) YEARS;

4. The Accused Brane Džinić TO THE LONG-TERM PRISON SENTENCE OF FORTY TWO (42) YEARS;

5. The Accused Slobodan Jakovljević TO THE LONG-TERM PRISON SENTENCE OF FORTY (40) YEARS;

6. The Accused Branislav Medan TO THE LONG-TERM PRISON SENTENCE OF FORTY (40) YEARS;

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Pursuant to Article 56 of the CC of BiH, the time that the Accused spent in custody until the referral to serve the sentences shall be credited towards the sentence of imprisonment, pursuant to the respective Decisions of the Court, as follows:

1. Miloš Stupar, from 22 June 2005;
2. Milenko Trifunović, from 22 June 2005;
3. Aleksandar Radovanović, from 22 June 2005;
4. Brane Džinić, from 22 June 2005;
5. Slobodan Jakovljević, from 21 June 2005;
6. Branislav Medan, from 23 August 2005;

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

Pursuant to Article 198(2) of the CPC of BiH, injured parties, witness S1 and witness S2, and members of the Association – Movement of the Mothers of the Enclaves of Srebrenica and Žepa are instructed to take civil action to pursue their claims under property law.

Contrary to the foregoing, pursuant to 284(1)(3) of the CPC of BiH,

8. **Velibor Maksimović**, **a.k.a "VELJA",** son of Živko and Radenka nee Jovanović, born on 15 December 1966 in Skelani b.b., of Serb ethnicity, citizen of BiH, forester by profession, single, with no children,

9. **Dragiša Živanović**, **a.k.a "KELE",** son of Desimir and Grozda nee Milić, born on 4 October 1974 in Bajina Bašta, Serbia, residing in Toplice, Srebrenica Municipality, of Serb ethnicity, citizen of BiH, farmer, unemployed, married, father of two, with no previous conviction, no other criminal proceedings are being conducted against him,

11. **Milovan Matić**, son of Radoje and Simka nee Simić, born on 20 May 1960 in Bratunac, residing in Kajići, Bratunac Municipality, of Serb ethnicity, citizen of BiH, worker by profession, literate, completed elementary school education, married, father of three, indigent financial situation, served the Army, with the rank of corporal, not registered in military records, with no previous conviction, no other criminal proceedings are being conducted against him,

ARE HEREBY ACQUITTED

OF THE FOLLOWING CHARGES:

Velibor Maksimović and Dragiša Živanović, as special police officers of the 3rd Skelani Platoon of the 2nd Šekovići Detachment, and Milovan Matić, as a member of the VRS, together with Miloš Stupar, as Commander of the 2nd Šekovići Special Police Detachment that he commanded, Milenko Trifunović, in his capacity as Commander of the 3rd Skelani Platoon of the 2nd Šekovići Special Police Detachment that he commanded, and Petar Mitrović, Aleksandar Radovanović, Slobodan Jakovljević, Miladin Stevanović, Branislav Medan, as special police officers within the same Platoon, Brano Džinić, as a special police officer within the 2nd Šekovići Special Police Detachment, as knowing participants of the JCE in the period from 10 July to 19 July 1995, during which the VRS and RS MUP carried out a

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widespread and systematic attack against the members of Bosniak people of the UN Safe Area of Srebrenica, pursuant to common purpose and a plan to destroy in part a group of Bosniak people by means of forcible transfer of women and children from the Safe Area and by organized and systematic capturing and killing of Bosniak men by summary executions; all the accused, acting individually and in concert with other members of the JCE, with knowledge of the plan, on 12 and 13 July 1995 were deployed along the Bratunac – Milići road, the section between the villages of Kravica and Sandići, Bratunac Municipality, including the section of the road in front of the warehouse of the Kravica Farming Cooperative, and undertook the following actions:

a. Secured the road and kept it closed or open for traffic in line with the execution of the plan to forcibly transfer about 25,000 Bosniak women, children and the elderly, who under fear, terror, active threat and inflicted injuries by the VRS and MUP members, were crammed into buses and trucks and forced out of the safe area;

b. On 13 July 1995, conducted security operations, such as reconnaissance and armed attacks using tanks, Pragas, anti-aircraft guns, and other infantry weapons against the column of Bosniaks in the area above Kamenica in the vicinity of the aforementioned section of the road, thereby forcing the Bosniak men to surrender;

c. On the same day secured the road by patrolling the road and laying ambushes, or otherwise intercepting members of the column of Bosniaks trying to reach the territory under the control of the Army of RBiH, and participated in the capture and detention of several thousand Bosniaks from the column by encouraging and deceiving them to surrender by making false promises, and when they did, stripped all the detainees of their money and other valuables and ordered them to discard their food, clothes and everything else they were carrying in their bags;

d. On the same day, conducted security duties on or around the Sandići Meadow, Bratunac Municipality, where they were detaining several thousands of captured men separating some of them, and then between 20 and 30 of them were singled out and handed over to the unknown members of the VRS who took them in a truck and they have been missing ever since; at least one captured young man was executed on the meadow, from which they boarded Bosniak male prisoners on buses and transported them from there to the sites designated for detention and execution, including the warehouse of the Kravica Farming Cooperative,

e. On the same day, conducted on buses and in a column more than 1,000 Bosniak male detainees and detained them in the warehouse of the Kravica Farming Cooperative where in the early evening hours, in the presence of the accused Miloš Stupar, the majority of those men were killed in the following manner: the accused Milenko Trifunović, Slobodan Jakovljević, Aleksandar Radovanović, Miladin Stevanović, Petar Mitrović, Branislav Medan, Velibor Maksimović, Dragiša Živanović, fired from automatic rifles at the detainees; Brano Džinić threw hand grenades at them, and the accused Milovan Matić seized wrist watches, money, and gold from the captured Bosniaks and was filling ammunition clips used for the execution of the detainees,

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Therefore,

With the purpose to destroy in part a national, ethnic and religious group of Bosniaks, they killed members of the group of Bosniak people, and inflicted serious bodily and mental wounds on the population of Srebrenica both men and women by, *inter alia*, separating able-bodied men from their families and forcibly transferring the population from their homes to the area outside Republika Srpska,

Whereby:

ACCUSED Velibor Maksimović, Dragiša Živanović and Milovan Matić, as co-perpetrators, by their acts, would have committed the criminal offence of Genocide in violation of Article 171 of the BiH CC, in relation to Articles 29 and 180(1) of the BiH CC.

Pursuant to Article 189(1) of the CPC of BiH, the Accused are relieved of the duty to reimburse the costs of the criminal proceedings, and the costs shall therefore be paid from the Court of BiH's budget appropriations.

Pursuant to Article 198(2) of the CPC of BiH, injured parties, witness S1 and S2, and members of the Association – Movement of the Mothers of the Enclaves of Srebrenica and Žepa are instructed to take civil action to pursue their claims under property law.

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REASONING

I. PROCEDURAL HISTORY

The Indictment of the Prosecutor's Office of BiH No. KT-RZ-10/05 of 12 December 2005, confirmed on 19 December 2005, charged the Accused Miloš Stupar, Milenko Trifunović, Brane Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Miladin Stevanović, Velibor Maksimović, Dragiša Živanović, Branislav Medan, and Milovan Matić with having committed the criminal offence of Genocide punishable under Article 171 of the Criminal Code of Bosnia and Herzegovina.

The Indictment alleged that the Accused, as knowing participants of a criminal enterprise, conducted a widespread and systematic attack on the Bosniak population in the UN Safe Area of Srebrenica, with a common goal and plan to partially eradicate a group of Bosniak people by expelling women and children from the Safe Area, and to systematically capture and execute by shooting Bosniak men in an organized manner, and that they acted individually and together with other participants, being aware of the plan. The Accused are specifically charged that on 12 and 13 July 1995, they were positioned along the road from Bratunac to Milići, and secured the road Bratunac-Milići on the section between Kravica and Sandići, opening and closing the traffic there following the plan of the forcible transfer of around 25,000 women, children and elderly Bosniaks, and that on 13 July 1995, they conducted reconnaissance and armed attacks with heavy weapons and artillery on the column of Bosniaks in the area of Kamenica, forcing them to surrender, and that on the same day they secured the road and participated in capturing and taking prisoner several thousand Bosniaks from the column, and that they held more than a thousand of Bosniaks on the Sandići Meadow, whom they transferred on the same day to the Kravica Farming Cooperative Warehouse and killed in early evening hours in the presence of the Accused Stupar. All the Accused except for Brane Džinić and Milovan Matić were shooting at the prisoners, Džinić was throwing hand grenades at them, while Milovan Matić was loading clips with ammunition used for killing the prisoners.

In addition, the Accused Miloš Stupar and Milenko Trifunović are also charged with individual criminal responsibility pursuant to Article 180(1) of the CC of BiH because they did not take any actions to protect the prisoners who were still alive while present at the execution site, and in doing so they aided and supported the executors of the killing, and by their presence they silently encouraged the perpetrators. Pursuant to Article 180(2) of the CC of BiH, they are charged that as superior officers they are criminally responsible also for the actions of their subordinates, for they knew or had reason to know that their subordinates were about to commit criminal acts or had done so, and they failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

On 24 June 2008, the Prosecutor's Office of BiH filed the Amended Indictment, which the Court accepted. The Indictment was amended in Part (e), where it is stated that they killed most of the prisoners in the warehouse, caused severe physical and mental injuries to the residents of Srebrenica, separating able-bodied men from their families and transferred them from their homes to areas outside Republika Srpska. The Indictment was amended also with regard to the Accused Matić, who was charged with taking watches, money and gold from the prisoners in the Kravica Warehouse.

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On 21 May 2008, the Panel, pursuant to Article 26 of the CPC of BiH, separated the proceedings against the Accused Petar Mitrović and Miladin Stevanović, which were completed separately, and separate verdicts were reached in those cases. A separate decision was rendered on this, which is referred to with all other procedural decisions in the attached Annex B, which is an integral part of this Verdict. As these are the procedural decisions rendered in the course of the trial, the lawfulness of these decisions may be contested by an appeal from the Verdict, thus the Panel decided to separate the procedural decisions in the Annex for their easy reference.

In the closing argument the Prosecution stated that based on the presented evidence it may be concluded beyond reasonable doubt that all Accused were responsible for the criminal offence with which they were charged. The Prosecution proposed that the Court find the Accused guilty of having committed the criminal offence of Genocide punishable under Article 171 of the CC of BiH. The Prosecution also requested that the Accused be sentenced to the maximum long-term imprisonment of 45 years.

In the closing arguments all eleven Defense teams stated that the Prosecution's allegations had not been proven regarding the Accused, and all Defense teams proposed that their clients be acquitted of charges. Having in mind the abundance of the material, all relevant objections regarding particular charges will be referred to below and explained through the appropriate and related facts and conclusions of the Panel.

In addition, due to the large number of exhibits presented and for easier reference in the reasoning, the Panel decided to list all the presented exhibits in Annex A, which is an integral part of this Verdict.

Having carefully and knowingly considered pieces of evidence separately and in their mutual connection with other presented pieces of evidence, and taking into account the principle of free evaluation of evidence, the Panel decided as stated in the operative part of the Verdict for the following reasons.

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II. General Considerations of Evidence

A. Generally

The Panel grounded its conclusion on the guilt of the Accused on several key pieces of evidence, including the testimony and statements of S4, and the statements of Petar Mitrović and Miladin Stevanović that corroborate the testimony given by S4.

With regard to the remaining witnesses examined, the Panel finds the following. Witnesses in this case were placed under a severe burden. It was well known that the Accused in this case were charged with genocide, called "the crime of crimes". The number of accused was larger than in any war crimes case prosecuted either at the ICTY or in Bosnia and Herzegovina. The alleged crime involved the killing of over 1000 people. The context of the crime was Srebrenica in July 1995. There were only two survivors of the killings in the Kravica warehouse. Therefore, the witnesses to the events were necessarily from the side of the conflict on which the Accused fought, and were in or around Srebrenica and Kravica between 10 and 19 July 1995. Most of the prosecution and defense witnesses had some reason to fear criminal prosecution themselves, knew some or all of the Accused and their families, lived in their neighborhoods, served with them in the war or worked with them after the war. Testifying in this case was consequently extremely difficult for most witnesses.

In addition, assessment of the credibility of the witnesses and the facts to which they testified was a major challenge for the Panel. However, this is the challenge that always faces the trier of fact. The Panel consists of three experienced judges who have among them several decades of practice in separating fact from falsehood. The Panel sat on and lived with this case for over two years, and observed first hand the witnesses, their demeanor, their tone of voice, their attitude, their physical and emotional reactions to the questions, their nonverbal conduct in relation to the parties and counsel, and the atmosphere within which they gave their testimony. The Panel was always mindful that this case presented factors which made credibility decisions more difficult and was always aware that because of the seriousness of the charges, those assessments had to be made with diligence.

The Panel heard 52 witnesses called by the Prosecution and 67 witnesses called by the defense, as well as 6 witnesses called by the Panel. Many of these witnesses testified about the same incidents or facts, which each saw or heard from a different physical, mental and sometimes chronological perspective. Rarely did two witnesses to the same event perceive that event identically, or relate it verbally in the same way. The Panel evaluated the credibility of the testimony of each witness, first by presuming that each witness intended to tell the truth. Where it was possible to reconcile the testimony of various witnesses, the Panel attempted to do so. Where such reconciliation was impossible, the Panel assessed the testimony of each, first in terms of the likelihood that the differences were the result of honest mistakes in recollection or perception and then in terms of the likelihood that the witness was consciously attempting to mislead the Panel.

Some witnesses the Panel found to be both honest and reliable, often at some personal cost to the witness. The Panel found that some witnesses, though honest, were nonetheless unreliable regarding certain portions of their testimony because of limitations in their perceptions and memories, or because of biases that effected their conclusions about the meaning of what they saw or heard. However, those same witnesses were also found by the

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Panel to have accurately perceived, remembered and reported other facts. The Panel found that other witnesses were not honest regarding certain portions of their testimony, either for reasons having to do with their own self-interest, because of friendship or loyalty to the Accused, or because they wanted to affect the outcome of the proceedings. However, those same witnesses were also found by the Panel to be honest and accurate in reporting other facts, sometimes because they were unaware of the significance of the fact or because they were unable to successfully maintain the fabrication. In reaching these findings, the Panel observed the manner and demeanor of the witnesses when testifying, tested the internal consistency of their evidence as given on the stand and in prior statements, and evaluated their ability to respond to difficult questions. The Panel examined the facts about which each witness gave testimony and compared them with the facts established by other witnesses and the admitted material evidence in order to determine whether they were corroborated or contradicted by other evidence in the case.

Ultimately, the Panel found that even witnesses who were not reliable or truthful about some portions of their testimony were reliable and truthful about other facts about which they testified. Therefore, the Panel concluded that it would neither serve the interests of justice nor meet the obligation to freely evaluate evidence and find the truth, if it disregarded all of the evidence given by witnesses who gave some unreliable testimony. Rather, unreliability of the witness as to some of the testimony was a factor to be considered when determining the accuracy of the remaining testimony. The Panel therefore assessed the reliability and honesty of each witness and, in that context, calculated the reliability and truthfulness of each fact that witness reported. In short, for several witnesses, the Panel believed some of the witness's testimony without necessarily believing it all.

B. Credibility of S4

1. Plea Agreements and Immunity Generally

Before analyzing the credibility of the specific evidence provided by witness S4, it will be useful to first address an initial issue of general concern, namely the use and value of evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity.[1]

It is indisputable, in accordance with the principle of the free evaluation of evidence as enshrined in Article 15 of the CPC of BiH, that such evidence may be used in criminal proceedings.[2] The more crucial question is how the trier of fact must approach such evidence. What issues must the Panel, as a matter of law, consider when evaluating such evidence? Similarly, what uses may the Panel, as a matter of law, make or not make of such evidence?

The Panel's fundamental obligation with respect to *all* evidence is stated in Article 281(2) of the CPC of BiH: "The Court is obligated to conscientiously evaluate every item of evidence

[1] The Panel notes that the witness S4 had not, as of the date of his testimony in these proceedings, in fact concluded a plea agreement with the Prosecutor's Office of BiH. Nonetheless, as both S4 and the Prosecutor's Office freely admitted, the parties were in the process of signing such an agreement and expected to do so in the near future. Moreover, witness Marko Aleksić gave a statement and testified under an immunity agreement with the Prosecutor's Office. *See* Exhibits O-47, O-48, and O-50.

[2] *See M.Š.*, AP-661/04 (Const. Ct. of BiH), Decision on Admissibility and Merits, 22 April 2005.

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and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved." As the Constitutional Court has noted, this fundamental obligation follows from the right of an accused to a fair trial as guaranteed in Article II (3) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention on Human Rights ("European Convention").[3]

The Constitutional Court has clarified that evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity is subject to the same standard, no stricter and no more lenient. Simply, with respect to evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity, there is neither a presumption of unreliability nor a presumption of truthfulness. The Constitutional Court's conclusion should be quoted in full:

> However, when obtaining evidence in such a manner [by means of plea agreements], that is when providing testimonies by exercise of this institute in a country with continental legal system, as Bosnia and Herzegovina, it is necessary to apply other, fundamental principles of the criminal legislation to such kind of evidence as solicit and conscientious evaluation of evidence in isolation and in connection with each other and principle *in dubio pro reo*. As already stated, by applying the principle of free evaluation of evidence, the courts cannot *a priori* attach greater value to such an evidence because it was obtained on the basis of agreement on confession of his guilt concluded with witness who was previously accused for the same offense. *On the contrary, the courts have to evaluate this evidence in the same manner and based on the same rules prescribed under the Law for any other presented evidence, i.e. in isolation and in connection with other evidence, and bring all presented evidence in logical relation.*[4]

In that proceeding, on the basis of the facts before it, the Constitutional Court was primarily concerned with what appeared to be an assumption on the part of the Basic Court that such evidence could necessarily be presumed to be more reliable than other testimony. As the Constitutional Court noted, no such presumption was permissible under the law.

However, the Constitutional Court further expressly rejected any suggestion that evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity should be presumed unreliable, or discounted and subjected to a higher degree of scrutiny than other evidence. As the Constitutional Court stated, "As to the testimony of the mentioned witness [who testified pursuant to a plea agreement], even though such witnesses may often be unreliable, *it in itself is not a reason not to have faith in the statement of such witness*."[5] The Panel must, of course, consider all facts bearing on the reliability of the witness when analyzing the witness's evidence and exercise caution. However, the Panel must do the same when considering any evidence.[6]

The Constitutional Court also implicitly highlighted the manner in which evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity can be used. In the

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[3] *Id.*, para. 30. *See also Branka Kolar-Mijatović*, AP-1262/06 (Const. Ct. of BiH), Decision on Admissibility and Merits, 23 December 2007, paras. 36-37; *Hazim Vikalo*, AP-3189/06 (Const. Ct. of BiH), Decision on Admissibility and Merits, 23 May 2007, paras. 35-36.
[4] *M.Š.*, Decision, para. 38 (emphasis added).
[5] *Id.*, para. 37 (emphasis added).
[6] *See also Abduladhim Maktouf*, KPŽ-32/05 (Ct. of BiH), Second Instance Verdict, 4 April 2006.

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trial proceedings, the Basic Court had relied on the testimony of the witness testifying pursuant to a plea agreement extensively and to a decisive extent. The testimony of that witness was the only evidence establishing that the applicant had committed the crime with which he was charged. Additional evidence corroborated that testimony, but that circumstantial evidence did not go to the essential facts on which the conviction was based.[7]

The Constitutional Court, however, only concluded that the Basic Court's failure to fully and conscientiously consider all the evidence and explain its reasoning – suggesting that the Basic Court arbitrarily convicted the applicant – violated the applicant's right to a fair trial. That is, the Constitutional Court did not consider the decisive use of evidence from a witness testifying pursuant to a plea agreement or grant of immunity to be a violation of the right to a fair trial. This is in accordance with the jurisprudence of the ECHR, which has singled out evidence from witnesses whom the accused cannot confront as evidence that may not be relied on to a decisive extent. So long as the accused can confront a witness testifying pursuant to a plea agreement or grant of immunity, that witness's testimony may be relied on to a decisive extent.

2. Discrepancies between Investigative Statements

Again, before considering the specific content of S4's statements and testimony, it will be useful to briefly address the broader issue of the discrepancies between the statement S4 gave on 18 April 2008 and his 22 May 2008 statement. The Panel, for the reasons explained below, concludes that these discrepancies do not undermine the credibility of S4. In fact, as noted below, an analysis of the similarities and discrepancies provides additional evidence that S4 is a highly credible witness.

As defense counsel for the Accused noted during cross-examination, it is unquestionable that there are discrepancies between the two statements S4 gave prior to his testimony in court. When first examined by the Prosecutor as a suspect on 8 April 2008, following his extradition to BiH, S4 exercised his right to remain silent and refused to provide a statement. However, on 18 April 2008, S4 requested to provide a statement as a suspect in which he would answer the Prosecutor's questions. During that examination, S4's defense counsel first broached the idea of cooperation with the Prosecutor's Office as part of a plea agreement. Finally, on 22 May 2008, S4 gave another statement, this time as a witness subject to penalty for perjury. S4 was, however, granted immunity with respect to the statement, which would be used with respect to himself solely for the purposes of negotiating a plea bargain and would not be used against him in criminal proceedings if those negotiations failed.

While both the 18 April and 22 May statements are similar in many respects, particularly as to the general pattern of events, the 22 May statement is much more incriminating for the Accused. In particular, the 22 May statement contains more information regarding the knowledge and intent of the Accused prior to the events of 13 July 1995, as well as the acts of the Accused on 13 July 1995 at the Kravica warehouse.

During cross-examination, defense counsel for the Accused confronted S4 with these inconsistencies and discrepancies between his 18 April statement and his 22 May statement. When asked to explain, he testified that in his 18 April statement, he was not being completely honest. S4 explained that he did not tell the whole truth and lied in his 18 April

[7] *Id.*, paras. 7, 9.

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statement because he did not want to incriminate himself. He further testified that after giving that statement, he decided to tell the full truth, which he did in the 22 May statement. In response to a question from a Panel member, S4 stated that the 22 May statement was the more accurate statement.

This is a credible and consistent explanation of the discrepancies between S4's 18 April and 22 May investigative statements. Indeed, this is the exact pattern of events that is to be expected when a suspect first gives a statement as a suspect – during which he is under no obligation to tell the truth – and then gives a statement as a witness – during which he is fully obligated to tell the truth and subject to penalty for perjury. The fact that S4 lied during his 18 April statement does not undermine his credibility; it is his right as a suspect to not tell the truth. However, when questioned as a witness with the obligation to tell the truth, S4 did so, and then repeated his statement during his testimony before the Panel.

The Panel does not find credible the suggestions of defense counsel that S4 was induced to lie by the promise of a plea agreement. In particular, the Panel notes that S4's statement and testimony do not fully support the Prosecutor's allegations, particularly with regard to the guilt of the Accused Maksimović and Živanović, as well as Miladin Stevanović. S4 provided strong exculpatory evidence regarding these persons, and indeed his testimony severely undermined the Prosecutor's allegations. The Defense Counsel did not suggest why S4 would untruthfully incriminate the other Accused but truthfully exonerate these three Accused.

In addition, throughout the May 22 statement and his testimony before the Court, S4 consistently noted those subjects about which he could not provide either full or direct evidence, and he consistently refused to guess, hypothesize, or speculate about those subjects. Many of these issues were of particular importance to the Prosecutor, but S4 testified only to what he knew directly and could be sure of. Moreover, his manner of answering questions demonstrated that he was attempting to recall facts from his own memory; his testimony was more complete with regard to some facts than others, he clarified what he had learned at the relevant time and what he later learned, and he noted those facts about which he believed his memory was accurate but could not be sure. It was very clear from his testimony that S4 was not reciting a memorized version of the facts or offering memories as his own that had been told to him by other persons.

In sum, the character of S4's statements and testimony are fully consistent with the explanation that S4 was attempting to testify truthfully to the best of his ability, and not at all consistent with Defense Counsel's suggestions that he was lying in order to secure a plea agreement. S4 did not provide evidence in support of all the Prosecutor's allegations, and he did not testify in a manner that would raise doubts concerning the source of his testimony. In fact, the content of S4's testimony and the manner in which he gave it mirrored in almost every way what would be expected of a credible witness testifying to events 13 years in the past.

Accordingly, the Panel concludes that the discrepancies between the 18 April and 22 May investigative statements do not raise doubts concerning the credibility of S4.

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3. Credibility of Facts

Nevertheless, the defense objected to the testimony of this witness, arguing its incorrectness and the witness's lack of credibility. However, when it comes to the issue of the quality of information provided by the witness S4, as to whether it constitutes a reliable source of information which makes it decisive evidence in the case on which the Panel may ground the conclusion on guilt of the Accused, the Panel finds that the witness provided a detailed and comprehensive testimony.

Witness S4 is an additional witness for the Prosecutor's Office, who was examined towards the end of the evidentiary proceedings. It has been established that this witness could not have been heard earlier, since he was not within the reach of the Prosecutor's Office of BiH. Before his testimony, the Panel had the opportunity to examine a large number of witnesses for both the prosecution and the defense, including former members of the 2nd Šekovići Detachment. In general, these testimonies are basically consistent and complete, except for the issue of the subject of the charges and the responsibility of the Accused. Therefore, for instance, all combat movements of the Detachment in the period from late June to mid-July 1995, about which witness S4 also testified, have been described similarly by all witnesses who were members of that unit. Furthermore, the testimony of S4 about the Accused being members of the 2nd Šekovići Detachment and the 3rd Skelani Platoon has not been contested in this regard. Also, the testimony of S4 is neither partial nor incomplete. Although S4 gave testimony that incriminates some Accused, S4's testimony was, on the other hand, favorable for the defense for some Accused. For all that, at no point in time during his testimony did this witness indicate that he had any private or any other interest whatsoever to put someone in an unfavorable position in comparison with the position of some other Accused. The soundness of his testimony wherein he provides exculpatory information on the participation of the Accused Maksimović and Živanović, as well as Miladin Stevanović, is particularly emphasized when analyzed in the context of other evidence adduced against these Accused persons against whom, notwithstanding the testimony of witness S4, the Panel found no evidence on guilt. The Panel considered that this is one indication that the testimony of this witness is especially objective.

C. Mitrović Credibility

Before turning to the credibility of the specific facts contained in Petar Mitrović's statements to the Prosecutor's Office, it is first necessary to address the credibility of those statements more broadly. Specifically, Defense Counsel for all Accused argued that Petar Mitrović's statements are not credible due to his mental capacity at the time of the events he described and at the time he gave those statements. Having reviewed the totality of the evidence presented, the Panel concludes that Petar Mitrović is a credible witness as a general matter, as he was capable of accurately perceiving and remembering events at the time they occurred, and he was further capable of accurately communicating the facts provided in those statements.

The Defense relied primarily on the Finding and Opinion and testimony of expert witness Dr. Kovačević (Exhibit O-III-Q11a), that served as evidence for the defense. Based on his examination, Dr. Kovačević concluded that Petar Mitrović has slight mental retardation, and further, that, at the time of the events about which he testified, the death of Krsto Dragičević triggered a reactive affective state and strong feelings of rage and fear in Mitrović. Expert

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witness Dr. Kovačević testified that as a result of both these conditions, Petar Mitrović had a limited ability to accurately and completely perceive and memorize details of the events he experienced.

In light of these findings, the defense expert examined the statements Petar Mitrović gave to the Prosecutor's Office. Dr. Kovačević noted that Mitrović's statements contained a great number of details regarding the criminal offense. He stated that such details could only be fully and accurately perceived, remembered, and then communicated by a person with very good intellectual capabilities, and moreover, that such a witness would need to be a passive observer to, rather than a participant in, the events described. Dr. Kovačević thus concluded that the statements were inconsistent with Mitrović's below-average abilities of perception, memory and relation.

In addition, Dr. Kovačević suggested that Petar Mitrović's ability to concentrate and accurately remember and communicate details of the events was further limited by the circumstances in which he gave his statements to the Prosecutor's Office. He suggested that Petar Mitrović was not able to sufficiently rest prior to giving his first statement to the Prosecutor's Office, and also suggested that Mitrović was in a state of fear before and during his examination. While Dr. Kovačević stated that he could not assess the effect of these circumstances on Mitrović's mental abilities at the time he gave his statement, he concluded that the circumstances would have had an effect, particularly in light of Mitrović's below-average intelligence.

In contrast, the expert witness on whom the prosecution relied, Dr. Kučukalić, concluded, based on his team's examination, that Petar Mitrović is of average mental ability and does not suffer from any psychological injuries or disorders that would otherwise impair his ability to remember and accurately report a stressful event. Dr. Kučukalić's team conducted physical and psychological tests using an electroencephalogram (EEG) and a computed tomography (CT) scan. Dr. Kučukalić testified that the results of these tests were normal and that neither suggested any physical damage to Mitrović's brain or cognitive functions. Defense expert Dr. Kovačević also reviewed the results of these tests and agreed that there was nothing to indicate that Mitrović suffered from any physical damage to his brain or cognitive functions.

In addition, Dr. Kučukalić's psychologist conducted a psychological examination of Mitrović. The psychologist concluded that Mitrović is of average intellectual ability and does not suffer from any temporary or permanent mental illnesses or disorders. The psychologist did conclude that Mitrović is emotionally unstable, impulsive, prone to aggression, and easily manipulated by others, but that these characteristics did not affect his mental abilities. Finally, the psychologist concluded that there was no evidence to suggest that Mitrović suffered from any temporary mental illness or disorder at the time of the relevant events.

In his testimony, Dr. Kučukalić concluded that, based on the experts' Finding and Opinion (Exhibit O-84), Mitrović is of normal mental ability and cognitive function and that there was no physiological or psychological impediment that would otherwise affect Mitrović's ability to remember and accurately report a stressful event.

The Panel recognizes that the primary dispute between the two expert witnesses concerns Petar Mitrović's mental ability and intelligence – whereas Dr. Kučukalić concluded that Mitrović is of normal mental ability, Dr. Kovačević concluded that Mitrović is slightly mentally retarded. These different findings prompted the two experts to reach different

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conclusions regarding Mitrović's ability to accurately perceive, remember, and report the events described in his statements.

The Panel need not resolve this issue, however, as the Panel concludes that, whether or not Mitrović is slightly mentally retarded, he has clearly evidenced the ability to accurately and completely perceive, remember, and report events in stressful situations. That is, while the Panel accepts Dr. Kovačević's conclusions to the extent that he testified that Mitrović's statements were inconsistent with what would be *expected* from a person with slight mental retardation, the Panel does not accept the unspoken inference that Mitrović did not accurately and credibly provide those statements. Rather, the Panel concludes that, even if Petar Mitrović is slightly mentally retarded, he nonetheless has demonstrated that he has average mental abilities with respect to the perception, retention, and reporting of events. Accordingly, the Panel concludes that Dr. Kovačević's findings and conclusions do not undermine the credibility of Mitrović's statements.

Indeed, Mitrović's behavior during trial and experiences as presented at trial demonstrate that he, contrary to Dr. Kovačević's suggestion, can accurately and completely perceive, remember, and report events. In particular, the Panel highlights Mitrović's behavior and participation in his own defense at trial. For example, on 27 July 2006 Mitrović personally cross-examined prosecution witness Sabina Sarajlija, who was present when he gave his 21 June 2005 statement to the Prosecutor's Office, concerning specific details from that meeting over one year earlier. Mitrović personally questioned and reminded the witness of such specific details as whether or not international persons were present and made comments, whether he had said he had a headache, and the specific language he and others had used during the meeting, which even the witness, a well-educated attorney, seemed to have forgotten. Mitrović thus clearly and unequivocally demonstrated that he can perceive specific details during an event, particularly a stressful event, and remember them, and that he is not only able to relate those details after a significant period of time has elapsed, but that he can selectively choose which specific details to discuss on the basis of their perceived importance and relation to other information – or, in other words, he can understand and report events in a logical and coherent manner.

In addition, Mitrović's past experiences strongly suggest that his ability to perceive and remember the relevant events was not affected by any stress he may have felt under the circumstances. Mitrović had previously served in the JNA, and in July 1995 he was a member of the 3rd Skelani Platoon of the Special Police Brigade. Expert witness Dr. Mile Matijević stated that the Special Police Brigade consisted of young, capable and professional members. It is also generally known that the Special Police, due to its purpose, is a special type of the police formation tasked with performing more difficult and complex police assignments. Defense witness for the Accused Trifunović, Mirko Trifunović, stated at the trial that Mitrović had been an average policeman, and that he used to go in the field with the Detachment on a regular basis. Therefore, Mitrović was a member of such a formation for two years and five months during the conflict in BiH, and before that, he was a soldier from the beginning of the conflict. Mitrović began his war service as a member of the "Red Beret" unit; this fact is established by Exhibit O-344, which lists members of that unit. Witness S4 also testified that several members of the Skelani platoon were former members of the elite special operations unit known as the "Red Berets," thus implying that members of the Skelani platoon were specially trained to be able to function in difficult situations.[8] Defense witness

[8] *See also* Exhibit O-345, which further discusses the Red Beret unit.

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Mirko Trifunović further testified that membership in the Skelani platoon required discipline, weapon-handling skills, and prior military service. Furthermore, Mitrović had been placed in dangerous situations throughout his experience in the Skelani platoon. Witnesses S4 and Milenko Pepić testified that the Šekovići platoon went to field missions often, was involved in the formation of combat lines, including deployment to the front line in Srednje in July 1995 with orders to restore the line, and that they carried automatic weapons. Accordingly, Mitrović had the necessary training and had in fact successfully dealt with numerous stressful situations during his three years of combat experience in the Skelani platoon before July 1995. Moreover, these experiences would have been just as, if not more, threatening than any risk he faced at the Kravica warehouse from unarmed and exhausted civilian men.

Accordingly, the Panel concludes that the findings and conclusions of the defense expert witness Dr. Kovačević do not raise doubts concerning the credibility as a general matter of Petar Mitrović's statements to the Prosecutor's Office. The Panel will further address the credibility of Petar Mitrović's statements with respect to specific facts below.

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III. SUMMARY OF EVENTS

A. Background and Summary of Events

The facts that have been proven beyond reasonable doubt establish that there existed an armed conflict in BiH between the armed forces of the Army of Republika Srpska ("VRS") and the Army of the Republic of BiH ("ARBiH"). This is partly corroborated by Established Fact T1.

1. Preparation for Attack on Srebrenica

It follows from the "Revised Report on Military Events in Srebrenica and Operation: *Krivaja 95*" ("Butler Report") (Exhibit O-225) that, during the armed conflict and shortly after its establishment in November 1992, the VRS launched the campaign to expel the Bosniak population from the Birač, Žepa and Goražde areas. Not long after that, on 16 April 1993, United Nations Security Council Resolution 819 proclaimed Srebrenica, Goražde, and Žepa as safe areas that were to be free from any armed attack or any other hostile action. The Butler Report and the established facts also show that there was a VRS military plan to reduce the Srebrenica enclave and to isolate it from Žepa. That was the *Krivaja 95* operation and the Drina Corps was in charge of its implementation.

On 8 March 1995, the Supreme Command of the Armed Forces of Republika Srpska issued a document called Directive for Further Operations No. 7 ("Directive 7") (Exhibit O-I-31), which clearly elaborates on the RS strategy pertaining to "the eastern safe areas". Specifically, this Directive assigns the following task to the Drina Corps:

> Complete the physical separation of Srebrenica from Žepa, preventing even communication between individuals in the two enclaves. By daily planned and well-thought out combat operations, create an unbearable situation of total insecurity with no hope of further survival and life for the inhabitants of Srebrenica and Žepa.[9]

In part, the Directive also states the following:

> The relevant State and military organs responsible for work with UNPROFOR and humanitarian organizations shall, through the planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim populations, making them dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion.

Established Facts T2, T5, T8, T9, T15, and T20 provide a general picture of the developments in Srebrenica in mid-1995.

According to the Butler Report, the initial military operations against the Srebrenica safe area commenced on 31 May 1995. The Drina Corps launched the *Jadar 95* operation, whereupon

[9] Established Fact T2.

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the forces of the UNPROFOR Dutch Battalion left check-point Echo, which was of strategic importance to the VRS in terms of their future planned operation to take over Srebrenica.

On 16 June 1995, the President of the Republic, Radovan Karadžić, issued an order (Exhibit O-273) to all institutions and population to have combat readiness in place and, in addition to that, general mobilization was also ordered. Also, on 10 July 1995, the Commander of the 1st Bratunac Light Infantry Brigade issued an order (Exhibit O-267) on general mobilization of persons who were engaged in the compulsory work service but were fit for military service.

On 2 July 1995, the then-Commander of the Drina Corps, Major General Milenko Živanović, signed two orders in which he presented the plan for the attack on the enclave and ordered various units of the Drina Corps to shift to the state of readiness for combat. The operation was codenamed *Krivaja 95*, as stated in the Butler Report.

Until 1995, the population in Srebrenica and the surrounding area specifically consisted of Bosniaks who had fled to that area from the occupied territories, while until 10 July 1995, Srebrenica and its surroundings were under the control of the 28th Division of the ARBiH.

Prior to its takeover by the Serb forces, the population of Srebrenica was about 40,000 people.[10]

2. Attack on Srebrenica and Aftermath

The military takeover of Srebrenica was carried out by the VRS, and it commenced on 6 July 1995 and lasted through 10 July 1995. This was also discussed in the Butler Report, which stated that the military attack commenced early in the morning on that day with fire at the positions held by the 28th Division. The VRS took over the Srebrenica safe area on 11 July 1995. A number of witnesses, both for the Defense and for the Prosecution, testified about this fact, and Established Fact T20 also refers to that. The Panel also reviewed the Defense evidence, more precisely, the Interim Combat Report of 11 July 1995, number 13/9 (Exhibit O-I-30), stating that the 28th Division of the "Muslim forces" has been crushed and Srebrenica taken over, presenting the decision on further activities wherein, *inter alia*, the following is said: "...[P]roceed with the attack and totally defeat the enemy in the Srebrenica enclave."

The takeover of Srebrenica on 11 July resulted in the escape of Bosniaks from the town and the surrounding villages, that is, in the gathering of about 25,000 women, children and the elderly in the UN base in Potočari. It has been found that, at that time, after the takeover of the town by the VRS, Bosniak men predominantly, about 15,000 of them, left Srebrenica on 11 July 1995 and, in the evening, set off from Šušnjari and Jaglići heading through the forest towards Kladanj and Tuzla, to the territory controlled by the ARBiH. Established Fact T32 also refers to that situation.

Witnesses Hajra Čatić, Jovan Nikolić, Maj. Robert Franken, and Šuhra Sinanović testified about the gathering of population in Potočari and the living conditions there, the fear and the uncertainty they had felt. Established Facts T33, T36, and T39 also refer to that situation.

[10] Annex to "Report on the Number of Missing and Dead from Srebrenica", Helga Brunborg (Exhibit O-230).

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Hajra Čatić testified that she and her husband left Srebrenica on 11 July due to the heavy shelling by the VRS. They went to the UN base in Potočari believing that they would be safe there. Before they left for Potočari, her son decided to join the column of men who had set off from the villages of Jaglići and Šušnjari in order to break through and reach the territory controlled by the ARBiH. Having arrived in Potočari, they spent two nights there. According to the witness, there were about 25,000 civilians in Potočari at that time, women and children mainly. She also stated that the VRS entered the UN base on 12 July 1995, and that the night between 12 and 13 July was terrible, people were screaming. Bosnian Serb soldiers were moving through the crowd of people singling out men. She also stated that the group included young men too, ranging from 12 year-old boys to young men up to the age of 30. She personally saw a soldier singling out 10-12 men and taking them to a nearby house. The next day, when she went to that house to fetch some water, she saw a number of slaughtered men, among whom she recognized her neighbor who had been taken away in that group. Her husband had also been singled out and taken away towards a house, where she had seen he had to put down his bag. She testified that, after that, she never saw her husband again, up until the time when she identified his mortal remains in the subsequent victim identification process. She further stated that the deportation of the population by the Bosnian Serb army, which took over control of the UN base, commenced on 12 July in the evening and ended on 13 July. The deportation was carried out by buses that mainly women and children were allowed to board. The buses travelled down the Bratunac – Konjević Polje road. The passengers could see columns of male civilians who had surrendered to the Bosnian Serb soldiers and were on the road. Near the meadow in Sandići, she saw about 300 men, stripped to the waist and with their hands up. She also saw Bosnian Serb soldiers wearing uniforms of the Dutch soldiers, and she also spotted one of them taking the uniform of one Dutch soldier by force.

Šuhra Sinanović, who was also in Potočari, described these events in a similar manner. She stated that the Bosnian Serb soldiers in Potočari had separated men from women and that, on that day, they singled out her father-in-law, and her husband also disappeared. This witness described how the Bosnian Serb soldiers had approached her neighbor Hajrudin Begzadić and taken him in an unknown direction, and when Hajrudin's wife approached them with his suit jacket in her hands, the Bosnian Serb soldiers told her that he would not need the suit jacket any more. He has been unaccounted for ever since.

Jovan Nikolić stated that he arrived at Potočari on 13 July 1995 and stayed there for about 10 minutes. He testified that there were several thousand people there, with children and some belongings. It was a hot day, people were tired and exhausted, some of them fainted. He stated that he had found it very difficult to watch all of that. He had recognized an acquaintance of his and later learned that he was exhumed from a mass grave. He witnessed the transportation of the women and children.

The Deputy Commander of the UN 1st Dutch Battalion ("Dutch Bat"), Major Robert Alexander Franken, stated that the mission of the Dutch Bat had initially been to prevent conflicts and demilitarize the enclave. The Battalion HQ was situated in Potočari. Maj. Franken stated that the town of Srebrenica was heavily shelled more than 200 times in July 1995, and that there was not a single military target in the town that would justify such an attack. Heavy artillery and tanks were used and the Bosnian Serb army had at its disposal 35 heavy caliber weapons, several multiple rocket launchers, and tanks. This attack resulted in the arrival of about 30,000 refugees in the Potočari base. The witness stated that the Bosnian Serbs seized personnel carriers and many light weapons from the Battalion. The Bosnian

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Serb forces entered Potočari. The refugees were in fear. The evacuation of people to the demarcation line in Kladanj was organized and implemented by the Bosnian Serb army. Maj. Franken also stated that he had seen Bosnian Serb soldiers in Potočari hitting people who refused to board the buses. He stated that he then feared that they would start killing them randomly.

The Butler Report states that, following the takeover of Srebrenica by the VRS, General Ratko Mladić, Commander of the Main Staff of the VRS, held three meetings at the Hotel Fontana in Bratunac, which were attended by representatives of the Dutch Bat. Established Fact T62 also refers to this event. Two meetings, on 11 July and 12 July 1995, were held with representatives of the Bosniak civilians. The meetings discussed the terms of the relocation of Bosniaks from Potočari.

The meeting was also video recorded (Exhibit O-193). The footage shows that, at the second meeting held with the representative of the civilian population in Potočari on 11 July, Gen. Mladić set a condition that he wanted to have the population disarmed and that he would organize the "evacuation" of the population from the enclave and treat the soldiers in "the spirit of international conventions". At the next meeting on 12 July, Gen. Mladić reiterated the same conditions, saying for the second time that they had a choice to either "survive or disappear". Gen. Mladić stated at the second meeting that he would start gathering transportation together for the citizens from the protected area. As the Butler Report goes on to elaborate, the transfer of civilians from Potočari, women, children and elderly men, was organized on 12 and 13 July, and the Bosnian Serb military organized the transportation by buses and trucks to the territory controlled by the ARBiH. On that occasion, about 25,000 Bosniak civilians were deported from Srebrenica. The request of the Drina Corps Commander (Exhibit O-270) clearly shows that, on 12 July 1995, the Drina Corps requested all available buses and minibuses to be put at the disposal of the Corps.

However, Bosniak men decided not to comply with Gen. Mladić's request to "surrender". It follows from Established Facts T71, T72, T74, T75, T76, and T78 that the majority of them withdrew into the forests, organized a column together with the members of the 28th Division of the ARBiH, and attempted to escape to the northern territory controlled by the ARBiH. The column gathered in the vicinity of the villages of Jaglići and Šušnjari. About one third of the men in the column were Bosniak soldiers, members of the 28th Division, although not all of them were armed.

These facts also follow from the Butler Report, which talks about 10,000 to 15,000 individuals, predominantly men, who attempted to break through towards Tuzla and Kladanj. Witnesses S1, S2 and E.H. testified about the column of men to which they themselves had belonged, and their testimonies will be summarized in the text below.

The regular combat report of the Drina Corps Command, number 03/2-214 of 13 July 1995 (Exhibit O-268), does not elaborate on the specific extraordinary events, and it rather states that the Corps' zone of responsibility was under full control. The report also states that the enemy did not undertake any rather serious combat activities against Drina Corps units, and that the enemy from the former enclave was in total disarray and "have been surrendering to the VRS on a massive scale". On 13 July 1995, the Drina Corps Command issued an order to all subordinate units (Exhibit O-272) to, among other things, "engage all men fit for military service in detecting, blocking, disarming and capturing the spotted Bosniak groups and in preventing them from going over to the Bosniak territory, and organize the ambushes along

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the Zvornik – Crni Vrh – Šekovići – Vlasenica road communication." It was also ordered that "those captured and disarmed be placed in the facilities suitable for that purpose that can be secured with the minimum of forces, and the relevant HQs be informed promptly."

On 13 July, some of the Bosniak men who either surrendered or were captured or separated from women and children in Potočari were taken away by the Bosnian Serb military forces: one group to the location of Cerska and the other to the warehouse in Kravica. It is stated in the Butler Report that the men who were taken to these locations were executed and that these are two of several execution sites where mass-executions of men took place until 18 July and continued as individual executions even after 18 July. What happened in the days that followed was described in the Butler Report and may be summarized as follows: Bosniak men who were either captured in the column moving through the forests, surrendered, or were separated from the women and children in Potočari were taken away to different locations, including the school in Orahovac, the school in Petkovci, the school in Pilica, and the Dom kulture in Pilica, where they were then executed, well-known execution sites being those in Orahovac, Petkovci, Branjevo military farm, Kozluk, and Pilica.

Established Fact T25 is consistent with the facts presented in the Butler Report, wherein it is stated that after the takeover of Srebrenica in July 1995, the Bosnian Serb forces executed several thousand Bosniak men. The total number of those executed very likely ranges from 7,000 to 8,000 men.

The Panel reviewed the Report on the Quartering and Condition of the Units of the 28th Division (Exhibit O-I-49), which shows that the General Staff of the Army of BiH organized the quartering of the 28th Division units, and that the number of those who had crossed the frontline by 28 July 1995 totaled approximately 2,300 persons.

3. Participation of RS MUP Units in the Aftermath

As to the involvement of RS Ministry of the Interior ("MUP") units in activities in the Srebrenica region, the Panel finds that the military attack against the safe area was conducted by VRS forces until the afternoon of 11 July 1995. On 10 July, the President of the Republika Srpska issued an order on MUP involvement in that area. Witness Tomislav Kovač, the then-acting Minister of the RS MUP, testified about this fact and stated that Karadžić insisted on having police forces present in the Srebrenica region. Kovač described the backdrop to events and the manner in which the police were involved in the activities in the Srebrenica region, stating that Karadžić intended to gain predominance over the Srebrenica territory, considering that the relationship between Gen. Mladić's army and himself as a representative of the civilian authorities was problematic and resulted from their vying for preeminence.

He stated that, based on his Order number 64/95 of 10 July 1995 (Exhibit O-81 and O-I-01), which he claimed was not signed by him but only issued in his name, the joint police forces were established to supposedly resubordinate to the VRS Drina Corps in the Srebrenica activities.[11] The joint forces consisted of the 1st Company of the Special Police Units (SPU) and the Zvornik Public Security Centre (PSC), a company from the camp of the Jahorina Training Center, a mixed company of the joint forces of the MUP of RSK (Republic of Serb

[11] The term "resubordination" refers to the temporary reassignment of RS MUP police forces to combat activities under the direct control and authority of the VRS unit in whose field of operations the MUP forces were to operate.

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Krajina), Serbia and Republika Srpska, and the 2nd Detachment of the Šekovići Special Police Brigade ("2nd Šekovići Detachment" or "Detachment"). Ljubomir Borovčanin, the then-Deputy Commander of the RS Special Police Brigade, was appointed commander of the joint forces. The joint forces were tasked with performing the activities being resubordinated to the military.

With regard to the involvement of the 2nd Šekovići Detachment, it is evident that it was planned to be a part of the joint MUP forces being resubordinated to the army in the Srebrenica operation. Zvornik PSC Report number 277/95 of 12 July 1995 (Exhibit O-271) reported on the activities of the joint police forces, "which are progressing towards Potočari in order to capture UNPROFOR and encircle the entire civilian population and cleanse the terrain from the enemy groups." This police activity that took place on the same day is consistent with the testimonies of the witnesses S4, Petar Mitrović, and Miladin Stevanović and other witnesses who were members of the Detachment, who stated that, on 12 July, they were sent to the village of Budak towards Potočari, to search the terrain in order to find Bosniak civilians and take them to Potočari. The Panel shall give additional comment on these testimonies and statements in the reasoning below.

Furthermore, based on the presented evidence, it has been found that, at the time of the military operation to take over Srebrenica on 6 July, the 2nd Šekovići Detachment was deployed in the so-called Sarajevo war theatre in the Srednje area, until an order was issued requesting their transfer to Bratunac. The Detachment arrived in the Bratunac area in the night between 11 and 12 July 1995.

During his testimony in this case, Tomislav Kovač stated that the referenced order was issued at the request of Radovan Karadžić, who, at that time, insisted on the involvement of the police in the activities for the takeover of Srebrenica, wherein it should be resubordinated to the VRS Drina Corps. Kovač stated that he learned about the plan for the takeover of Srebrenica and about Karadžić's intention to include the police when he met him at a meeting held on 5 July 1995, when Karadžić told him that he wanted two police detachments in that area. Kovač stated that he opposed the police engagement in that region at that particular time, since the situation in other war theatres was more serious than the one in Srebrenica. Already at that time, Karadžić knew that the commander of the ARBiH military forces in Srebrenica had left Srebrenica, that Srebrenica was in disarray in terms of military, that it was practically "there for the taking", and that the takeover of Srebrenica was an easy operation.

Based on the testimonies that are to be thoroughly elaborated on in the following text, it is clear that the Detachment reached the Bratunac area early in the morning on 12 July. Their first assignment on that day was to "search the terrain" of the village of Budak and escort anyone they found to Potočari.

Dragomir Vasić, Head of the Zvornik PSC, informed the Office of the Minister of RS MUP about the developments in the Srebrenica region in his dispatch notes of 12 July – 14 July 1995.

Dispatch note number 281/95 of 12 July 1995 (Exhibit O-184) states that "the evacuation and transportation of civilians is underway." Among other things, it also states that the "majority of those fit for military service, about 8,000 of them (of whom 1,300 were armed) are in the region of Konjević Polje and Sandići. The Šekovići Special Police Detachment and the First

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Company of Zvornik PSC SPU (....) are blocking that part of the area in order to destroy those forces."

Other dispatch notes by Dragomir Vasić also suggest that resubordinated MUP units were not the only MUP units present in the Srebrenica area during 12 and 13 July. Dispatch notes (Exhibits O-186, O-187, and O-188) provide information that other MUP units were also part of the overall activities in the territory of Srebrenica. Thus, the dispatch notes provide information on the participation of the 2nd, 5th, and 6th Companies of the Zvornik PSC SPU, one company of the Bijeljina PSC SPU, the Doboj PSC SPU, and the Srbinje Special Police Detachment in the area around Crni Vrh and Baljkovica, which units were reported (Exhibit O-187) to be "working on blocking and destroying" the enemy forces.

4. Widespread and Systematic Attack

The Prosecutor's Office asserts that the Accused took the actions with which they are charged during the widespread and systematic attack by the VRS and the RS MUP against the Bosniak population in the UN "safe area" of Srebrenica. The widespread and systematic attack against the civilians, referred to below as Phase Two of the "Liberation of Srebrenica", occurred between 10 July and 19 July 1995, subsequent to and as a consequence of the military attack on and takeover of the Srebrenica safe area.

According to the ICTY definition, an attack is widespread if it includes a large-scale attack and a large number of persons targeted.[12]

The military attack on Srebrenica began by shelling the town, while the military takeover of Srebrenica resulted in the flight of civilians from that region to the UN base in Potočari. The presented evidence shows that the military attack directly resulted in the flight of about 25,000 women, children, and elderly to the UN base in Potočari, whereas about 15,000 persons, predominantly men, began to flee through the forests in order to reach the territory controlled by the ARBiH. These people were targeted in their entirety: the women and children through forcible transfer, and the escaping men through ambushes, shelling and execution. It is not only that the population fled to the UN base: their transportation from Potočari by buses and trucks was also organized on 12 and 13 July, and they were forcibly transferred from the territory of Srebrenica towards Kladanj and Tuzla in an organized manner. Furthermore, the military attack also resulted in a column of men who attempted to break through the encirclement through the forests. Evidence showed that one of the consequences of the attack on civilians in the Srebrenica "safe area" was the execution of about 8,000 Bosniak men who were captured and executed at the various locations in the Srebrenica region. The consequence of such an attack was the complete disappearance of Bosniak population from the Srebrenica "safe area".

In addition to that, the attack against the Bosniak population in the UN-protected zone was systematic. According to ICTY jurisprudence, an attack is systematic if it is organized in nature and constitutes "a non-accidental repetition of similar criminal conduct on a regular basis."[13] The presented evidence showed that the military operation for the takeover of Srebrenica was well thought-out beforehand, well-planned and organized. It is evident that, in the early spring of 1995, it was well-known that there existed a plan of action and takeover

[12] *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para. 94.
[13] *Id*.

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of the Srebrenica enclave and that the initial military operations took place as early as May 1995, when the UN checkpoint was attacked and captured. Also, a high degree of combat readiness was ordered in Republika Srpska in mid-June 1995, as well as general mobilization. After the success of the military takeover, the civilians were treated in an identical systematic manner. Women, children, and the elderly were transported by buses and trucks, while men were killed by shelling or ambushes, or captured, or they surrendered hoping to be exchanged, while they were actually executed in a manner as applied in the first mass execution incident. Not a single action committed by the VRS or MUP was an isolated incident, including the event charged. All killings were carried out according to plan and mass executions were systematically carried out, which is best illustrated by the fact that several thousand persons were killed in the same manner, that is, they were executed by firearms after being taken and detained in facilities suitable for temporary mass-detention, such as schools and the like.

Therefore, considering that the Bosniak population lived in Srebrenica until July 1995, and that the final executions took place after 19 July 1995, the Panel finds that, in the period from 10 to 19 July 1995, there existed a widespread and systematic attack on the Bosniak civilian population not only in the Srebrenica Safe Area, as stated in the Indictment, but the target of the attack was the population that came from within the Safe Area. The widespread and systematic attack on the civilian population was a direct consequence of the military attack on and the takeover of Srebrenica, and it implied the involvement of both military forces of the VRS and the RS MUP units, which were engaged in the Srebrenica region from 10 July 1995.

The Defense for the Accused Trifunović argued in their objection that the ARBiH was armed, and it referred to the evidence introduced by the Defense for the Accused Stupar, which included reports both on the number of men under arms and on the weapons they had, and stated that both parties had strategic plans concerning Srebrenica. The Butler Report states that the Bosniaks were occasionally active from the Safe Area which, in a way, forced the Bosnian Serbs to "maintain the lines of defense facing the enclave".

However, these facts do not affect the Panel's conclusion that there existed a widespread and systematic attack on the Bosniak civilians in the Safe Area, who found themselves in the mass of refugees seeking protection in Potočari and attempting to save themselves by heading towards the territory controlled by the ARBiH. It is important to note that ample evidence presented during the trial showed the number of military and police units of the Republika Srpska, and the type and intensity of weaponry they directed against the people of Srebrenica in the widespread and systematic attack at the relevant time, was disproportionate to any military threat posed by that population; and that the ultimate goal sought and achieved – the total disappearance of the Bosniak population from the territory of Srebrenica – had no military justification under international law.

5. Structure of the 2nd Šekovići Detachment

The Indictment charges that all the Accused, except Milovan Matić, committed the criminal offense as members of the 2nd Šekovići Detachment. The Findings and Opinion of Dr. Mile Matijević (Exhibit O-I-51), expert witness for the Defense, shows that the Special Police Brigade was the successor of the former SR BiH Police Detachment, which had split into Bosniak, Croatian, and Serbian parts when the armed conflict broke out in 1992. There was a need for permanent field operation of the Detachment and, consequently, in 1992, it initially existed as a formation outside the regular police centers and was composed of young and

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professional police officers mentally and physically fit for the service, while in 1993 the unit was established as the Special Police Brigade of the RS MUP.

In his Findings and Opinion, Dr. Matijević also provided a survey of the brigade hierarchy structure and stated that the brigade had a commander, deputy commander, logistics and administrative personnel, and the detachments in the field. A detachment was commanded by a detachment commander who had his deputy; a detachment was composed of platoons commanded by platoon leaders; platoons were composed of squads commanded by squad leaders.

Tomislav Kovač also described the structure of the Special Police Brigade of the RS MUP at that time. According to him, there were a total of nine detachments, including the 2nd Šekovići Detachment, all commanded by Goran Sarić, commander of the Special Police Brigade. Kovač, as well as witnesses Tomislav Dukić, Marko Aleksić, Predrag Čelić, Dragan Kurtuma and others, also testified about the structure of the 2nd Šekovići Detachment and stated that the Detachment, which had about 100 men, consisted of three infantry platoons, an armored platoon and a logistics platoon. The infantry platoons were armed with automatic rifles and light machine guns, while the armored platoon was equipped with mortars, one or two *Pragas*, two T55 tanks, and a so-called "three-barreled" gun. The platoons had about 30 men each, except for the armored platoon, which had up to 20 men, while the logistics platoon had 5-6 members.

B. Operations of the 2nd Šekovići Detachment and the 3rd Skelani Platoon

In the following text, the Panel shall give a chronological overview of the course of the events as indicated in the presented evidence; the review shall include the time period relevant to the specific involvement of the Accused, which includes the time period between 10 and 15 July 1995.

The events which occurred in the period between 10 and 14 July were described by Prosecution witness S4 in his testimony and his statements given during the investigation stage, as well as by witnesses Petar Mitrović and Miladin Stevanović in their statements given during the investigation stage, as well as witnesses S1, S2, and E.H. in the evidence they gave before the Court, also including the Accused Radovanović and many other Prosecution witnesses such as Stanislav Vukajlović, Marko Aleksić, Slobodan Stjepanović, Milenko Pepić, Dragan Kurtuma, and Ljubiša Bečarević, and the Defense witnesses Zoro Lukić, Zoran Tomić, and others. Parts of the event were recorded by a journalist from Serbia, Zoran Petrović, with his video camera, as well as video footage from other sources.

1. 10 July – 11 July

It has been established that, from late June 1995 to 10 July, the 2nd Šekovići Detachment was deployed in the so-called Sarajevo war theatre, in the Srednje-Nišići area, where they performed combat assignments. According to the consistent statements of the witnesses – S4, Ljubiša Bečarević, Marko Aleksić, Predrag Čelić, Dragan Kurtuma, Slobodan Stjepanović, and witnesses Miladin Stevanović and Petar Mitrović, who gave their statements during the investigation stage, and the testimony of the Accused Radovanović, all of whom were members of the Detachment – the Detachment was sent to Bratunac on the night of 11

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July, based on the information that they would take part in the "liberation of Srebrenica", as witness S4 termed it (for the use of the term "liberation of Srebrenica", see Section V, *infra*).

The Detachment at that time received an order to pull out from Srednje and redeploy to the Srebrenica area from Deputy Commander Rade Čuturić, a.k.a. *Oficir*.[14] The Accused Trifunović ordered the 3rd Skelani Platoon of the 2nd Šekovići Detachment ("Skelani Platoon" or "3rd Platoon") to relocate. According to the testimony of witness S4, Trifunović said at that time that they were supposed to return to Bratunac for further instructions. They reached Bratunac early in the morning and slept at a local school.

2. 12 July

On 12 July, after 11:00, the Detachment was sent to search the terrain in the vicinity of Potočari towards the Žuti most ("Yellow Bridge") or, more precisely, the village of Budak, which was known to have been populated by Bosniaks. As witness S4 understood, "search of the terrain" meant that they were supposed to check if there were any Bosniaks in the village and, should they find anyone, they were supposed to take them to Potočari. However, as they did not find anyone, they headed further towards Potočari, where they arrived between 12:00 and 13:00.

Witness S4 stated that they passed through Potočari and stayed there for a short while, no more than 20 minutes. People in Potočari looked exhausted and undernourished, which was described by the witnesses Jovan Nikolić, Hajra Čatić, Šuhra Sinanović and Maj. Franken in their testimonies as discussed above. Witness S4 saw women and children boarding the buses there, while he saw no men at all. The Detachment had no special assignments in Potočari. Witness Marko Aleksić also stated that he saw a lot of people in Potočari. They then set off towards Konjević Polje along the Kravica – Sandići route. Trifunović told them to proceed to Kravica and Sandići, and that they would receive further instructions there. It was mentioned that there would be a large influx of Bosniaks, and that the traffic on the Bratunac – Konjević Polje road should be secured.

On its way to that area, the 2nd Detachment stopped in Bratunac for a while, and they were ordered not to disperse, as stated by the Accused Radovanović and corroborated by the witnesses Predrag Čelić and Ljubiša Bečarević. Afterwards, they proceeded towards the Bratunac – Konjević Polje road, then stopped, and were ordered to take positions along the road. According to the testimonies of the witnesses, including Predrag Čelić and Milenko Pepić, the platoon closest to Kravica was the 2nd Platoon, while the 3rd Platoon was closer to Sandići.

Marko Aleksić, a Prosecution witness, stated that Čuturić had tasked them with establishing the frontline further up from Gornji Potočari in order to prevent the passing of the armed column of Bosniaks who were moving through the forests. Witness Milenko Pepić stated that they were assigned to the road, while witness S4 stated in his testimony that they had been tasked with capturing and escorting to the meadow the Bosniaks who would come there and who they knew were moving from the direction of Srebrenica. Witness S4 stated that they were supposed to search them there and seize everything: gold, money, and documents, everything they had on them. As Miladin Stevanović said in his statement, they spent the

[14] For the reasons discussed in Section VII.E.6, *infra*, the Panel concludes that while Rade Čuturić commanded the 2nd Šekovići Detachment during field missions, the Accused Stupar remained in overall command of the Detachment before and during July 1995, when the Detachment was deployed to the Srebrenica area.

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night of 12 July on the road. In the morning, at around 09:00 on 13 July, they received an order to redeploy along the road in the vicinity of Sandići, as Bosniaks were expected to start surrendering there.

3. 13 July: Sandići Meadow

On 13 July 2008, early in the morning, at about 04:00, there was an exchange of fire between Bosniaks and the 1st Company of the Zvornik PSC SPU in the area between Sandići and Konjević Polje. Dragomir Vasić's dispatch note No. 282/95 dated 13 July 1995 (Exhibit O-185) states that "the enemy suffered heavy losses", while "one police officer was killed in the fight, and two more were wounded." Defense witnesses Zoran Tomić, Zoro Lukić, and Nenad Andrić, who was wounded on that occasion, also testified to that effect.

The footage recorded by Zoran Petrović and the testimonies of witnesses S4, S1, S2, and E.H. show that, on 13 July, light and heavy artillery were fired at the column in the direction of the forest from the part of the road where the 2nd Detachment was positioned.

On that day, Bosniak men started surrendering. Prosecution witnesses Stanislav Vukajlović, member of the Jahorina Training Centre, S4, and Miladin Stevanović, in his statement, testified consistently about this, as did the Accused Radovanović. According to them, Bosniaks were induced to surrender through a megaphone, and the Accused Radovanović testified that this occurred around 12:00 that day. The testimonies of witnesses S4, S1, S2 and E.H. establish that the Bosniaks who were in the column started surrendering to the Bosnian Serb forces on 13 July, precisely at the site of the Sandići meadow, as also shown in the footage of Zoran Petrović (Exhibit O-193), which covers a sequence when those surrendering emerged from the forest.

As the Detachment was deployed in the Kravica-Sandići area, an area which also included the building of the Kravica Farming Cooperative, the 3rd Skelani Platoon was deployed in the Sandići meadow and its surroundings, while one part of it was positioned around a nearby house opposite the Sandići meadow, and another part secured the group on the meadow. In addition to S4, Mitrović, and Stevanović, witnesses Zoran Tomić, Predrag Čelić, Milenko Pepić, Dragomir Stupar and others also corroborated that the Skelani Platoon was indeed positioned at that location. It has also been proven that, in addition to the Skelani Platoon, there were members of other platoons and formations there. This also follows from the Zvornik PSC Dispatch Note number 281/95 (Exhibit O-184), which states that the area between Konjević Polje and Sandići should be blocked by the 2nd Šekovići Detachment, the First Company of the Zvornik PSC SPU, and the 5th Company of the Zvornik PSC in order to destroy the nearby Bosniak forces.

It has been established beyond doubt that a large number of Bosniaks actually did surrender to members of the 2nd Detachment at that time. After surrendering, their bags and other valuables, including money and documents, were seized, which follows from Established Fact T115, although there is no evidence that the Accused themselves directly participated in this.

Witnesses S1 and S2 stated that they decided to surrender themselves because of the constant artillery fire and constant ambushes that the Bosnian Serb formations had been setting for them, as well as the appeals for their surrender made by those on the road who had been giving them guarantees that they would be safe and that provisions for them would be

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arranged, and also because they had been deceived by the presence of the UN forces, as members of the Bosnian Serb forces were on the road dressed like UN soldiers and driving UN personnel carriers.

That day, the conditions in Sandići were very bad, because it was a hot July day, they did not have enough water, and no other provisions for the captives were arranged. The captives who had surrendered themselves were very exhausted and hungry, and some of them were also wounded.

The site was visited by General Mladić between 12:00 and 13:00. That was stated by S4, Dragomir Stupar, S2, S1, and others, who stated that he arrived with Ljubomir Borovčanin and some other officers, addressed the captives and left. In his speech, when he addressed the captives, Gen. Mladić said that they would be exchanged for Bosnian Serbs and that no harm would befall them. According to Dragomir Stupar, the Accused Miloš Stupar was present on the meadow when General Mladić made this speech.

4. 13 July: Kravica Warehouse

The Panel formed its conclusions about the series of events that followed in the afternoon on 13 July 1995 and about the role of the Accused primarily based on the detailed and comprehensive testimony of witness S4. This witness was a direct eyewitness to the events. This witness gave a detailed statement to the Prosecutor's Office during the investigation stage and a detailed testimony at the main hearing. In its critical portions, the statement of Witness S4 is supported by the statements of witnesses Mitrović and Stevanović given to the Prosecutor's Office during the investigation stage, and the statements of witnesses S1 and S2, victims-eyewitnesses to the committed crime.

The events that followed can be summarized as follows. The Sandići captives were taken to the warehouse of the Kravica Farming Cooperative and executed. The execution of the captives was preceded by an incident during which one of the captives snatched a rifle from one of the members of the Skelani Platoon and killed him. Rade Čuturić, the Deputy Commander of the Detachment, was injured while attempting to prevent the captive from further shooting at the others, and the captive was himself shot. Shortly afterwards, captives were shot at, first from an M84 machine gun and then from automatic rifles, which was followed by throwing hand grenades. The killing of the captives at the Warehouse on that occasion lasted for about an hour and thirty minutes, after which the Detachment left the site, having been replaced by other forces.

The number of the captives in Sandići, who were marched in a column to and eventually killed at the Warehouse, was disputed by the Defense.

The Defense for the Accused Medan endeavored to establish the number of those who were captured in Sandići on 13 July 1995, at 14:00, which the Prosecution was proving by Exhibits O-219a, O-219b, and O-219c, which are aerial photographs of a group of people on the relevant day. To that end, the Defense also presented evidence in the form of a report by the land surveying expert witness Dragan Obradović. In the conclusion of his findings and opinion (Exhibit O-X-2), the land surveying expert witness stated that there were about 450 captives on the Sandići meadow at 14:00. In addition to that, the Defense Counsel for the accused Slobodan Jakovljević pointed out the fact that the number of the executed captives has never been precisely established, nor their names, and so the number of the captives on

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the Sandići meadow or on the road varies from 100–150 men (according to Đorđe Vuković and Slobodan Mijatović), to 250–300 (according to Hajra Čatić), to 500–600 (according to Dragoslav Mirković), and up to 1,000–1,200 individuals (according to Luka Marković). Indeed, in his testimony, witness Milojko Milovanović, brother of one of the members of the Skelani Platoon who was himself at the Sandići meadow, stated that, while he was there, there were between 400 and 500 captives in Sandići, which corresponds to what witness Danilo Zoljić, Commander of the Zvornik SPU (Special Police Units), said, who mentioned the number of 400–500 captives in Sandići in his statement given to the Prosecutor's Office (Exhibit O-79). Witness S2 also talked about the number of captives on the meadow, and said there had been between 300 and 500 captives there. Witness E.H. mentioned the number of 1,000, while witness S1 testified about 2,000 captives. An additional argument supporting the position that the number of captives exceeded 1,000 is Petrović's footage, which shows a soldier on the respective road who talks about 3,000–4,000 captives, while in Ljubomir Borovčanin's Dispatch Note number 284/95 of 13 July 1995 (Exhibit O-340), he reports to the Police Headquarters in Pale and the Special Police Brigade in Janja that, on 12/13 July, there was a fight between Muslims and the police forces in the area of Konjević Polje, and that about 200 Muslims were killed and about 1500 soldiers surrendered to the police.

Everything described above indicates that, based on the presented evidence, it was impossible to establish the exact number of captives, but it also shows beyond doubt that the witnesses made general comments on the number mentioning the highest number they could remember. It should not be forgotten that the number of captives was not constant and that it varied all the time depending on the time of the day and the inflow of captives who surrendered themselves that day. However, it is clear that the number of captives on the Sandići meadow that day was well over 1,000. Nevertheless, it is not necessary to establish either the exact number of prisoners on the meadow, or that the prisoners killed in the warehouse came exclusively from the meadow, or even the precise number of prisoners killed in the warehouse.

Not all the Sandići captives killed in the massacre reached the warehouse by foot, marching in the column. The Panel draws that conclusion based on the testimonies of two witnesses, S1 and S2, who were brought to Kravica on 13 July in different ways: S1 marched in the column, while S2 was bused to the warehouse. Although S4 did not recall seeing any buses around the warehouse, there is substantial evidence to corroborate S2. Luka Marković said that up to 17 buses carrying prisoners arrived during the day, and Zoran Erić reported seeing a bus parked in front of the hangar. In addition, aerial photography from 13 July (Exhibit O-199) substantiates the presence of buses in front of the hangar at 14:00.

In any case, there is clear evidence that a substantial number of captives were marched to the warehouse in a column, while others were bused there. The number of prisoners in the column is described by S4, Mitrović and Stevanović in their statements, witnesses Predrag Čelić, Slobodan Stjepanović, and S1, the Accused Radovanović, and many others. All of them similarly stated that the prisoners had been captured in the afternoon and taken to the warehouse, to which they had marched for about 1 km in a column. S4 and Slobodan Stjepanović stated that the prisoners were lined up four by four. According to the statements and testimonies, the number of captives in the column ranged from 400 to 800. By way of illustration, S1 stated that the column had even been up to 400 meters long, while witness S4 said that there had been rumors that the column numbered between 700 and 1,000 captives.

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Furthermore, based on the presented evidence the Panel has established that the first section of the building (the left-hand side section when facing the warehouse from the road) was first filled with the captives who arrived by bus, and after that, since this bigger section was already full, the captives from the column went into the right-hand side section. S2, speaking about the left section, testified that the captives were urged to enter and then to sit down, and they were crowded closely together. Witness S1 testified that the right section of the hangar, where he was, was so crammed with people that it was not possible to sit down, and there was no space at all between the standing men.

Having all this evidence in mind, the Panel concludes that the total number of captives in the warehouse on 13 July 1995 exceeded 1,000 Bosniak men.

The execution of the captives itself commenced in the afternoon. The Panel has concluded that most of the captives were killed during the time that the Accused were present and participating in their executions, a period of about one and a half hours. The shooting was preceded by the incident described above when Krsto Dragičević and a Bosniak prisoner were killed, while the Deputy Detachment Commander, Rade Čuturić, sustained injuries to his hands. The Defense for some of the Accused attempted to present this incident as a trigger for the execution of Bosniaks at the Warehouse which followed. The Panel will assess this incident later in the verdict. Witness S4 stated that the shooting had lasted for one hour and thirty minutes, which corresponds with the length of time Marko Aleksić, in his statement, reported hearing gun shots and explosions from the location of the warehouse. S4 further testified that first the right hand section was targeted by fire and then the left one. The killings began in each room with M84 machine gun fire, which would then be followed by automatic rifle fire and hand grenades that were thrown into the warehouse through the openings.

According to Count e) of the Indictment, more than one thousand Bosniaks were killed at the warehouse. It was really impossible to determine the definite number of those who were killed, because it was established during the proceedings that the 2nd Detachment withdrew from the site in the early evening of 13 July and was replaced by other forces, and it has also been established that the sporadic killing of the captives and potential survivors continued throughout the night and the following morning. The Panel concludes that in the course of the executions performed by the Accused during the first approximately hour and a half of the killing, the majority of the captives were killed, as is charged in the amended Indictment, after which the Skelani Platoon withdrew from the site.

The Kravica Farming Cooperative facility was primarily designed for storing and retailing agricultural goods and cattle. The compound consists of several buildings, including the largest one – the warehouse. The dimensions of the warehouse itself were given by the construction expert witness Vlado Radović (Exhibit O-VII-04). The expert witness's Findings and Opinion stated, *inter alia*, that the Farming Cooperative Kravica is a complex of business buildings built on the right-hand side of the Bratunac – Konjević Polje road, in the settlement of Kravica. It consists of five buildings. The expert witness's analysis particularly focused on the large warehouse at the Farming Cooperative. According to the Findings and Opinion, the dimensions of the warehouse are approximately 61m by 11m, with a total area of 630 square meters. According to the photo documentation of the Farming Cooperative Kravica, the Public Security Centre Bijeljina (Exhibit O-180), there are two warehouse sections, the dimensions of one being 30.77 m by 11 m, and the other 24.28m by 11 m.

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The warehouse, that is, both large divided sections, were filled with Bosniaks. The column of men escorted by the Accused and ordered into the right section of the warehouse was never counted. Witness reports vary from as low as 200 (Ilija Nikolić) to as high as 800 (Predrag Čelić) or even 1000 (S4). Witness S1 testified that the men from the column were so crowded into the right side of the warehouse that there was no room at all in between them. The men in the left section arrived by bus – Luka Marković counted a total of 17 buses carrying prisoners to the cooperative that day. Witnesses S1 and S2 stated that the sections into which they were ordered were crowded with people to the very entrance. When making an imprecise estimate of the number of captives, the Panel also took into account the estimate provided by the expert witness in land surveying, Dragan Obradović, who concluded in his Findings and Opinion (Exhibit O-X-2) that two adults occupy 1 square meter of space and so, when this information is generally connected with the total area of the warehouse covering 630 square meters, the Panel concludes that more than one thousand of persons were kept in the warehouse.

5. 14 July – 15 July

The dates of 14 July and 15 July are connected with several events relevant to the charges.

Firstly, the execution of the captives in the warehouse of the Farming Cooperative continued throughout the night between 13 and 14 July and during the early morning hours of 14 July. These executions were undertaken by other forces that controlled the facility. These subsequent executions were described in their testimonies by witnesses Jovan Nikolić, Luka Marković, Zoran Erić and S2. S2 testified that, while lying behind the warehouse during the night, he heard shots coming from the warehouse and the killing of those who had survived.

In addition, the warehouse was used as an execution site for other prisoners brought there in the morning specifically for that purpose. Witness Jovan Nikolić witnessed such a subsequent execution and stated that he saw, on the morning of 14 July when he arrived at the Farming Cooperative, some soldiers bringing a group of 20 captives to the Farming Cooperative warehouse, ordering them to lie down on the floor and shooting them dead. Witness Luka Marković also stated that he saw about 10 captives being brought there the following morning and ordered to lie down on the ground and then shot dead.

The clean-up of the warehouse and the transportation of bodies to mass graves started on 14 July and continued on 15 July, when it was finished. The clean-up consisted of loading of corpses onto trucks and transporting them to the previously prepared mass graves in Glogova. In the context of everything described above, witnesses S3 and Ostoja Stanojević, who were involved in these operations of the removal of bodies, also stated that, 2 to 3 months later, the bodies were removed from the graves to the locations of the previously prepared secondary graves in Zeleni Jadar.

Based on the presented evidence, particularly evidence given by witnesses Jovan Nikolić, S3, and Ostoja Stanojević, it has been established that, on 14 July, in the morning hours, transportation of bodies was organized from the warehouse to the mass grave in Glogova.

Witness Jovan Nikolić stated that, on 14 and 15 July, bodies were loaded and transported to Glogova to the previously designated sites. He personally saw that three trucks and one loader were used, and when the transportation of bodies was finished, a tank-truck arrived and washed the facility.

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Witness S3 stated that several days after the fall of Srebrenica, his Company Manager ordered him to report to the headquarters in Bratunac. He went to Bratunac together with a colleague of his. He reported to the headquarters and was ordered to load up with fuel and head for the Kravica Farming Cooperative. Another 5 – 6 trucks set out with them, they were escorted by the Military Police. When he arrived at the Warehouse, he saw soldiers and bodies inside the Warehouse. He said there had been Civil Protection workers there as well, who were throwing the bodies of the dead into the bucket of the loader that was loading the bodies onto the trucks. He observed that those people had been shot with rifles, they were mostly men. Bullet marks were visible on the facade, it was rather damaged. That first day, the loading lasted until 4 p.m. After they were loaded, they headed towards the village of Glogova in the direction of Bratunac. The Military Police travelled in front of the trucks again. There were 5 – 6 trucks in the column. When they arrived in Glogova, they drove 300 - 400 meters off the road, where they saw soldiers who were securing the area. He also observed a dug out grave 2.5 meters wide, 50 meters long and about 2 meters deep. The grave had been dug out using an excavator or a trencher. Inside the grave, he observed several bodies, he does not know how many. Those were bodies of men dressed in military uniforms. Trucks arrived, unloaded the bodies into the grave and went back. Next day, they were told that they would be called again if necessary. He went back to Glogova 2 – 3 months later. It happened just like the first time, the Military Police arrived again asking for trucks to have the bodies removed to another location. The witness was with his colleague again, there were some other people from his company and some from the Public Utility Company. Again, they gathered in front of the headquarters and fuelled their vehicles, and then set out together with the Military Police. Momir Nikolić was with them. They set out from Bratunac at about 6 p.m. with the total of 5 trucks. They did not even know what they were supposed to do. When they arrived in Glogova, they saw two vehicles there, and a big excavator and a loader a bit bigger than the one from Kravica. Then the trencher grabbed the bodies and loaded them onto the trucks. The Civil Protection workers assisted. Then they drove off down the Glogova - Bratunac - Potočari - Srebrenica - Zeleni Jadar road. They followed the Military Police vehicles. That was after 8 p.m. They arrived in Zeleni Jadar, there was a machine there, a loader, which flattened the ground after the bodies had been unloaded. There were people from the Civil Protection there too. There was also one grave there that had been dug out.

Witness Ostoja Stanojević states that, in July 1995, he was a driver in the engineering unit of the VRS. Major Jokić ordered him to set out in the direction of Bratunac for Srebrenica sweeping. When he returned from the meeting and told him that he should get his truck ready, that he was going for a field mission in Srebrenica and that he would stay there for 10 days. He believed that was on Friday, 15 or 16 July, he spent the night in Bratunac, but he stayed in Bratunac until Saturday afternoon. He arrived in Kravica in front of some garages on Saturday afternoon, a farm of some kind, with some openings. They were next to the road. There were 5 – 6 people in work clothes in that place. He stayed there while the truck-trailer was loaded with bodies in two rounds using a loader. The trailer of the truck that the witness drove was not full, because they said they would not fill it up to the top so that the bodies would not be visible, because there were cars travelling on the road. After they loaded the bodies, he arrived in Glogova to a shallow grave. When he unloaded the truck, he went back to collect the rest, and after he unloaded the second round, he was told to go back to Bratunac and that there were no more bodies.

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The funeral of the killed Krsto Dragičević was organized on 14 July. According to witnesses S4 and Stevanović, the funeral was attended by almost all members of the Skelani Platoon. According to witness S4, people said at the funeral that what had happened in Kravica was bad and that, sometime in the future, somebody would have to be held accountable for that. Witness Stevanović also confirmed that they discussed the events in Kravica after the funeral. The funeral was attended by almost all members of the Platoon, as well as Commander Stupar, which was also corroborated by Ljubomir Borovčanin, who testified before the Panel that he had asked Stupar to take an active role in the organization of the slain soldier's funeral.

On July 15, 1995, a meeting was held at the Zvornik Brigade Command. Witnesses Dragan Obrenović, Danilo Zoljić, Dragomir Vasić and Ljubomir Borovčanin, who also attended the meeting, testified about the meeting itself, the attendees and the topic of the meeting. Witness Danilo Zoljić stated that, on 15 July 1995, a meeting was held with Dragan Obrenović, Chief of the Zvornik Brigade, and it was also attended by Dragomir Vasić, Miloš Stupar and Ljubomir Borovčanin. The situation in the field, recent events, including the killings at the Kravica warehouse, and the planned future activities were all discussed at the meeting.

C. The Execution at the Kravica Warehouse

The acts of the Accused and the events that are subject of the charges have been described by the eyewitnesses as follows.

In his detailed testimony, S4 stated that he was at Sandići on 13 July. He saw Bosniaks who were coming out of the woods and then stripped of all their belongings, including money and documents. He observed wounded persons on the meadow too, some of whom were able to walk without help and some of whom were not. He said it had been a very hot day. The wounded received no medical care and no food, and water was insufficient. All that time there was traffic on the road, many buses and trucks that were transporting Bosniak women, children, and elderly. The Detachment did not have a specific assignment related to that. The traffic was not stopped until the column set out for the Farming Cooperative. Ljubomir Borovčanin, General Mladić, and some other officers arrived at the meadow. Gen. Mladić delivered a short speech to the captives, something about them being safe, but S4 could not hear all of it. Gen. Mladić stayed but for a short time. The witness himself stated that he had thought that what Mladić had said would not eventually be done, and that it had been but a trick. S4 saw his neighbor Ziklija, whom his father had cooperated with, among the Bosniaks, and he talked to him. Ziklija asked him what was going to happen, but the witness stated that he had not been allowed to say what was going to happen because they had been told in meetings that they were not to speak of that. There were many captives on the meadow, he does not know just how many. Sometime in the afternoon, they received an order to take the captives from the meadow, and then they learned they were supposed to take them to the Kravica Farming Cooperative. The Accused Trifunović, as platoon commander, ordered the Detachment members to gather around the column of Muslims that had been formed, march them to the warehouse and detain them. The captives marched in a column four by four. At that point, the witness presumed they would be killed. There were 15 – 20 other people who escorted the column, and some of the other members of the 2nd Detachment who escorted the column included the Accused Trifunović, Radovanović, Medan, and Jakovljević, but members of other platoons were there too, including Čupo, Brano Džinić.

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The witness stated that the number of people in the column was rumored to be 700 – 1,000, but that was what was said before, no one could have counted that. The column marched down the middle of the road, there was no traffic for that particular reason. The traffic was stopped before the hangars and from Sandići in the direction of Konjević Polje. At the trial, the witness identified the Kravica Farming Cooperative building and he also identified the Bratunac – Konjević Polje road that they had been on. The column went off the road when it reached the right hand side corner of the building and that is where they immediately started entering (right hand side of the hangar when facing the facility from the road). Most of those in the column went into the right hand side section of the building. Some of them went in there, while the rest of the column went in through the centre door. The witness saw that the first section was full, the captives were standing inside. First, the facility was secured in order to prevent the captives from escaping and that was done by forming a semi-circle and covering the furthest ends of the building to the left and to the right. On the right hand side where S4 was, there were also Rade Čuturić and Milenko Trifunović, a.k.a. Čop. Branislav Medan, Petar Mitrović and Slobodan Jakovljević went behind the building to the right. They went back there to secure the back of the building because there were small windows there.

When they assumed their positions and when everybody was settled, one of the members of the Skelani Platoon, Krsto Dragičević, went inside the facility to talk to one of the Bosniaks, whom he knew and who asked about his two brothers and the house. Čop called out to him to come out, whereupon he stepped out and then went back inside again. At that moment, one of the captives snatched his rifle from him and killed him. Čuturić ran to him immediately and grabbed the barrel. One volley was fired while he was holding onto the rifle, and as a result of that Čuturić sustained burns on his hands. Everything happened very quickly. That happened in the larger part of the section, the right-hand side one. Both of them fell down to the floor. Čop ran to them and pulled the rifle out from beneath them and threw it behind his back. The witness stated that he had moved to the right, when one of them, Mirko Milovanović, started firing the M84 machine gun at the hangar. The prisoner was killed. The shooting ceased while S4 recovered Krsto's body, whereupon the shooting started again. He observed that several captives fell down to the floor because of the M84 machine gun fire, and then the others started shooting too from their automatic rifles. Somewhere from the corner of the door, crossfire shots were fired from automatic rifles and the M84 machine gun issued to Mirko Milovanović. The witness was not more than 8 meters distant from the asphalt road. The shooting lasted for about one hour and thirty minutes. Whole rifle magazines were fired and then replaced with new ones. The witness also testified that hand grenades had been used for killing too, that some Detachment members threw them inside, taking them from two cases that had been brought there. After they fired at the first section, they took a break and then they started firing at the other section. Mirko started the firing in the other section too. There were several attempts at escape in the beginning; the attempts were prevented by killings, bodies were falling down inside the doorway. There were 13 – 14 Skelani men, and as many other Šekovići men, but there were many other individuals on the spot, unknown, wearing uniforms and civilian clothes. One of those who was there said that his two sons had been killed and that he wanted to have his revenge, so he was doing the killing too. After that, the Accused Trifunović, the commander of the 3rd Platoon, ordered them to move, and they were replaced by another unit because he saw that others arrived. S4 believed that their replacement was a MUP unit. After that, they went to Bratunac. The body of Dragičević had been taken to the Bratunac morgue, and then the platoon along with the body returned to Skelani. S4 went to the house of the killed soldier that evening, and he also attended his funeral the following day. The things that had

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happened were discussed among the Accused at the funeral, and it was said that someone would be punished for what had happened.

The statements of witnesses Petar Mitrović (Exhibit O-320) and Miladin Stevanović (Exhibit O-321b) given during the investigation stage support the testimony of S4 in its critical parts.

Petar Mitrović stated that he was involved in securing a group of 500 Muslims on the road between Kravica and Sandići. Mitrović said that part of the Skelani Platoon marched around 500 Muslims in a column towards the hangar. At the hangar, Mitrović saw members of the Skelani Platoon shooting, including Mirko Milanović as well, who fired from an M84 machine gun, and he also stated that he himself had fired two shots in the direction of the hangar door. Then, he was ordered to go to the other side of the building together with Branislav Medan and Slobodan Jakovljević, as well as a certain Željko Ivanović, in order to secure the small openings that the building had on that side. In addition to this shooting, he also heard the detonations of hand grenades that were being thrown inside the warehouse. Soon after the grenade detonations they left. The screams of people who were inside were heard from the hangar. Mitrović stated that he had not seen anyone bringing the ammunition, but given the length of the shooting, he believed that someone must have brought the ammunition. The Panel also accepted Mitrović's statement given during the reconstruction of the incident on 4 October 2005. Compared with this statement, in his statement given during the reconstruction Mitrović departed from what he had said earlier, and he stated that he had only seen Mirko Milanović shooting but not the others. Also, with regard to the person nicknamed Čupo, he stated that he had only heard but not seen Čupo threw the hand grenades, and that he had only seen Čupo, whom he knew and who had been a member of the 2nd Detachment, in Sandići, not in front of the warehouse.

In his statement, witness Miladin Stevanović stated that on that day he was in the vicinity of the meadow in Sandići where the captives were being rounded up. They were searched and stripped of their belongings. He said he had seen a certain number of the captives being put on buses and taken in the direction of Bratunac. After that, together with Nenad Vasić, he escaped and went to his relatives. Stevanović stated that having spent some time in Bratunac, he returned to the road near Kravica that same day after 16:00, and that, while approaching the location, he observed that the traffic was stopped 100 meters before the entrance to the Kravica Farming Cooperative. He and Nenad Vasić talked to the police officers who were manning the traffic blockade, and they told him there that there had been an incident in which Krsto Dragičević was killed. While approaching the Cooperative facility, he saw Mirko Milanović next to a table on which his M84 machine gun was standing, aimed at the people in one of the warehouse rooms. He saw dead bodies in the other warehouse room, about 400 of them. He saw a young man throwing hand grenades into that room, and he heard cries and screaming from that room. Stevanović stated that, together with Nenad Vasić and Miko Milić, he took the body of Dragičević and set out for Bratunac, where they stayed a while waiting for the doctor and the key keeper of the chapel. They left Bratunac later that night, and they went to Skelani to inform the family of the dead soldier. Because he was a warehouseman he helped organize the funeral, and it was attended by most of the members of the Skelani Platoon. At the funeral, the members of the platoon spoke about the killings at Kravica, and he heard Mirko Milovanović saying that he had opened fire from the M84 machine gun at the people in the second room who attempted to escape, having heard what had happened in the other room.

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Although witnesses S1 and S2 do not incriminate the Accused, because they do not know them, these witnesses credibly and in detail describe the suffering they experienced while they were in the Farming Cooperative on 13 July, when they avoided the fate that befell the others who were killed. They gave similar descriptions of the catching and capturing of the Bosniak men from the column that was moving through the woods in the direction of Tuzla. They gave a detailed and clear description of the act of killing itself, while they were unfamiliar with the identities of the executioners. Although they have different perspectives on the killings because they were each in different rooms, their description of the events corresponds with the testimony of witness S4, particularly as to those details corroborated in the statements of Mitrović and Stevanović.

Witness S1 testified that, on 11 July 1995, he left the Srebrenica protected enclave having found out that morning that Srebrenica was under the control of the VRS. He saw people leaving with bags and, together with his family, he headed to Potočari. He separated from his family and reached Jaglić, while his wife and children went to Potočari. The next day, there were many people there. Some of them were armed, but more of them did not have weapons. Shooting started there. There were many dead. At the distance of approximately 1 to 2 kilometers there was the asphalt road that connected Bratunac - Konjević Polje - Milići. The road could be seen from the meadow. In the meantime, the Bosnian Serb army appealed to them to surrender. He saw the soldiers and the vehicles travelling down the road. At that point, the Bosnian Serb army cut off their column. There was firing from a Praga. He saw many dead, some of whom were ambushed. That was already 13 July. The shooting first came from the woods and continued coming from the road. He saw two wounded individuals. When they were surrounded they were told to carry the wounded. On their way down to the road they crossed the river. There were two Bosnian Serb soldiers who searched them. The witness had to give everything he had. After that, his hands were tied behind his back and they were told to go sit in rows on some meadow. There were many Bosnian Serb soldiers there, over 50. He heard people who were with him saying that there were even up to 2,000 people there, they were surrounded by the Bosnian Serb army. It was very hot that day. Water was brought to them by boys who had been captured with them. One of them was a 7th grade student, and there were children even younger there. While he was in the meadow, many trucks and buses passed down the road transporting women and children, Bosniaks. They stayed on the meadow for a long time. A tank-truck was brought, and they were sprayed with water twice. One of the soldiers threatened to start shooting from an anti-aircraft gun that was mounted on a tank. He witnessed beatings and killings on the meadow. When General Mladić arrived, he asked if they recognized him. Gen. Mladić introduced himself and said that Naser Orić had abandoned them and left for Tuzla. He said that their families had been relocated and that soon they would be exchanged too, and that they would be moved to a place that was cooler. The General had some escort, soldiers. He arrived from the direction of Bratunac. The General stayed there for about 10 to 15 minutes, he was close to that man who took them to Kravica. Until the General arrived, they had not started for Kravica, so he thinks it was the General who ordered that they be taken there. S1 estimated that twenty minutes later, they were told to form a column four by four. The man at the head of the column had a machine gun and a German Shepherd with him. The witness was in the middle of the column, and they headed down the road to Kravica. On both sides of the column, there were soldiers carrying automatic rifles and ammunition belts. The distance between soldiers was 6 meters. The column was over 400 meters long, and the distance between the rows in the column was one meter. The column did not stop anywhere on their way. The meadow was approximately 1-2 kilometers away from the warehouse. On their way there, they passed by UN personnel carriers. The column went off the road when it

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reached the Kravica Warehouse. He saw a bus parked between the Warehouse and the asphalt road. Two Bosnian Serb soldiers were standing at the door through which the witness entered. The interior between the door and the wall was spacious, it was approximately 30–40 meters long and up to 15 meters wide. The last person in the column who went inside could barely fit, the warehouse was so full. Soon after that, the shooting started, the fire included volleys, hand grenades that were thrown in through the door and windows, rifle grenades, and screams were heard. He had a harder time listening to this than listening to the shooting. That could have been 16:00 or 17:00. The shooting in the warehouse continued up until the nightfall. The witness bent his head down and waited to be hit. Throughout the night the screams of the wounded who asked for help could be heard in the warehouse, while talking and laughter could be heard outside the warehouse. The witness took cover by placing two bodies on top of him. He saw Zulfo Halilović standing up and asking for water, he was killed immediately. He heard several wounded persons asking for water. They were killed immediately. The next evening, trucks arrived and the order was to first spread hay over the dead bodies, then wash the asphalt and load the bodies. He saw that two had survived. He went out the door, crossed the road and reached the river, he crossed the river and went to the woods. He walked for 5 days to reach Jelah. He met another two men from Bratunac. The witness continued travelling with these men from Bratunac. On 26 July he arrived in Žepa, and Žepa fell on the 29th.

Witness S2 was also an eyewitness and a survivor, and he stated that prior to July 1995 he lived in Srebrenica. On 11 July 1995, the VRS occupied Srebrenica. The women and children went to Potočari, including the witness's mother, while the witness and his two brothers went into the woods together with the other soldiers because he feared he would be arrested and killed. He set out together with the other men. There were also some women and soldiers who were partly armed, but there were more unarmed persons. He was wearing civilian clothes and carried a backpack with some food in it. Their goal was to get to Tuzla. On their way through the woods, Bosnian Serb soldiers ambushed them, shelled them, captured them and some even surrendered themselves. That was in a place called Jaglići just outside Srebrenica. That was also where the front line had been in the vicinity. When they would come across one of the ambushes, since they walked in a column, and the ambushes would be set up during the night, they tried to find cover from the shells, many would be left killed and wounded. On the third day of their journey, they were marching through the woods outside Kravica and Konjević Polje. From the woods there, they could see that Kravica was close by, and they could see the asphalt. He also saw Bosnian Serb soldiers on the asphalt and their military equipment, armored vehicles, near Kravica, in Sandići. He observed the movement of UN vehicles, there were several of them. He heard the appeals made to them over the megaphone to surrender themselves and that they would be exchanged. At the same time, they were constantly shelled. Many of them were killed on that occasion or left behind wounded. The shells were fired from mortars, three-barrel anti-aircraft guns, Pragas, and Bofors anti-aircraft guns. The fire was coming from Sandići. On the last night, a big ambush was set up exactly at the place where they were. They were shelled and fired at from all described weapons including tanks too. Many were killed and wounded. Those who survived decided to surrender themselves, including the witness. The witness says that he was very frightened. Before they crossed the asphalt road, they were ordered to put down their backpacks and leave them on a pile. One of the soldiers asked for money from them as they were crossing the road. Bosnian Serb soldiers were around them, they were many. They headed towards the meadow in Sandići, which was 50-100 meters away from the asphalt road. Bosnian Serb soldiers were all wearing green multicolored uniforms, some were wearing overalls. There were more of them in two-piece uniforms, they

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were young. When it comes to weapons, they had automatic rifles with wooden or folding butts and M84 machine guns. Among others, there was a Praga and a tank on the meadow which fired in the direction of the woods. It was very hot that day. There were around 15-20 wounded. The witness says he surrendered himself in the first group, and 2-3 hours later the second group of captured Bosniaks arrived from the direction of the woods, they were 300-500. Once they were all brought to the meadow there were many people there. Soon after that, General Ratko Mladić showed up on the meadow. Gen. Mladić approached the group, stayed for a little while and said they would be exchanged and that they would go home. There were 4 – 5 other officers in camouflage uniforms with Gen. Mladić. After Gen. Mladić left, an officer told them that they were going to be taken for an exchange in Tuzla where they would be exchanged for "their Serbs". They believed that, thinking it was true.

The officer picked them pointing with his finger who should step out, and he ordered them to board the bus that was on the asphalt road and facing Bratunac. They were ordered to board the bus, which, however, was facing the opposite direction from the one to Tuzla. There were 2-3 buses there, and the witness boarded the first bus. A large number of them boarded the bus, it was very cramped, they could hardly breathe. When he saw that the bus was facing the opposite direction from Tuzla, he suspected that something was going to happen, that they were going to be executed. They were taken to Kravica, they arrived in a couple of minutes. When travelling from Tuzla to Bratunac, the hangars are on the right-hand side. The bus took a right turn towards the entrance to the hangar, they got off the bus and everybody who was on the bus went in to the left-hand side part through the first entrance. They were ordered to get off the bus by a Bosnian Serb soldier who told them to run out and go inside the hangar as fast as they can. He saw Bosnian Serb soldiers in front of the hangar, they were 5 – 10. They were wearing multicolor green uniforms and carrying rifles. That was the same type of uniform as the one that the soldiers in Sandići wore, they had automatic rifles, several M84 pieces. Before the witness went inside, the hangar was empty. He heard the order according to which they should line themselves from the end of the wall towards the door and that they should sit next to each other on the ground. They went inside running. There was a fairly big container inside and one burnt car. There were several windows in the room and they were at two meters height. The container was about 1.5 meters high. The next group of Bosniak men who came inside came from the second bus. After that, groups of people kept coming. He did not see the buses, but he saw people coming inside also running. There were Bosnian Serb soldiers there, standing in front of the entrance. The hangar was filled all the way to the entrance, they had to sit next to each other. The door and the windows of the hangar were open all the time.

After the room was filled, they heard shooting in the other side of the hangar. Their guards told them that Bosniaks were attacking the hangar and that Bosniaks were doing the shooting.

All of a sudden, the soldiers, who were outside, went inside the hangar and started shooting at them. The soldiers fired from rifles and a M84 machine gun. During the shooting spree, they would take a break, smoke a cigarette, and then continue. After that, they would throw in a series of hand grenades. Inside, screams and calls for help could be heard. When the first one started shooting, the witness lay down on the ground. They were shooting for a long time, firing volleys, hand grenades. Everything would calm down, they would take a rest and then continue. He heard them killing the wounded. The shooting created a lot of smoke. You could not see a thing. During the night, the witness jumped out of the window, he was wounded in his leg, but he was able to walk and he did not feel the pain. He climbed up on the container, stepped on the window sill and jumped out. There was a corn field close by.

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Having jumped through the window, he remained lying in the corn field. While he was lying there until dawn, he heard a soldier coming through the corn field. He heard a voice saying, "There goes another one through the window". They approached him, shone a flash light at him and fired one shot at him, but did not kill him. From the moment he jumped out through the window, he was all covered in blood. He heard an excavator go in, most probably loading on some truck. He recognized the sound of the loader and heard orders "load". The witness was shot two times then. He did not feel the pain due to the great fear he felt. These injuries impeded the movement of the witness, but he was able to move. After that he heard them saying there were more dead around the hangar. That was when he crawled through the field to the creek and escaped into the woods.

Also, witness E.H. who, although he managed to escape from Sandići, describes the incidents that he witnessed. So, he testified that the attack on Srebrenica started on 6 July with the shelling. His mother and sisters left for Potočari on 11 July, while his brother, his father and himself went to Kazani to escape from Srebrenica through the woods. Besides them, there were many people there, mostly men. The column was headed by around 40 armed men. While they were pushing forward, suddenly shooting and shelling of the column started. Many were wounded. They spent the night travelling and the next day, 13 July, they arrived in Kamenica. He saw around 200 dead around him. From there they could see the asphalt road, saw the UN soldiers and a white personnel carrier. He heard Bosnian Serbs calling them through megaphone. They told them they would be safe, that UNPROFOR would protect them and take them to Tuzla, and that, if they did not surrender, they would continue with the attacks. The witness states that he begged his father to go down there and surrender themselves, which is what they did. He saw that from the hill where they were a column was going down towards Sandići. While they were going down, Bosnian Serb soldiers cursed them and asked that they give them the money. All who had a bag or some things with them had to leave them before they crossed to the meadow. When they arrived at the meadow, they saw Bosnian Serb soldiers, they were wearing camouflage uniforms with some patches on them. Soon after that, he was approached by one soldier who ordered him to bring water from a nearby place across the road. He brought the water and one soldier ordered that they could get a bottle stopper of water each. There were many wounded, no one helped them. Soon after that, he was ordered to go bring water again, but he saw a bus which stopped there which he managed to board. The witness stated that he never found his father, while his brother survived.

Many other witnesses testified about the killings in the Kravica Warehouse, and the Panel finds their testimony credible and clear. So, witness Miladin Nikolić, a worker at the Farming Cooperative, stated that he had heard bursts of fire during the night and seen some people standing on the asphalt, firing in the direction of the hangar.

Witness Jovan Nikolić, the then-Manager of the United Farming Cooperatives, which included the Kravica Farming Cooperative, stated that he arrived at the Kravica Farming Cooperative on 13 July after 22:00, when he heard from Zoran Erić, also a worker at the Farm, that Bosniaks were imprisoned there, that a police officer from Skelani had been killed, and that many of the people who were imprisoned there at dusk that day were killed in the hangar. The witness also said that he learned in the days to follow that the captured men who had surrendered in Sandići were killed there. Erić told the witness on that occasion that the Skelani Police Unit was also there. According to witness Nikolić, Luka Marković, one of the workers, told him that a Skelani Platoon unit "was in operation" that day close to the Kravica facility and that one member of the Platoon was killed. Witness Jovan Nikolić returned to the

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Kravica facility on 14 July and saw piles of dead bodies inside the hangar. It was the day when the clean-up of that building started and was finished on 15 July, then a tank-truck arrived on 16 July and cleaned up the area. He saw 3 trucks brought there and a loader which loaded the bodies onto the truck, which then took them to the already prepared graves in Glogova. Witness Nikolić stated to have witnessed the killing of one group of the prisoners in the morning hours of 14 July. They were lined up in front of the warehouse and killed by soldiers unfamiliar to him.

Witness Zoran Erić stated to have arrived in the Farming Cooperative on 13 July at around 10:00 to 11:00. On the way to the Farming Cooperative, he saw soldiers deployed along the road. Upon entering the perimeter of the hangar, he saw a bus parked in front of it. Later during that day, shooting was heard inside the hangar and he learned from a soldier who was there that Borovčanin's special police force member from Skelani was killed. According to this witness, continual fire started at that moment and it lasted all night long with some breaks. Wails could be heard from the hangar. In his statement given during the investigation, the witness said that hand grenade explosions were also heard. Then, Jovan Nikolić came, but he left soon afterwards. The following morning, all those who survived were called to get out and then another burst of fire was heard. The witness was ordered to cover the bodies with hay. (Witness Milenko Pepić also saw some hay in front of the hangar.) There were 5-10 bodies in front of the warehouse, just like throughout the entire hangar.

Luka Marković, the Manager of the Farming Cooperative during the period from May to July 1995, also testified about the events that took place in the Farming Cooperative. He stated that he arrived in the Farming Cooperative in the morning hours of 13 July. Around 09:00, one bus carrying prisoners came and one all-terrain vehicle with three officers. They inspected the hangar, asked him for a chain and a padlock, saying that they had no place available to house those prisoners, and that they would stay there until the following morning. The bus that arrived there first, parked in front of his office. He saw people getting off the bus with their hands up and going into the hangar. When the first part was filled in, they locked it up. According to this witness, about 17 buses arrived that day bringing prisoners. Later, he thought approximately 18:00 that evening, a short burst of fire was heard first and then the seven men who guarded the prisoners started shooting. At that moment, another 30 men arrived in military uniforms. First they killed the prisoners in the open area, then bomb explosions were heard. The witness corroborated the statement given by Jovan Nikolić, and he also stated that some prisoners were executed the following morning as well. After that, 2-3 trucks, a loader and a tank-truck arrived in the perimeter of the facility. The bodies were loaded onto the truck and covered by hay. An unpleasant smell could be felt. The clearing of the site lasted for 2 days, the cistern truck took water from the river and washed the pavement.

The forensic evidence recovered from the Kravica Farming Cooperative further corroborates the testimonies of the witnesses detailed above, primarily the three summary reports drafted by Mr. Dean Manning (Exhibits O-236, O-239, and O-241). These reports include a detailed description of the Kravica Farming Cooperative complex and summarize the evidence collected and observations made during forensic investigations of the site. In addition, an investigative report was prepared by the United States Naval Criminal Investigative Service ("NCIS Report") based upon its investigation of the Kravica Cooperative on 30 September

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1996 (Exhibit O-229).[15] Finally, Michael J. Hedley, an OTP investigator, also prepared a report dated March 2001 ("Hedley Report") on the examination and recovery of evidence from the Kravica Cooperative (Exhibit O-232) based upon his visits to the site.

Dean Manning is a former ICTY OTP investigator. On 16 May 2000, in the course of the OTP investigation, he produced a summary of the forensic evidence pertaining to the execution sites in Srebrenica.[16] He stated in the summary that OTP investigators visited the Kravica Warehouse on 12 April 1996 and 17 August 1997, and that he produced his report based on the observations and analysis of the collected samples made during those forensic investigations.[17]

The Panel notes that Dean Manning was cross-examined about his reports during the main trial.

The 1st Manning Report notes that the Kravica Farming Cooperative is a large warehouse of prefabricated construction. It was used as an agricultural warehouse and it is a part of complex of several buildings. On the North wall, there were suspected "impact areas" next to suspected blood and tissue splatter extending up the height of the ceiling. The West wall was an "impact site" with significant blood and tissue splatter and dripping patterns. There were two suspected seats of explosive detonations along the wall at the junction with the South wall: one explosion originated near the floor. Suspected tissue and blood splatter patterns were found near the explosion site and extending to the height of 11 feet off floor. On the South wall were observed: six areas that indicated explosive detonations; numerous impact defects (one extending through both interior and exterior wall); extensive suspected blood splatter extending for several feet upwards; and steel reinforcing bars inside the concrete walls were broken at this point. Observations of the East wall revealed: possible seat of blast beginning 1 ft. from wall; numerous impact defects; suspected explosive residue and blood and tissue splatter.

The South wall (exterior) was observed to be heavily marked with hundreds of impact defects, most heavily concentrated around the doors. The investigators recovered three metal fragments consistent with the jacketed portion of a bullet. On the North wall (exterior) were observed: a single hole through the wall below which was a shallow mound of earth with 30 suspected human bone fragments; numerous impact marks around the smaller doorway to the left and the exterior wall; and significant damage along the top and western margins of the larger doorway (at the eastern end), which was indicative of an inward force being applied. The smaller doorway on the western end had foam lettering above it that was missing a section. The floor was covered with hay, manure, and farming tools.[18]

Finally, investigations and analyses of mass grave sites provided additional forensic evidence regarding the killings at the Kravica warehouse, which was consistent with, and further corroborated, the eyewitness accounts. As the "Summary of Forensic Evidence – Mass

[15] *See also* "Report on blood and tissue samples found in Grbavica school and Kravica warehouse", Netherlands Forensic Institute, 20 December 1999 (Exhibit O-233). This report details the analysis of samples collected by the NCIS for human blood and tissue.
[16] "Summary of Forensic Evidence – Execution Points and Mass Graves" ("1st Manning Report"), Dean Manning, 16 May 2000 (Exhibit O-239).
[17] Manning also relied on the report of the United States Naval Criminal Investigative Service.
[18] 1st Manning Report, pgs. 5-6l (Exhibit O-239); *Blagojević*, Testimony of Dean Manning of 5 February 2004, pg. 7213 (Exhibit O-228).

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Graves Exhumed in 2000" ("2nd Manning Report") (Exhibit O-236) notes, one mass grave site in particular, Glogova 1, was linked to the killings at the Kravica warehouse through artifacts and other evidence.[19] As stated in that report:

> Glogova 1 is a primary, disturbed mass grave located on a dirt road off the Konjević Polje to Bratunac Road near the village of Glogova. …Ample evidence was located within the Glogova 1 grave linking it to the mass execution point of Kravica Warehouse. This evidence includes broken masonry and door frames indistinguishable from that located at the Kravica Warehouse, as well as artifacts such as car parts and straw described by a survivor of the massacre as being present in the warehouse.
>
> …The bodies of at least 191 individuals and 283 body parts were located within the graves. Due to time constraints, a limited number of autopsies have been conducted and the calculation of the MNI (Minimum Number of Individuals) has not yet been made….
>
> The Glogova 1 gravesite is a primary grave made up of at least 6 sub-graves [C,E,F,H,K and L]…. …A particular feature of some of the graves… was the high incidents of apparent blast and shrapnel injury to the bodies. Located within some of the graves were grenade "fly off" levers, as well as apparent pieces of grenade and shrapnel. The items located within the graves and the injuries evident in the bodies fully supports witness testimony of the process of execution and body removal at the Kravica Warehouse.
>
> A direct physical link to the Kravica Warehouse execution point was found in each of the Glogova 1 graves….
>
> Although post-mortem examination has not been made of all the bodies from Glogova, it is clear that the victims within the grave suffered a violent death. Bodies were discovered with bullets and shrapnel embedded in bones and decomposed flesh. Many bodies showed signs of high impact fractures, many of which were consistent with the use of explosives and hand grenades. …The remains varied in age, however, at least one individual was described by an anthropologist as being approximately 12 to 14 years of age.[20]

[19] A more detailed report of the investigation of the Glogova 1 mass grave site was produced by Richard Wright, which contains additional information on evidence found at the Glogova 1 site. "Report on Excavations and Exhumations at the Glogova 1 Mass Grave in 2000", Richard Wright, 9 February 2001 (Exhibit O-237). The Hedley Report also discusses evidence discovered at the Glogova 1 mass grave site.

[20] 2nd Manning Report, Dean Manning, February 2001, pgs. 11-12 (Exhibit O-236). Additional evidence concerning mass grave sites, including secondary mass grave sites, linked to the killings at the Kravica warehouse is contained in the "Summary of Forensic Evidence – Execution Points and Mass Graves 2001" ("3rd Manning Report"), Dean Manning, 24 August 2003 (Exhibit O-241), and the "Report on Excavations at Glogova 2, Bosnia and Herzegovina 1999-2001 ("Baraybar Report"), Jose Pablo Baraybar (Exhibit O-238).

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IV. LAW OF GENOCIDE

A. Elements of the Crime

Article 171 of the CC of BiH defines the offense of genocide as:

> Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:
> a) Killing members of the group;
> b) Causing serious bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) Imposing measures intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group…

Article 171 of the CC of BiH is identical in most respects to Article 141 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY") and Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), entry into force 12 January 1951.[21]

Article 141 of the CC of the SFRY defined the offense of genocide as:

> Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

The Panel notes that, in addition to the other acts enumerated in Article 2 of the Genocide Convention, Article 141 specifically defined forcible transfer as one of the possible underlying acts of genocide.

Article 2 of the Genocide Convention defines the offense of genocide as:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;

[21] *See also* Rome Statute of the International Criminal Court ("Rome Statute"), Art. 6, entry into force 1 July 2002, U.N. Doc. A/CONF.183/9 (identical to Art. 2 of the Genocide Convention).

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(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Although, for reasons discussed in Section VIII, *infra*, the application of Article 171 of the CC of BiH need not be premised on the customary status of the crime of genocide, the Panel notes that it is indisputable that genocide is recognized as a crime under customary international law. As early as 1951, the International Court of Justice declared, "[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[22] Likewise, the Secretary General's Report pursuant to Security Council Resolution 808 and unanimously approved by Security Council Resolution 827 declared, "The part of the conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: …the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948."[23]

Article 2 of the Genocide Convention is incorporated verbatim in Article 4 of the ICTY Statute and Article 2 of the ICTR Statute, applicable to the activities in Srebrenica and confirmation that the definition of genocide as recognized in customary international law is identical to that set out in the Genocide Convention. As the Trial Chamber highlighted in *Jelisić*, "Article 4 of the Statute takes up word for word the provisions of the [Genocide Convention]. …Subsequently, the Convention has become one of the most widely accepted international instruments relating to human rights. There can be absolutely no doubt that its provisions fall under customary international law…."[24]

Article 171 of the CC of BiH, as well as Article 141 of the CC of the SFRY before it, were adopted as domestic law in order to meet the State's obligation under the Genocide Convention. Article V of the Convention reads: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide...." The SFRY took an active role in the drafting of the Genocide Convention and ratified it in 1950.[25] As domestic law thus derived from international law, Article 171 of the CC of BiH brings with it as persuasive authority its international legal heritage, as well as the international jurisprudence that interprets and applies it.

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[22] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, (1951) ICJ Reports 23.
[23] Secretary General's Report pursuant to para. 2 of Security Council Resolution 808 (1993) ("Secretary General's Report"), UN Doc. S/25704, para. 45. *See also*, *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 495 ("The Genocide Convention is undeniably considered part of customary international law."); *Prosecutor v. Goran Jelisić*, IT-95-10-T, Judgment, 14 December 1999, para. 60 ("Article 4 of the Statute takes up word for word the provisions of the Genocide Convention, which is undoubtedly part of customary international law.").
[24] *Jelisić* Trial Judgment, para. 60.
[25] Official Gazette of the Presidium of the People's Assembly of the Federal People's Republic of Yugoslavia, no. 2/50.

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Accordingly, the crime of genocide under Article 171 of the CC of BiH incorporates two distinct sets of elements, namely the *chapeau* elements – the genocidal *mens rea* or intent – of genocide and the elements of the underlying acts.[26]

B. *Actus Reus*

Pursuant to Article 171(a) of the CC of BiH, the *actus reus* of genocide includes "killing members of the group". The Panel concludes that, at a minimum, "killing members of the group" includes acts of murder as otherwise defined in domestic law.[27] In particular, the Panel concludes that Article 171(a) prohibits "depriving another person of his life" as also prohibited as a crime against humanity and a war crime pursuant to Articles 172(1)(a), 174(a), and 175(a) of the CC of BiH.

This Panel has previously identified the elements of the crime of murder:

1) the deprivation of life;
2) the direct intention to deprive of life, as the perpetrator was aware of his act and wanted the act to be perpetrated.[28]

The qualification "members of a group" does not imply *per se* that the number of victims must be large or significant. In theory, the killing of only one victim can still amount to an act constituting the *actus reus* of the crime of genocide.[29]

Finally, the qualification "members of the group" requires that the victims of the killings must be members in fact of the national, ethnical, racial, or religious group that the perpetrator sought to destroy in whole or in part.[30]

C. *Mens Rea*

The crime of genocide requires proof that the six Accused found to be principal perpetrators of the killings intended to kill the prisoners in the warehouse, and in addition, had the specific genocidal intent to destroy a protected group in whole or in part by committing the killings. The Panel concludes that the five principal perpetrators did in fact intend to kill the prisoners in the warehouse and did in fact posses genocidal intent at the time they committed those killings.

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[26] While the underlying acts specified in sub-paragraphs a) through e) can be characterized as the *actus reus* of genocide, it must be recognized that these underlying acts themselves have both *actus reus* and *mens rea* elements. Accordingly, it is preferable to conceptualize genocide as similar to crimes against humanity in requiring distinct inquiries into the *chapeau* or general elements and the underlying act. This serves to emphasize that the crime of genocide requires proof of two distinct *mens rea*, the *mens rea* of the underlying act and the genocidal *mens rea*.

[27] The Panel expresses no conclusions regarding whether the concept of "killing members of the group" in Article 171(a) is broader than murder.

[28] *See Mitar Rašević and Savo Todović*, X-KR/06/275 (Ct. of BiH), First Instance Verdict, 28 February 2008, pg. 61; *Dragan Damjanović*, X-KR-05/51 (Ct. of BiH), First Instance Verdict, 15 December 2006, pgs. 53, 54. *See also Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Judgment, 17 January 2005, para. 642; *Prosecutor v. Radislav Krstić*, IT-98-33-T, Judgment, 2 August 2001, para. 543.

[29] In *Ndindabahizi*, the ICTR Trial Chamber found the killing of one person satisfied that *actus reus* of genocide. *Prosecutor v. Emmanual Ndindabahizi*, ICTR-2001-71-I, Judgment, 15 July 2004, para. 471.

[30] *Prosecutor v. Radoslav Brdjanin*, IT-99-36-T, Judgment, 1 September 2004, para 688.

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1. Intent to Kill

The intent to kill the prisoners is apparent, and without legal justification. As discussed in Section III.C, *supra*, and Section VII.A through D, *infra*, the Panel finds without a doubt that the five Accused, together with Petar Mitrović, were present during the killings and each made a significant contribution to the killings. The Panel further finds that their contributions were done with the intent that the prisoners be killed; that is, each of the six Accused was aware of his act, knew that the act would contribute substantially to the deprivation of life of the Bosniak prisoners, and wanted the act to be perpetrated. The defense argued that any killing that was done was in self-defense because of the advance and intended attack by prisoners from the warehouse after Krsto and the prisoner were killed, and Čuturić injured. The facts do not support that the Accused acted in necessary defense pursuant to Article 24 of the CC of BiH. In particular, the Panel concludes, as reasoned below, that there was no "attack" as that term is used in Article 24, and that the response of the Accused was clearly and indisputably massively disproportionate to any threat from the unarmed prisoners, who were unquestionably well-secured in the warehouse. Therefore, none of the elements of the "necessary defense" exception provided for in Art. 24(1) and (2) of the CC of BiH are met.

The prisoners were unarmed. The Accused were armed with automatic rifles, an M84 machine gun, and hand grenades. The warehouse was a completely enclosed structure, except for the windows in the back, which were being guarded by the Accused Mitrović, Jakovljević and Medan. Those windows were sufficiently large, which made them a potential avenue for escape, but impossible as a point from which an attack could be launched (which is also proved by the fact that the witness S2 seized the opportunity and jumped out of the warehouse through the window). As previously described, the hangar had two separate sections. As established by S4, the Krsto/prisoner killings occurred in the right section, after all of the prisoners were secured inside the building, and occurred because Krsto insisted on going into the warehouse room against the orders of the Accused Trifunović. The prisoners on the left were unaware of what was happening in the right side of the warehouse, and S2 testified that although they heard gunfire from that location, they were told by their captors that the Bosniaks were firing on the warehouse. Access to the left side of the warehouse was chained and padlocked, according to Luka Marković. In the right room of the hangar the prisoners were crammed so tightly together, according to S1, that there was no space between them. Furthermore, according to S1, those in the back of the right side of the warehouse knew only that a prisoner had been shot and that panic had broken out. The only "threat" to the Accused from any of the unarmed prisoners would have been from those who had access to the doorway, a space measuring 2.45 by 2.35 meters wide (Exhibit O-232), and those people were surrounded by the Accused, who were armed with automatic rifles, an M84 machine gun, and hand grenades.

S4 testified that the only prisoners who approached the door were those who, having seen the prisoner and Krsto shot, were attempting to escape, and these people did not reach far past the threshold before they were shot dead with the M84 and the rifles of the Accused. The cries and curses of the prisoners, when they realized what was occurring, were heard by many witnesses, including Mitrović, S4, and workers at the warehouse, but it was obvious from the physical layout of the building that any final exhortations by the prisoners to take action were of no practical consequence. In addition, they were met not only by the gunfire of the Accused, but also by ethnic curses by those doing the shooting, as S4 testified. Finally, any doubt regarding whether the accused intended to kill the prisoners is completely eliminated

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by the fact that they continued the killings for more than an hour, and, when they believed that all were dead in the right part, systematically proceeded to kill those in the left part of the warehouse. Even Borovčanin admitted, when questioned by OTP investigators, that these killings were murder.

> Q: Were these Muslims from the account you heard, were they, any of the Muslims, murdered or did this occur as the result of the Muslims fighting with the Serb soldiers or police?
> A: I don't think they fought but I think that the whole incident started with this Muslim soldier killing the police officer. It is very difficult to say that those were fights because Muslims were not armed.
> Q: So would that amount to the murder of the Muslims?
> A: Yes.[31]

2. Genocidal Intent

"The definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law."[32] Article 171 defines the elements of this genocidal intent as:

1) the aim;
2) to destroy;
3) in whole or in part;
4) a national, ethnical, racial or religious group.

a. "Aim" ("Intent")

Genocidal intent can only be the result of a deliberate and conscious aim. The destruction, in whole or in part, must be the *aim* of the underlying crime(s).[33] In addition, and consistent with Article 2 of the Genocide Convention, the term "aim" encompasses the intent to destroy the group "as such". That is, the evidence must establish that "the proscribed acts were committed against the victims *because of* their membership in the protected group," although they need not have been committed "*solely* because of such membership."[34]

b. "to Destroy"

The International Tribunals, the ILC, and a majority of scholars have concluded that the "destruction" element requires that the perpetrator intend to achieve the physical or biological

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[31] Statement of Ljubomir Borovčanin to ICTY OTP of 11 March 2002 ("Borovčanin March 2002 Statement"), pg. L0066355 (Exhibit O-337).
[32] Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996 ("1996 ILC Report"), UN Doc. A/51/10. *See also*, *Akayesu* Trial Judgment, para. 498 ("Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*.").
[33] *Blagojević* Trial Judgment, para. 656 (emphasis added). *See also*, 1996 ILC Report, pg. 44 ("However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide."); *Krstić* Trial Judgment, para. 571 ("For the purpose of this case, the Chamber will therefore adhere to the characterization of genocide which encompass only acts committed with the *goal* of destroying all or part of a group.") (emphasis in original).
[34] *Prosecutor v. Eliezer Niyitegeka*, ICTR-96-14-A, Judgment, 9 July 2004, para. 53 (emphasis in original).

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destruction of the group, that is, destruction of its material existence.[35] Physical or biological destruction may be accomplished through a variety of methods, most of which do not imply the immediate material destruction of the group through killings.[36] The Genocide Convention, and the laws which implement it currently and in the former Yugoslavia, list a variety of methods by which the physical destruction of the group will ultimately be brought about. Although the most immediate method is killing the members of the group, other methods, singly and in combination, if done with the same aim, would lead to the group's destruction. The Trial Chamber in *Blagojević* reasoned that "the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population conducted in such a way that the group can no longer reconstitute itself," echoing the conclusion of the Appeals Chamber in *Krstić* that "forcible transfer could be an additional means by which to ensure the physical destruction of [the protected group]."[37]

c. "In Whole or in Part"

The Panel concurs with the reasoning of the ICTY Appeals Chamber and the ILC that the intention to destroy a group "in part" requires the intention to destroy a "substantial part of that group."[38] The Panel further agrees that the analysis of the "substantiality" of the part of the group involves a number of considerations, which include numeric size; the relative size of the part to the total size of the group; its prominence within the group; whether the part of the group is emblematic of the overall group; and whether the part is essential to survival of the group. The specific intent to destroy a part of the group may extend only to a limited geographic area.[39] "The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him."[40] The Panel holds that the beliefs and perceptions of the perpetrators regarding the substantiality of a part of the group are an additional factor to be considered. However, in the final analysis, the Panel must be satisfied that the identified part is *objectively* a "substantial part of that group."

d. "A national, ethnical, racial or religious group"

Whether a group is a protected group should "be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the

[35] *See, e.g.*, *Prosecutor v. Krstić*, IT-98-33-A, 19 April 2004, para. 25; *Krstić* Trial Judgment, para. 580; *Prosecutor v. Laurent Semanza*, ICTR-97-20-T, Judgment, 15 May 2003, para. 315.
[36] The ILC has suggested that the underlying acts listed in paragraphs a through c of the Genocide Convention can be understood as acts of physical destruction, whereas the acts listed in paragraphs d and e can be understood as acts of biological destruction. 1996 ILC Report, pg. 46.
[37] *Blagojević* Trial Judgment, para. 666. In addition, under the law as it existed at the time, forcible transfer was one of the listed methods by which genocide was accomplished. Article 141 of the Criminal Code of SFRY.
[38] *Krstić* Appeal Judgment, para. 8; 1996 ILC Report, pg. 45 ("None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."). *See also Jelisić* Trial Judgment, para. 82; *Prosecutor v. Sikirica, et. al*, IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001, para. 65; *Prosecutor v. Clemént Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 97; *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para. 64; *Semanza* Trial Judgment, para. 316. *See also* Benjamin Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, para. 29 ("'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership.").
[39] *Brdjanin* Trial Judgment, para. 703.
[40] *Krstić* Appeal Judgment., at para. 13.

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subjective perceptions of the perpetrators."[41] The protected group can be subjectively identified "by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics."[42]

D. Proof of Genocidal Intent

As reasoned above and below, the Panel concludes that the Accused had the intent to kill and the additional intent to destroy a substantial part of a protected group as such.

The defense argues that the Accused had no knowledge of the legal qualifications of genocide and therefore could not have harbored the intent to commit genocide. However, it is never necessary that an accused have the ability to define the legal qualifications of his crime, only that he have notice that his actions and intentions are criminal. It is for the Panel to determine the crime then committed. The Accused need not be able to recite the legal definition of genocidal intent, as long as they possessed the intent to which the definition refers. The necessary intention is the aim to destroy a protected group in whole or part, and it is not necessary that those who form that intention specifically know that the legal term for this is "genocidal intent".

Proof of genocidal intent does not require specific statements or admissions by the perpetrator describing his intent. Rather, since "it may be difficult to find [e]xplicit manifestations of intent by the perpetrators," the circumstances and facts surrounding the perpetrator's acts can, as a matter of law, establish genocidal intent beyond doubt."[43]

Intent is a state of mind, and specific intent to destroy a protected group, like specific intent for any other crime where a particular state of mind is an element of the offense, must be proven by examination of the surrounding facts and circumstances, as well as the act itself. Evidence regarding:

1) The general context of events in which the perpetrator acted;
2) The perpetrator's knowledge of that context; and
3) The specific nature of the perpetrator's acts;

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[41] *Semanza* Trial Judgment, para. 317 (emphasis in original). *See also*, *Bagilishema* Trial Judgment, para. 65; *Prosecutor v. Alfred Musema*, ICTR-96-13-T, Judgment, 27 January 2000, paras. 161-163; *Prosecutor v. Georges Rutaganda*, ICTR-96-3-T, Judgment, 6 December 1999, paras. 56-58; *Kayishema and Ruzindana* Trial Judgment, para. 98; *Akayesu* Trial Judgment, para. 702.

[42] *Krstić* Trial Judgment, para. 557 (citing *Prosecutor v. Nikolić*, IT-94-2-R61, Review of the Indictment pursuant to Rule 61, 20 October 1995, para. 27 and *Jelisić* Trial Judgment, para. 70).

[43] *Kayishema and Ruzindana* Trial Judgment, para. 93. *See also Prosecutor v. Georges Rutaganda*, ICTR-96-3-A, Judgment, 26 May 2003, para. 525 ("In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from the relevant facts and circumstances"); *Prosecutor v. Andre Ntagerura, et. al* ("*Cyangugu*"), ICTR-99-46-T, Judgment, 25 February 2004, para. 663; *Semanza* Trial Judgment, para. 313; *Akayesu* Trial Judgment, para. 523; *Krstić* Appeal Judgment, para. 34 ("Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime"); *Jelisić* Appeal Judgment, para. 47 ("As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive discriminatory acts").

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when taken together, can establish the perpetrator's intent beyond doubt.

E. Findings on Protected Group

1. The Accused knew that the Victims of the Killings at the Kravica Warehouse were Bosniaks from Srebrenica

The identification of the Bosniaks from Srebrenica as a protected group for the purposes of applying the correct law in this case is a legal characterization. It is not necessary that the accused understand or make proper legal characterizations. It is sufficient that they were aware of the facts upon which the characterization has been made, that is: that they knew that the victims in the warehouse were Bosniaks from Srebrenica; that they knew that the men in the column whom they saw induced to surrender through trickery, and whom they knew were being fired upon and ambushed, were Bosniaks from Srebrenica; and that they knew furthermore that the women, children, and elderly, that made up the remainder of the Bosniaks from Srebrenica, were being expelled from their homes and forcibly bused out of the Srebrenica area.

The evidence is overwhelming that they did know that the victims were Bosniaks from the Srebrenica safe area. Radovanović admitted knowing that the men surrendering at Sandići were from Srebrenica, and that only Bosniaks had been living in Srebrenica since 1993. S4 testified that Trifunović had told them on their way to their assignment on the road that they were expecting a large influx of *Bosniaks* fleeing Srebrenica, and this was confirmed to him when he saw those surrendering, some of whom he knew personally. He further confirmed that the men taken to the warehouse were from the group of Bosniak men who surrendered and that these were men fleeing Srebrenica.

Their testimony is corroborated by the statements of Stevanović and Mitrović. Mitrović, in his statement to the Prosecutor, spoke of receiving the order to accept all Bosniaks who surrendered, as they were "hiding in the woods", explaining that he was guarding a group of 500 Bosniaks; he also stated then that captured Bosniaks were taken to the Kravica warehouse. Stevanović, in his statement to the Prosecutor, confirmed S4's recollection, stating that after deployment to the Budak hill: "Suddenly, we received the task, communicated to us through Commander Trifunović, to move in order to secure the communication between Bratunac and Konjević Polje, more specific to Kravica, because Muslims should pass there." Later in the statement he spoke of the Bosniaks surrendering.

Radovanović, S4, Mitrović, and Stevanović also acknowledged that the women and children on the buses, as well as those S4, Mitrović, and Stevanović admitted seeing in Potočari on 12 July, were Bosniaks from Srebrenica, as did Milojko Milanović, Milenko Pepić, Slobodan Stjepanović, Dragomir Stupar, Marko Aleksić, Predrag Čelić, and Stanislav Vukajlović. Other members of the 2nd Šekovići Detachment who testified at trial further confirmed that all three platoons of the Detachment were along the road on 12 and 13 July, saw the Bosniak men who had been fleeing from Srebrenica surrendering by the hundreds, and saw the Bosniak women and children who had fled Srebrenica to Potočari transported in buses from Srebrenica in the direction of Tuzla and Kladanj. Even the civilians who were in the compound of the Kravica warehouse knew that the prisoners who were surrendering and who were held captive in the warehouse in Kravica were Bosniak men from Srebrenica and that

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the woman and children in the buses on the road were Bosniak residents of the Srebrenica safe area.[44] Finally, the fact that soldiers along the road knew that the male prisoners who were surrendering and the woman and children being transported in the buses were Bosniaks from Srebrenica was documented by the journalists for Serb television.[45]

2. The Bosniaks of Srebrenica were a "Part" of a "Protected Group"

The Panel concludes that the Bosniak people were a protected group within the meaning of Article 171 of the CC of BiH. Objectively, the Panel notes that Muslims were recognized as a constitutive "nation" of the Socialist Republic of BiH in the 1974 Constitution of the SR BiH. In addition, in the recent history of BiH, the Constitution of FBiH of 18 March 1994 recognized Bosniaks (Muslims) as a constituent nation in the FBiH, which, with regard to this particular case, lived in the territory of Srebrenica until July 1995. Subjectively, the evidence is overwhelming that the Bosniak people were identified and stigmatized as a distinct national group by members of other national groups who perpetrated crimes against the Bosniak people. That the Bosniak people were additionally stigmatized on religious grounds serves only to emphasize that they are a protected group.

The Panel further concludes that the Bosniak population of Srebrenica constituted a "part" of the protected group of Bosniak people within the meaning of Article 171 of the CC of BiH. As previously noted, the intent to destroy a group in part requires the targeting of an objectively "substantial" part of the relevant protected group. While the Bosniak population of Srebrenica admittedly numbered only approximately 40,000 persons, the evidence establishes that this population was a particularly prominent and significant part of the group of Bosniak people, particularly by July 1995. For both the Bosnian Serbs and the Bosniak population, Srebrenica had immense strategic and symbolic value.

Strategically, the Bosniak population of Srebrenica was an obstacle to the establishment of a contiguous, ethnically pure Bosnian Serb state with protected lines of communication and movement. Conversely, for the larger Bosniak population, control of Srebrenica and the safety of the Bosniak population there was absolutely imperative to prevent the political fragmentation of Bosnia and Herzegovina as a central state within its internationally recognized borders, which in turn was crucial for the protection of the Bosniak population.

Symbolically, the fate of Srebrenica and the Bosniak population of the enclave was viewed by both sides as emblematic of the ultimate success of their respective efforts. For the Bosnian Serb political and military leadership, Srebrenica ultimately represented their failure after three years of war to realize their main war objectives, notwithstanding the clear military superiority of the Bosnian Serb forces. Similarly, for the Bosniak people, the Srebrenica enclave was a symbol of resistance and hope that Bosnian forces could eventually reverse their losses. In addition, the role of the international community in the creation of the Srebrenica safe area further imbued the Srebrenica Bosniak population with symbolic import. While the Bosnian Serb leadership wished to emasculate the international community and demonstrate their ability to realize their goals even in the face of international opposition, the Bosniaks understood that the fall of the Srebrenica safe area would demonstrate their absolute insecurity as a people.

[44] Jovan Nikolić; Luka Marković; Zoran Erić; Ilija Nikolić.
[45] Srebrenica Video Footage ("Srebrenica Video"), Transcript ("Video Transcript"), pg. L0092465-70 (Exhibit O-193). This exhibit includes the video footage filmed by the journalist Zoran Petrović.

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Therefore, the Panel concludes that the Bosniak population of Srebrenica was a "substantial" part of a protected group within the meaning of Article 171 of the CC of BiH. The intent to destroy the Bosniak population of Srebrenica accordingly constitutes genocidal intent.

Defense expert witness in demography, Dr. Svetlana Radovanović (Exhibit O-XI-7c), who provided her Findings and Opinion about the statistical-demographic data for the scale and ratio of mortality connected with the 13 July 1995 events in Kravica, concluded that the number of those killed at the Kravica Farming Cooperative was not sizable enough to vitally threaten the survival of the Bosniak ethnic community in Bosnia and Herzegovina. She further concluded that the mortality ratio "in terms of statistics-demography" had an insignificant influence on the biological reproduction capacities of the Bosniak community. According to the expert witness, if rigorous and established scientific principles are employed in analyzing available objective data, only 25 victims can, with the desired degree of scientific certainty, be said positively to have died at Kravica on 13 July 1995. Likewise, using that same limited data, and applying the same rigorous scientific method, the number of established victims for Srebrenica is 409, or 1.49% of the total population, which, in her opinion, did not threaten the vitality of the ethnic group, bearing in mind the size of the population from the latest 1991 census. She further asserted in her testimony that in order to actually achieve the biological destruction of the group, it is more important to kill women than men to prevent the future regeneration of the group.

The Panel appreciates both Dr Radovanović's expertise and her high standards for scientifically confirming from the available data which specific individuals were killed at Kravica on 13 July, and which and where specific individuals were killed during the operative time from Srebrenica in total. Were there no witnesses to the killings at Kravica and throughout the Srebrenica area between 10 and 19 July, the Panel might have been required to rely solely on scientific reconstructions, and her approach would be of significant interest to the Panel. In that case, the Panel might agree that, because of the extraordinary efforts of the VRS to separate the victims from any means by which they could be identified with precision, and then separate their remains through dismemberment in the execution, burial, and reburial process, and finally to hide even to this day the burial sites, there may in fact be insufficient data from which to scientifically establish the number of those killed, the identity of each of those killed, and the place where the killing occurred. However, that is not the situation that the Panel faces. Instead the Panel has heard from more than sufficient witnesses, and reviewed more than sufficient documentary evidence, from which it concludes that thousands of Bosniak men from Srebrenica were killed by the VRS and MUP, and that the majority of over 1000 Bosniak men were killed in the Kravica warehouse on 13 July. That there are insufficient objective indicia from which Dr. Radovanović can accomplish a definitive scientific verification does not detract from either the truthfulness of the evidence or the grim reality that it documents.

Likewise, although it is interesting that successful genocide is best accomplished through the killing of women rather than men, there is nothing that would indicate that those devising the genocidal plan or those carrying it out had the benefit of that information. The planners and perpetrators were overwhelmingly male. Given the relative roles of men and women in the community at that time, especially in time of war, it would have been much more logical for the perpetrators to believe that the destruction of the male population would have a greater impact on the ultimate destruction of the group than the killing of the female population, which would in any event have been more difficult to justify to the international community as legitimate combat casualties. Furthermore, it is not necessary as a matter of law that the

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genocidal plan be the best genocidal plan or that it even succeed in its ultimate goal. In fact none of the classic genocides of the 20th century were ever actually successful in destroying the targeted groups.

Therefore, the Panel cannot accept as relevant to its conclusions the findings of the expert witness in demography referring to the ratio of killings, and whether that ratio can reach the level of the "destruction of the group". The number, or the percentage, of the persons killed and how such percentage affects the "vitality of an ethnic group" is not an element of the criminal offense with which the Accused are charged. To put it simply, the Accused are charged with committing killings of members of a group with the aim of destroying that group. Whether those are mass killings or individual killings, whether in reality they affect the survival of the group or not, and whether they result in appreciably serious consequences for the "biological reproduction capacities" of the analyzed group is not relevant to the factual and legal analysis of the elements of the criminal offense, its commission, and the finding that the offense was committed with that specific intention. Likewise, Dr. Radovanović's conclusions are not relevant to the Panel's finding that the Bosniak population of Srebrenica was a "substantial" part of a protected group within the meaning of Article 171 of the CC of BiH. The intent to destroy the Bosniak population of Srebrenica accordingly constitutes genocidal intent.

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V. GENOCIDAL PLAN AND CONTEXT – THE "LIBERATION" OF SREBRENICA

For the reasons set out below, the Panel concludes that the Accused were aware of the rudiments of the genocidal plan that was conceived by their superiors for the destruction of a part of the protected group, the Bosniak people from the Srebrenica Safe Area. The Accused were of course not privy to the entire plan or to each of the acts that were contemplated to carry that plan out. What they knew was that they were assigned to be part of the second phase of the Liberation of Srebrenica: the permanent eradication of the Bosniak people from the safe area by the forcible transfer of women, children, and the elderly and the killing of the men. They further knew that this assignment was "not to be spoken of" outside the unit and that the orders for implementation of the plan came "from the top". The predicate for that knowledge is found firstly by an examination of whether such a plan existed and secondly by examining whether those rudiments that were known to the Accused were accurate. A review of the direct and indirect evidence accepted in this case provides that corroboration, and establishes a genocidal plan.

A. The "Liberation" of Srebrenica

Liberation was the term used by the Bosnian Serbs for the eradication of the Bosniaks from Bosnian Serb-held territory. The expulsion of the Bosniaks from the area along the Drina River had been the publically proclaimed goal of the RS since the beginning of the war. In the 26 November 1993 volume of the *Official Gazette of the Republika Srpska*, the "strategic objectives or priorities of the Serb people in Bosnia and Herzegovina" listed included, among other goals, the objectives to: "Establish State borders separating the Serb people from the other two ethnic communities;" and "Establish a corridor in the Drina River valley, that is, eliminate the Drina as a border separating Serb States."[46]

Miroslav Deronjić, in his 25 November 2003 statement to the OTP ("Deronjić Statement") (Exhibit O-326), affirmed this goal and referred to it as "liberation". He described that "liberation" of the East Bosnia area along the Drina corridor involved a two part plan devised in 1991 and 1992. The Bosnian Serbs would first take over power in the municipalities in the Podrinje and then expel the Bosniak population by force: specifically by forcibly transferring the women and children and often by detaining and killing the men. He cites the "liberation of Bratunac" (para. 152), the "liberation of Konjević Polje" (paras. 154, 156), the "liberation of Kravica" (para. 156), and the attempted liberation of Srebrenica in 1993 (para. 152). Deronjić described in detail two "liberations": the small town of Glogova, where the Bosniak women and children were forcibly transferred and 65 of the men killed; and Bratunac municipality where the Bosniak women and children were forcibly transferred and the men held on the gym of the Vuk Karadžić school and the hangar behind it where many were killed..[47] The ICTY testimony of Witness 161 given in the *Popović* case and introduced by the defense (Exhibit O-X-05), confirmed that they buried between 100 and 150 Bosniak men in a mass grave after the Bratunac "liberation" to which Deronjić referred.

[46] "Decision On Strategic Objectives Of The Serbian People In Bosnia And Herzegovina," Momčilo Krajišnik, President of the RS National Assembly, executed 12 May 1992.

[47] Deronjić implies that many more would have been killed but for his rescue of them, by which he had them sent to Pale for imprisonment. Deronjić Statement, paras. 106-129 (Exhibit O-326).

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"Liberation" is also precisely the term Karadžić repeatedly used in Directive 7, "Directive for Upcoming Operations", issued on 8 March 1995 (Exhibit O-I-31). The Directive set out the goals for the war and established a war plan for each geographic area. The Directive was highly confidential, and sent only to the command level. However, it instructed that there be a public campaign to "raise the awareness of people and soldiers… of the need to put all available human and material resources at the disposal of the *liberation struggle* in order to create a free and unified Serb state in the former Yugoslavia." (emphasis added).

In addition to the "liberation struggle" which characterized the entire war effort, Directive 7 spoke of "liberating" the Serb areas of Goražde, and "liberating" the Ustiprača-Goražde-Srbinje road. Most significantly, it ordered the Drina Corps, whose area of operation included the Srebrenica safe area, to:

> [P]lan an operation named Jadar with the task of breaking up and destroying the Muslims forces in these enclaves and *definitively liberating* the Drina valley region. (emphasis added).

B. Phase One: Military Takeover of Srebrenica

Srebrenica was key to the liberation effort. Military offensives against the enclave were justified by Karadžić and his generals, who asserted that members of the 28th Division of the ARBiH were within the enclave and used it as a staging area for assaults against Bosnian Serb villages in the surrounding area. However, Directive 7 described a strategy for Srebrenica that focused primarily on the destruction of the civilian population.

The first part of the strategy was to starve the inhabitants of the enclaves into submission, and so Directive 7 ordered civil and military agencies to: "[R]educe and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will." This goal was to be accomplished through deceit, in order to avoid "condemnation by the international community and international public opinion;" and to be carried out by the "planned and unobtrusively restrictive issuing of permits" by "State and military organs responsible for work with UNPROFOR and humanitarian organizations."[48]

The second part of the strategy was also directed at all of the inhabitants of the enclaves, not simply the military forces that may have been present. The goal of that strategy was the creation of "an unbearable situation of total insecurity with no hope of further survival and life for the inhabitants of Srebrenica and Žepa," to be accomplished "by daily planned and well-thought-out combat operations." The operation that commenced as a result of this order was named Operation Jadar 95. Directive 7 required that "defense readiness shall be implemented immediately, and operations of operational and strategic level by 20 April 1995, by which time all operative-strategic and material preparations for the coming VRS operations must be completed."

[48] The Directive characterized "certain individuals and parts of UNPROFOR and some humanitarian organizations" as engaging in activities that were "biased and hostile" and the directive to "unobtrusively" deny passage of food, fuel and medicine was consistent with one of the stated objectives of Directive 7 "to deceive the enemy as to our true intentions."

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In the months leading up to 11 July, the Bosnian Serbs were effective in blocking food, petrol and medical supplies to the enclave. Lieutenant Colonel Thomas Karremans, commander of the Dutch Bat, made reference to the "blockade" of the town in his first meeting at the Hotel Fontana with Gen. Mladić. At the second meeting, Lt. Col. Karremans recounted that they had received no diesel deliveries in months and that there was only enough food for his soldiers for two more days and none for the refugees. He also confirmed that the people were already in weakened condition because they had not had enough food in the compound in the past six weeks.[49]

Military preparations were also underway in accordance with the instructions and deadlines set out in Directive 7. Major Robert Franken, deputy commander of the Dutch Bat, explained that the Bosnian Serb military operation tentatively began in April, when "on one occasion south of OP Romeo where it was clear that the Bosnian Serbs crossed the UN boundary, and we managed to get them back to their own side of the confrontation line."[50] Miroslav Deronjić reported a visit from Karadžić to Zvornik that occurred in May when Karadžić told him that a military operation "would soon take place in Srebrenica" and asked Deronjić "to take necessary steps."[51] Deronjić understood this to mean he was expected to make preparations in Bratunac, and to that end he contracted for fuel reserves with the *Vihors* transportation company and saw to the collection of food for an increased military presence.[52]

On May 31, OP Echo was taken. As Maj. Franken explained:

> We analyzed it [the attack on the outpost] as a test case... in the sense of will the UN react with air support.... That did not occur. There was no counterattack by Muslim forces, and there was not a real counterattack by UN forces. So we analyzed it as being a test case for the following attack on the enclave in July.[53]

The next stage of the military plan to create the situation designed to extinguish any expectation of the inhabitants of Srebrenica "for further survival and life" was initiated under the name Operation Krivaja 95. Krivaja 95 commenced when the then-commander of the Drina Corps, General-Major Milenko Živanović, signed two orders on 2 July 1995 laying out the plans for the attack on the enclave and ordering various units of the Drina Corps to ready themselves for combat.[54] On July 4 Karadžić gave the order to proceed.

Maj. Franken's analysis that the capture of OP Echo was a test to see whether there would be any resistance to a Bosnian Serb military advance seems to be accurate. Tomislav Kovač, then-acting Minister of the Interior of the RS, testified that on 5 July, the day after the order to attack the enclave had been issued by Karadžić, a meeting occurred at which he, Karadžić, and Gen. Krstić, who participated by phone, discussed that the enclave was theirs for the taking. As early as the March Directive 7, Karadžić stated, "UNPROFOR ground troops will probably not be directly engaged, except in the case of immediate danger. The engagement of NATO ground troops is very unlikely." Operation Jadar 95 established that the risk from

[49] Video Transcript, pg. L0092435 (Exhibit O-193).
[50] *Krstić*, Testimony of 4 April 2000 ("Franken *Krstić* Testimony"), pgs. 2015-2016 (Exhibit O-277).
[51] Deronjić Statement, para. 163 (Exhibit O-326).
[52] Deronjić Statement, para. 167 (Exhibit O-326).
[53] Franken *Krstić* Testimony, pg. 2072 (Exhibit O-277).
[54] Established Fact T8.

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direct engagement by UNPROFOR or the 28th Division of the ARBiH was minimal. Air attack by NATO was expected, but on 5 July, the "Krivaja 95 Combat Plan, the Air Defense Order" was in place to minimize the consequences of air intervention.[55] Kovač reported that Karadžić said at the meeting that he was satisfied that Naser Orić, commander of the 28th Division of the ARBiH, was not in the enclave, and that without his leadership, they had very little to fear from the ARBiH: "It was clear to him that Srebrenica as Srebrenica was in the disintegration phase in terms of military…. I listened to General Krstić saying that it was a done deal and that there is not much there." And so the attack on the enclave began on 6 July.[56] Karadžić had two variations of the attack plan, as he explained to Deronjić on 9 July: Variation A would be to reduce the size of the safe area, while Variation B was the take-over and occupation of the entire safe area. Deronjić recalled: "He let me know that variant or plan B …would be attempted if it were militarily feasible…."[57] On the same day that he explained this to Deronjić (9 July), Karadžić authorized Variation B and gave the VRS the order to take over the entire Municipality of Srebrenica including the UN Safe Area.

In that same 9 July meeting with Deronjić, Karadžić disclosed what success in this part of the liberation struggle meant for the Bosniaks then living in the enclave. The objective stated in the *Official Gazette* of creating "state borders separating the Serb people from the other two ethnic communities" was unchanged. After describing Variation B, and discussing Deronjić's view that there were 40,000 people living in the safe area, Deronjić recounts:

> Karadžić said the following: "Miroslav, they should all be killed." Then he said "Whoever you can get hold of." He used the plural form "you". Then he added the following sentence – "the principle of Western Slavonia". That's literally the sentence he used. I am 100% certain that he used those exact words.

Deronjić then explained that he and Karadžić had been discussing earlier a recent Croatian attack in Western Slavonia where it was believed that the Croats had killed all of the civilians, including those who were trying to escape.[58]

The VRS, in following Karadžić's 9 July order to take the enclave, engaged in relentless shelling of the town which was far beyond any proportionate military necessity and that demonstrated disregard for civilian lives. Maj. Franken testified on cross-examination by defense counsel before the Panel that the only legitimate military target would have been the post office, which was the headquarters of the 28th Division, stating, "The only possible military target could have been the Post Office. Period." Other than that, Franken noted in his ICTY testimony that "the city itself did not give any military objective in that stage, other than, of course, the UN forces." Maj. Franken was convinced that there were only two reasons for such intensive shelling and both would have the same effect: "killing people or trying to raise a panic by killing people. And by 'people' I mean civilians, women and children."[59] Hajra Čatić and E.H. related in their testimony the fear and extreme psychological havoc the shelling was having on the inhabitants in the overcrowded town.

[55] Butler Report, 3.9 (Exhibit O-225).
[56] Established Fact T9.
[57] Deronjić Statement, para. 177 (Exhibit O-326).
[58] Deronjić Statement, para. 181 (Exhibit O-326).
[59] Franken *Krstić* Testimony, pgs. 2018, 2019 (Exhibit O-277).

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The Bosnian Serbs continued shelling the escaping Bosniaks on their way to Potočari. After the failed air attack by NATO on 11 July, and during the evacuation to Potočari of the 15,000 to 30,000 women and children and between 1000 and 2000 unarmed men, Hajra Čatić testified that they continued to be fired upon.[60] This is likewise confirmed by Maj. Franken, who ordered Major Otter, the Dutch compound commander, to travel with the evacuees. Thereafter, with the civilians in Potočari, Franken testified, the Bosnian Serbs warned the Dutch Bat that if there was any further resistance from NATO air attacks, "they said they would kill our [Dutch Bat] POWs." Maj. Franken believed this would have occurred, and further he had no doubt as to what would have happened if the Dutch Army had mounted a defense in Potočari:

> We would have had a massacre, and I mean a massacre between women and children.... The Serbs already proved that they didn't respect anything about civilians or non-combatants. They fired at them with artillery in Srebrenica; they fired on them with artillery on the way down to Potočari….[61]

By the night of 11 July, when the first meeting at the Fontana Hotel occurred, the liberation of Srebrenica had been completed in its first phase, the military take over. The VRS had created "*an unbearable situation of total insecurity for the inhabitants of Srebrenica*." That had been accomplished with a disproportionate use of force aimed indiscriminately at the entire population without regard for the lives of non-combatants and those who were indisputably civilians. The second phase was then to begin: that which ensured "*no hope of survival and life for the inhabitants of Srebrenica.*"[62]

The two-part nature of the liberation of Srebrenica was described by Captain Momir Nikolić, the Assistant Commander for Intelligence and Security of the Bratunac Brigade of the VRS, who acknowledged that by the morning of 12 July, after the enclave was militarily taken, the "combat part had been completed." At the main trial Nikolić reconfirmed that actually, by the morning of 11 July, "everything was over in terms of combat activities." But Capt. Nikolić further explained, "Then *the second part* of the operation continued, which meant the activities which I have already spoken about." Those activities about which he had already spoken were the permanent eradication of the Bosniaks from Srebrenica through the forced transfer of women, children and elderly, and the detention and killing of the men.[63]

C. "The Second Part": Phase Two – Eradication of the Bosniaks

Capt. Nikolić's understanding of the two-part nature of the "liberation of Srebrenica" is supported by the contemporaneous public statements of two of the leaders involved in the operation: General Radislav Krstić and President Radovan Karadžić. In television interviews given by each on 12 July, they leave no doubt that the first part of the liberation, the military takeover, was complete, but that the second phase, dealing with the 40,000 Bosniaks who lived in Srebrenica, was ongoing.

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[60] Franken testified at the main trial that all ARBiH weapons were left behind when B Company withdrew from Srebrenica; after the men had withdrawn and there were no armed men in the Potočari complex. There are likewise no reports of weapons found among the refugees.
[61] Franken *Krstić* Testimony, pgs. 2020, 2023 (Exhibit O-277).
[62] Directive 7 (Exhibit O-I-31).
[63] *Blagojević*, Transcript of 22 September 2003 ("Nikolić *Blagojević* Testimony"), pg. 2358 (Exhibit O-246). Momir Nikolić was cross-examined before this Court by defense counsel for the Accused on 6 February 2008.

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Video footage reveals a journalist standing outside the UN compound at Potočari, surrounded by Bosnian Serb soldiers and Bosniak refugees, asking Gen. Krstić to evaluate the way in which the Drina Corps did their "military job in relation to the *Liberation of Srebrenica*."[64] Krstić corrected the journalist, and clarified that the military operation was only part of the task: "We did not stop the operation, we are proceeding to the end, to the *liberation of the territory of Srebrenica Municipality*." Leaving no doubt that he was talking about eradication of the Bosniaks as that part of the liberation that was "proceeding to the end", he went on to reference the thousands of refugees surrounding him, and explained: "We guarantee safety to the civilian population, they will be safely transported to where they want to go."

Karadžić in his television interview, also given on 12 July, makes the point even more strongly.[65] Karadžić acknowledges the military victory, calling it "a complete example of the superiority of both the Serb Weapons and the Serb Army…." He also acknowledges that "combat activities ceased". When asked by the interviewer, "What is the latest situation in Srebrenica?" Karadžić does not speak about any military threat but rather refers to the Bosniak population of Srebrenica, saying:

> [O]ur commissariat for refugees, as you can see, rushed in to help. Everyone can see that these people look well-fed and that there are no problems at all. If you compared what happened in Western Slavonia, where Croatians were allegedly liberating, with what has happened in Srebrenica, *where the Serbs are doing the liberating*, there is such a difference that it is impossible to talk about war at all. (emphasis added).

The "liberating" to which he refers is clearly the treatment of the inhabitants after the military operation was concluded. His comparison to the "liberating" by the Croats in western Slavonia is particularly telling both because the so-called liberation of western Slavonia was thought to have involved the total annihilation of the Serb civilian population after the Croat military victory, and because three days before Karadžić used the same example when speaking with Miroslav Deronjić to explain that the same fate ("they should all be killed") should befall the Bosniaks after the Bosnian Serbs' military victory in Srebrenica.[66]

Gen. Krstić and Karadžić attempted by their public pronouncements to advance the deceit that the refugees were being well-treated and being given some freedom of choice as to their future. Their approach continued to be consistent with the goal of Directive 7 to avoid "condemnation by the international community and international public opinion." General Mladić was less discreet about the fate of the Srebrenica inhabitants. On the afternoon of 11 July, during his triumphal march through the empty town of Srebrenica, he turned to the camera and addressed his television audience with these words:

> Here we are, on the 11th of July, in Serb Srebrenica. On the eve of yet another great Serb holiday, we give this town to the Serb people as a gift. Finally,

[64] Video Transcript, pgs. L0092452-L0092453 (Exhibit O-193).
[65] Video Transcript, pgs. L0092454-L0092455 (Exhibit O-193).
[66] Butler Report, para. 1.32 (Exhibit O-225). As Butler explains, Croatian Military and Police forces inflicted a major defeat on Republic of Serbian Krajina military forces by recapturing the Serb-occupied portion of western Slavonia in Operation Flash.

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> after the rebellion against the Dahis, *the time has come to take revenge on the Turks in this region*.[67] (emphasis added).

Capt. Nikolić left no doubt that Gen. Mladić's statement more accurately reflected the official approach to the Srebrenica inhabitants. In his Statement of Facts, confirmed in his testimony before the ICTY and subject to cross-examination at this main trial, Capt. Nikolić recounted in detail the official plan for the eradication of the Bosniak population in Srebrenica.[68] This plan was already conceived and operational in the early morning hours of 12 July when he was given his role in connection with the plan. In his statement he stated:

> [I]n the morning of 12 July, Lieutenant-Colonel [Vujadin] Popović told me that the thousands of Muslim women and children in Potočari would be transported out of Potočari toward Muslim-held territory near Kladanj and that the able-bodied Muslim men within the crowd of Muslim civilians would be separated from the crowd, detained temporarily in Bratunac, and killed shortly thereafter. I was told that it was my responsibility to help coordinate and help to organize this operation.

Although his specific task on 12 July had to do with the men at Potočari, Nikolić took this information to mean that all of the Bosniak men from Srebrenica who came under the control of the forces of the Republika Srpska, regardless of whether they were in Potočari or elsewhere, would likewise be detained and killed.[69]

1. The Role of the Security and Intelligence Organs in Phase Two

This information was relayed to Nikolić by two officers from the Drina Corps, Lt. Colonel Vujadin Popović, Chief of Security, and Lt. Colonel Svetozar Kosorić, Chief of Intelligence, after a meeting between the commanders of the Srebrenica operation, including Generals Mladić and Krstić, held earlier that morning, according to a dispatch filed by Dragomir Vasić, who also attended that meeting. In the dispatch, quoted by Butler in his Narrative, Vasić reported that tasks were assigned at that meeting.

Capt. Momir Nikolić was at that time the Security and Intelligence Officer for the Bratunac Brigade, 2nd Infantry Battalion. The Security and Intelligence organs existed at the Brigade, Corps, and Main Staff levels, and were charged with collecting, managing and maintaining intelligence, conducting counter intelligence, providing security for the command and oversight of the military police.[70] Within those functions fell responsibility for interrogation of prisoners of war and their "evacuation to a designated location."[71]

Under the JNA Brigade Rules applicable to the VRS, as quoted by Butler, the Security and Intelligence organs were charged with organizing cooperation with their counterparts in other military units.[72] The Bratunac Brigade was part of the Drina Corps. Lt. Col. Popović,

[67] Video Transcript, pg. L0092407 (Exhibit O-193).
[68] Momir Nikolić, Statement of Facts and Acceptance of Responsibility ("Nikolić Statement of Facts") (Exhibit O-246).
[69] Nikolić *Blagojević* Testimony, pg. 1717 (Exhibit O-246).
[70] "Report on command responsibility of VRS Brigade" ("Butler Brigade Report"), Richard Butler, Ch. 3 (Exhibit O-226).
[71] Butler Brigade Report, 3.19 (Exhibit O-226).
[72] Butler Brigade Report, 3.17 (Exhibit O-226).

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Assistant Commander for Security Affairs, was with the Security and Intelligence Organ of the Drina Corps, as was Lt. Col. Kosorić, Chief of Intelligence, who accompanied Popović when Popović told Nikolić of the mission that was the second phase of the liberation of Srebrenica, and advised Nikolić of his role in that mission. Colonel Radislav Janković, who liaised with Franken on 12 and 13 July[73], was also with the Drina Corps Security and Intelligence Organ. Colonel Ljubiša Beara, who played an active role in supervising the transfer of the prisoners from Bratunac to Zvornik[74], was with the Security and Intelligence Organ for the Main Staff, and 2nd Lt. Dragomir Nikolić, who would later be called on for assistance by Capt. Momir Nikolić and Col. Beara in executing and burying Bosniak prisoners, was with the Security and Intelligence Organ of the Zvornik Infantry Brigade. Throughout the period beginning on 12 July through 19 July, these individuals worked together on various aspects of Phase Two of the liberation: overseeing and coordinating the extermination of the Bosniak population by the forced transfer of women, children, and the elderly from Potočari, and the detention and killing of the men of Srebrenica. The manner in which they operated suggested an Intelligence and Security hierarchy parallel to the command structure within the Corps, which extended from Colonel Beara at the Main Staff level to Momir Nikolić and Dragan Nikolić, both on the brigade level, and their subordinates.[75] They continued to work together to dispose of the bodies of the executed men and the reburial of those bodies in the autumn of 1995. Evidence of their role is attested to by Momir Nikolić, Miroslav Deronjić, Ljubomir Borovčanin, Dragan Obrenović, Dragomir Vasić, Tomislav Kovač, and many other witnesses. They did not take on these responsibilities of their own volition. As will be discussed below, their orders came "from the top".

2. The Role of the MUP forces in Phase Two

Neither the 2nd Šekovići nor any of the other MUP units resubordinated to the Drina Corps under Order 64/95 (Exhibit O-81 and O-I-01) had any involvement in Phase One – the military operations – of the Liberation of Srebrenica. Their sole involvement was, and was always meant to be, with Phase 2 – the extermination of the Bosniak people. At the time they were redeployed from the front line in Srednje, General Mladić had four hours previously taken his triumphal walk through the streets of Srebrenica, and he was about to take part in the first meeting at the Hotel Fontana where the fate of the Srebrenica Bosniaks and the Dutch prisoners were the center of attention. It was to this phase of the Liberation of Srebrenica that these units (considered to be the highest caliber troops in the RS, see Section V.F.2, *infra*), were diverted from the front line in Sarajevo (considered to be in the greatest jeopardy[76]) and sent in the middle of the night to Bratunac, where the military victory had

[73] Franken *Krstić* Testimony, pg. 2049 (Exhibit O-277).
[74] *See* Sections V.E and V.F, *infra*.
[75] Borovčanin explained in his ICTY statement that there were two lines of authority to which the Intelligence and Security officers answered: one was the Corps structure, in which Momir Nikolić would have been answerable to the brigade commander; and the second was the Intelligence and Security structure, in which he would also have been answerable to the Chiefs of security of the Drina Corps and the Main Staff. Statement of Ljubomir Borovčanin to ICTY OTP of 20 February 2002 ("Borovčanin February 2002 Statement"), pg. L0068886 (Exhibit O-337).
[76] Tomislav Kovač testified: "I knew that there was no critical reason to engage police units in the Srebrenica battlefield, whereas on the other hand, there were plenty of reasons to do that on Sarajevo battlefield where they were deployed, because I, because those units were already deployed based on the previous orders of the President of the Republic and my orders, they were already there on the Sarajevo battlefield and because that battlefield was, objectively speaking, the most critical and toughest battlefield and my assessment was that this battlefield was simply betrayed by the Headquarters of the Army of Republika Srpska, that they left them

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already been achieved. It is obvious that the purpose of their deployment to the Srebrenica area was something different from assisting the take over of the safe area ordered by Karadžić on 9 July, or accomplishing the task specified in the redeployment Order 64/95 "to crush the enemy offensive from the Srebrenica protected zone." Kovač testified, and the Panel believes, that the formulation of the "task" was a "cover-up", although the Panel does not agree with the conclusion Kovač drew as to the purpose of the cover-up. His opinion as expressed in his testimony – that Karadžić for political reasons wanted troops associated with him personally to be on the ground when Srebrenica fell – is unlikely. The world's journalists had already reported that Srebrenica had fallen hours before, but the Detachment was still pulled from an important front line and sent to Srebrenica. The Panel found that the Detachment was sent to do exactly what they did, assist in the second phase of the Liberation of Srebrenica.

D. Phase Two: Eradication of Bosniaks – Forcible Transfer

1. Preparation for the Transfer Plan

On 11 July, Miroslav Deronjić heard by public radio broadcast both that the safe area of Srebrenica had fallen and that he was appointed Civilian Commissioner for Srebrenica by Karadžić. He contacted Karadžić that night by telephone. During that phone conversation, he received instructions to meet with Gen. Mladić, UNPROFOR, and the refugees in Potočari, and deliver to them the President's message for the following three variants:

> The first variant was that they would remain in Srebrenica which was inconceivable. The second variant was that they would go in the direction of Kladanj, which was under the control of the Muslim Army. Under the third variant, they would go to third countries, which was also not a real variant.

It was clear to Deronjić that Karadžić was not serious in offering these options. He explained in his statement given to the OTP the obvious reasons why this was so, but "the main or basic reason was that there was no serious intent to keep these people. The whole thing was done for propaganda purposes. And the actual intent was to have them leave the area and to cleanse the terrain of Muslims."[77]

Deronjić nevertheless took this message to the third meeting at the Hotel Fontana and delivered it to those in attendance, even though he knew that there was only one option actually available: their expulsion to Kladanj. Gen. Mladić echoed this deceit at the Fontana meeting as well, saying to the civilian representatives: "You can choose to stay or you can choose to leave. Just express your wish. If you wish to leave you can go anywhere you like…If you want to go east, across Serbia or to it, I don't mind. If you want to go west, you can say where you want to go."[78]

Momir Nikolić testified at the ICTY, subject to cross-examination at this main trial, that when he heard that Gen. Mladić had said this, it was obvious to him that Mladić was lying:

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without reinforcements, without weapons, without ammunition, while on the other hand they had rather strong forces in the Srebrenica area."

[77] Deronjić Statement, paras. 187, 227 (Exhibit O-326).

[78] Video Transcript, pg. L0092448 (Exhibit O-193).

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> He said that whoever wished to stay should speak out and say so on an individual basis, whether they wanted to stay or leave. That's what he said. In theory, some of the Muslims would be allowed to stay. In practical terms, I know what Mr. Popović and Mr. Kosorić told me. Quite simply, the position was that all civilians would be evacuated, that the men would be detained - separated, detained, and killed. This was a position that clearly indicated the operation would go through to the very end and would be applied to everyone.[79]

Gen. Mladić acknowledged in the third Fontana meeting that he had at that point (10:00 on 12 July) the needed vehicles, but that UNPROFOR had to provide the petrol. As it happened, buses and trucks filled with petrol arrived in Potočari within minutes of the conclusion of third Fontana meeting. Maj. Franken testified that Lt. Col. Karremans returned from the meeting at about 11:30 and told them that Gen. Mladić had said that transportation for the civilians would arrive at 16:00 hours, "but the very moment he told me that, we got a report that there were a hell of a lot of buses and trucks appearing from the direction of Bratunac, over the road going to the Potočari area."[80]

In fact, Butler reports that "as early as 0730hrs, Gen. Krstić ordered 50 buses from nine municipalities…. By 0800 hours… Vasić reported to his superiors that 'over 100 trailer trucks have already been provided.'"[81] In addition, an order by Gen. Živanović on 12 July at 08:35 (Exhibit O-270) required all brigades within the Drina Corps to supply "all available buses and minibuses belonging to the units of the Army of Republika Srpska to be secured that day by 16:30 hours at the latest." This request by Gen. Živanović also indicates where these vehicles are to obtain the petrol, thereby also indicating that supplies of petrol were available for their use. The order also demanded that the Ministry of Defense "obtain by 12 July 1995 all the buses available from state and private owners for the use of the commands of the brigades" in the areas of Sokolac, Rogatica, Višegrad, Han Pijesak, Vlasenica, Milići, Bratunac and Šekovići. All of this activity preceded the third meeting at the Hotel Fontana, as well as the exchange between Lt. Col. Popović and Capt. Momir Nikolić.

Gen. Mladić had been told by Lt. Col. Karremans and the refugee representative at the second meeting at the Hotel Fontana, held at 23:00 on 11 July, that the number of people in Potočari was between 15,000 and 30,000, and that most were women and children.[82] Maj. Franken, an experienced military officer, observed that providing the equipment, petrol, manpower, and coordination necessary to move 25,000 to 30,000 people from one area to another in two days was a massive logistical undertaking. "If you see the problems that the Serb forces were confronted with… The organization of the evacuation, the transport, securing the routes, arrangements to be made at the crossing point of Kladanj, I think there were four up to six brigades at least involved, so we're talking about corps level at least."[83]

From this activity and the events leading up to noon of 12 July, several things are clear:

- The number, gender, and composition of the Bosniak civilians taking refuge in Potočari was known.

[79] Nikolić *Blagojević* Testimony, pg. 1683 (Exhibit O-246).
[80] Franken *Krstić* Testimony, pg. 2028 (Exhibit O-277).
[81] Butler Report, pg. L01134335 (Exhibit O-225).
[82] Video Transcript, pgs. L0092435, L0092443 (Exhibit O-193).
[83] Franken *Krstić* Testimony, pg. 2029 (Exhibit O-277).

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- Phase two of the liberation of Srebrenica, the eradication of the Bosniak "civilians" (women, children, and the elderly), was about to begin.

- The Bosniak civilians from Srebrenica were to be forcibly transferred.

- The task was being coordinated by members of the Intelligence and Security organs.

- The Bosniaks never had any choice but to leave.

- Where they would go was entirely up to the powers within the RS.

- Provision for their transfer had been organized well in advance and certainly before the meeting at 10:00 hours at the Hotel Fontana.

- Those making preparations for the transfer were well informed on the large numbers that would be transported.

- Many people from several different military and civilian lines of command, as well as private providers, were involved and knowledgeable about this part of the eradication plan.

- President Karadžić, Miroslav Deronjić, and General Mladić had coordinated the public deceit that the refugees had the choice to stay, a deception which was consistent with the ongoing objective to avoid "condemnation by the international community and international public opinion."

The evidence establishes that sometime before the moment that Capt. Momir Nikolić was assigned his coordination task, the plan to eradicate the Bosniak women, children, and elderly by forcible transfer was developed. The Panel has insufficient information on which to conclude the exact time that this occurred. However, that the plan existed, at least as a contingency, prior to the fall of Srebrenica, is evidenced by the efficiency with which the tasks were assigned at the level of coordination and implementation and assembly of resources; and the speed with which the deceit that they had any choice in whether and where they were to go was created and circulated.

2. The Deception

The deceit was broadcast repeatedly. Much was made to the media of the "free" choice made by the refugees to leave Potočari and go to the territory under the ARBiH. President Karadžić, in his television interview given on 12 July, said: "If they [the Bosniaks] want to accept the authorities of Republika Srpska, and become its citizens, then they don't have to go. However, it turns out that the overwhelming majority wishes to go and they are mainly going to Tuzla."[84] Gen. Mladić, accompanied by the video journalist, is seen going from group to group of refugees at Potočari on the afternoon of 12 July, assuring them for the cameras: "Anybody that wishes to stay can stay. Anybody who wishes to leave this territory can leave this territory."[85] At another point he looks sympathetically at his audience while

[84] Video Transcript, pg. L0092454 (Exhibit O-193).
[85] Video Transcript, pg. L0092452 (Exhibit O-193).

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the camera catches him saying: "We have organized the transport… the food, the water and medicine. In the first round today, we will evacuate women, children, and the old, as well as other people who want to leave this combat area in their own free will, without any kind of force."

Although it was true that by 12 July, after enduring the shelling in Srebrenica and on the road to Potočari, and the squalor, destitution, and fear in Potočari, the people undoubtedly preferred to be transferred than to remain in those conditions, this was certainly not a free choice. There was little food or water available, and the July heat was stifling.[86] Gen. Mladić did not arrange for food, water or medicine, as he had promised while the cameras were rolling, and in fact he refused to give the Dutch Bat the medical supplies Lt. Col. Karremans asked he be allowed to retrieve from Srebrenica.[87] Hajra Čatić testified of the night of 12/13 July as being one of unbelievable horror, when people were screaming and shouting, some going insane, a few committing suicide. The refugees in the compound could see Bosnian Serb soldiers setting houses and haystacks on fire.[88] Men and boys were being separated from their families and taken away, shots were heard, killings witnessed, and dead bodies discovered.[89]

Jean-René Ruez, the former lead investigator in Srebrenica for the ICTY OTP, corroborated the witness accounts of conditions in the Potočari compound and its surroundings from interviews with victims conducted within days of their arrival in refugee camps in ARBiH territory. He testified at the main trial as to his efforts to establish the reliability of his information, which the Panel found convincing. He described what he learned from these interviews. First he corroborated that the buses and the VRS arrived in Potočari on 12 July around noon, and the Bosnian Serb soldiers started mixing with the crowd almost immediately on that day. Several took UN equipment from the UNPROFOR soldiers so that men whom the crowd believed were UN were in fact speaking Serbian. When separation of the men ensued, panic quickly spread.[90] Hajra Čatić also related mistreatment of the people by the Bosnian Serb soldiers, a point corroborated by Momir Nikolić.[91]

Nonetheless, President Karadžić wanted to maintain the deception for the international community that the "evacuation" had been voluntary. When Deronjić conceived a plan to draft an agreement with UNPROFOR stating that the evacuation was carried out according to the requirements of international law, Karadžić, according to Deronjić, was very pleased, although he told Deronjić that he doubted that it would be signed.[92]

The statement was in fact signed by Maj. Franken, with Lt. Col. Karremans' approval, although Maj. Franken insisted on adding a disclaimer to the part that declared that the people had a choice to stay or go. As Maj. Franken explained at main trial in this case:

> The contents of that statement were incorrect. To make that clear I added a hand-written sentence at the last line of that statement. I estimated, and in my opinion that was not a realistic choice. Because staying meant staying without

[86] Established Fact T36.
[87] Video Transcript, pgs. L0092437, L0092439 (Exhibit O-193).
[88] Established Fact T39.
[89] Hajra Čatić; Major Robert Franken.
[90] *Blagojević*, Testimony of 15 May 2003, pg. 384 (Exhibit O-243).
[91] Nikolić *Blagojević* Testimony, pg. 1710 (Exhibit O-246).
[92] Deronjić Statement, para. 221 (Exhibit O-326).

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> any means, without food, without drink, without housing, etc. etc. staying in a potential hostile environment, and the alternative was going to a safe area. You can't speak about a choice – a real choice – that those people had. That is what I meant about that statement not being realistic.

Nevertheless, Karadžić was delighted with the statement when Deronjić faxed the signed copy to him, and suggested that Deronjić deserved "to be decorated" for this accomplishment. Again, according to Deronjić, the statement was discussed with Karadžić and others "at the top" including a Mr. Zametica, whom Deronjić recalled said, "Miroslav, it is wonderful you managed to do this. Now we will be able to show the world… that this is proof that we carried out the entire evacuation in a just and proper manner." Karadžić had the document forwarded directly to the UN.[93]

E. Phase Two: Eradication of Bosniaks – Killing of the Men

1. Preparation for the Killing

The same intelligence that allowed the Bosnian Serbs to adequately prepare for the transfer of 25,000 to 30,000 people and accomplish it in 48 hours was also available to them to estimate the number of men in Srebrenica. Miroslav Deronjić reaffirmed to Karadžić on 9 July, the day Karadžić issued the order to take over Srebrenica, that there were a total of 40,000 people living in the Srebrenica safe area that would need to be dealt with if variation B, the military takeover of Srebrenica, proved to be militarily feasible. Momir Nikolić, whose job it was to provide intelligence, assured the Panel during his testimony at the main trial that by the afternoon of 11 July, "of course we had the information" of the military strength of the 28th Division, their armaments, and "man strength." On the morning of 12 July, by the time he spoke with Lt. Colonels Popović and Kosorić, Nikolić had already assessed the number of men fleeing to Potočari, and on the night before he had sent a report the Drina Corps command that between 1000 and 2000 had gone there.[94] Lt. Col. Karremans confirmed to Gen. Mladić at the second meeting at the Hotel Fontana that as of 23:00 hours on 11 July, at least 15,000 to 20,000 people were in Potočari "and they are still coming". Of these, he told Mladić, 95% are women and children and the other 5% elderly and men, but very few men.[95] The refugee representative, Nesib Mandžić, adjusted the figure for the larger group he had seen outside the compound and told Mladić that the total was closer to 30,000 people.[96] Simple math, even without the necessity of intelligence reports, would have disclosed the total number of Srebrenica males, in and out of Potočari.

Gen. Mladić therefore would have known the approximate number of men and the amount of armament the men of Srebrenica had when he made his ultimatum for surrender at the second Hotel Fontana meeting held at 23:00 hours on 11 July. At that meeting he called for the surrender of all the men and the relinquishment of their weapons. He sent the refugee representative back to Potočari with the message that the community must decide that the men surrender: "I need to have a clear position of the representatives of your people on whether you want to survive… stay or vanish."[97]

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[93] Deronjić Statement, para. 224 (Exhibit O-326).
[94] *Blagojević*, Testimony of 19 September 2003, pg. 1661 (Exhibit O-246).
[95] Video Transcript, pg. L0092435 (Exhibit O-193).
[96] Video Transcript, pg. L0092443 (Exhibit O-193).
[97] Video Transcript, pg. L0092443 (Exhibit O-193).

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Four events occurred between the second Hotel Fontana meeting held at 23:00 on 11 July and the third Hotel Fontana meeting held at 10:00 on 12 July that show how Phase Two unfolded regarding the Bosniak men.

First, Miroslav Deronjić had his telephone conversation with President Karadžić in Pale late in the evening of 11/12 July. This is the same call during which Karadžić instructed Deronjić to relay the deceit that the refugees in Potočari had three options as to their future. In addition, Karadžić instructed him as to the message to be delivered regarding the men. He told Deronjić that the men would not be transferred but detained, because "it was possible" some of them might be war criminals. Deronjić reported in his ICTY statement: "He even told me that the Serbs would have to insist on this because according to the conventions of war, we had the right to do so."[98] This conversation is corroborated by orders issued by Karadžić in connection with Deronjić's appointment as "Civilian Commissioner". Deronjić said in his ICTY statement that he insisted that Karadžić provide him with written authorization for his assignment as commissioner. In response, Karadžić issued two orders, both quoted in Butler's narrative.[99] The first order, appointing Deronjić to his new position, charged him with ensuring that "all civilian and military organs treat all citizens who participated in combat operations against the Army of the Republika Srpska as prisoners of war." The second, establishing a Public Security Station for "Serb Srebrenica" directed that "...citizens who engaged in combat be treated as prisoners of war." Both orders require that *all* "citizens who engaged in combat" be treated as prisoners of war, and made no distinction as to those found in Potočari or elsewhere. These orders confirm Momir Nikolić's understanding that "all those captured in that period enjoyed the same status."[100] The beauty of this deception was of course that in order to screen for former combatants, war criminals or even to screen for age, all men and boys would have to be taken into custody, at which point they were dependent on the Bosnian Serbs' "good will".

Second, intelligence was received regarding the location of the 10,000 to 15,000 Bosniaks who had formed a column and were fleeing Srebrenica toward Tuzla. Deronjić stated that he heard later on the night of 11/12 July that there had been no further military resistance in Srebrenica and a large number of the men had "withdrawn" in the direction of Konjević Polje.[101] Butler reports that two intercepted military telephone conversations from 06:08 and 06:56 on 12 July show that the VRS were tracking the column's movements.

Third, Butler reports on a Dispatch sent on 12 July from Dragomir Vasić, Head of the Zvornik PSC, to the MUP, the Cabinet of the Minister (in Pale) and the HQ of the Police Forces in Bijeljina, Zvornik CJB. In it Vasić notes a meeting held at 08:00 that morning, with Generals Mladić and Krstić present, where tasks were assigned.

Fourth, after that very 08:00 meeting with Generals Mladić and Krstić, reported by Vasić, where tasks were assigned, but before the 10:00 meeting at the Hotel Fontana, Momir Nikolić learned of his mission in connection with the second phase of the liberation of Srebrenica from Lt. Cols. Popović and Kosorić, Krstić's Intelligence and Security officers. In addition

[98] Deronjić Statement, para. 187 (Exhibit O-326).
[99] Butler Report, 4.1, 4.2 (quoting from Orders 01-1340 and 01-1341) (Exhibit O-225).
[100] Nikolić *Blagojević* Testimony, pg. 1717 (Exhibit O-246).
[101] Deronjić Statement, para. 190 (Exhibit O-326).

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to his tasks coordinating the transfer of the women, children and elderly, Nikolić learned he would have a role in coordinating the detention and killing of the Bosniak men.[102]

At the third Hotel Fontana meeting, Gen. Mladić added another point to his surrender demand, one that echoed the point on which Karadžić told Deronjić hours before they must "insist" and which is reflected in the two orders issued hours before. Mladić said that all men between the ages of 16 and 60 would be screened for war crimes.[103] He also repeated his threat of the night before:

> As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS. Upon surrendering the weapons you may choose to stay in the territory , or if you so wish, go wherever you want, The wish of every individual will be observed no matter how many of you there are.[104]

Gen. Mladić repeated the identical threat made the previous night, showing it was not a slip of the tongue, and his message was clear: he had the power to make them disappear and their survival was in his hands. The ensuing events established that this was not rhetorical hyperbole, but the simple truth. The deception was that they had any choice in the matter.

Gen. Mladić established that his goal was the surrender of all the men from Srebrenica, not only those who happened to be in Potočari, and he was willing to threaten and make false promises, before video cameras, to achieve that goal. At the time he made his demands for surrender, the approximate number of Bosniak men and their level of weaponry was known, as was the fact that they had formed a column and "withdrawn", that they were attempting to escape from Srebrenica, and their location. Also by this time, Gen. Mladić had met with military and police commanders and tasks had been assigned. One task, coordinating efforts for detaining and killing Bosniak men from Srebrenica, had already been relayed to the Intelligence and Security Officer for the Bratunac Brigade by the Intelligence and Security Officers of the Drina Corps.

The capture, detention, and execution of the Bosniak men of Srebrenica required personnel. It required assembling manpower in addition to that needed to coordinate and effectuate the transportation and transfer of the women, children and elderly. It required assembling manpower in addition to personnel used for the military takeover of Srebrenica. Additional manpower was needed for phase two of the liberation. The resubordinated MUP unit was part of that additional manpower. The Panel was provided some of the documentary evidence that establishes preparation for assembling other additional manpower. That documentation shows that, in addition to the resubordination of the MUP forces, there was a call up order issued by Colonel Blagojević, Commander of the Bratunac Brigade, dated 10 July. It too indicates that the aim was to "crush the enemy offensive", the same language that Kovač asserted was a cover-up when used in Order 64/95, and certainly there was no enemy offensive from Srebrenica on 10 July. That order lists the numbers of men being called up from the various local agencies and companies where men performed compulsory work service. In his order of 16 June 1995, Karadžić specifically exempted from call-up those working in utilities, food production and services on which the military relied. In his order of

[102] Nikolić *Blagojević* Testimony, pg. 1717 (Exhibit O-246).
[103] Franken *Krstić* Testimony, pg. 2039 (Exhibit O-277).
[104] Video Transcript, pg. L0092447 (Exhibit O-193).

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10 July, Blagojević called up men under compulsory work service in utility, farming, postal, telephone and telegraph, transport and petrol companies. This call up order, like the MUP resubordination order, was officially dated the day before the fall of Srebrenica. However, it was to take effect on the following day and was clearly designed to increase personnel for operations necessary after the military phase of the "liberation" was completed.

From the activity and events leading up to noon of July 12, several things are clear:

- The numbers, weapon strength, and locations of the Muslim men from Srebrenica was known.
- Phase Two of the "liberation" of Srebrenica, the eradication of the Bosniak men, was about to begin.
- The Bosniak men from Srebrenica were to be killed.
- The task was being coordinated by members of the Intelligence and Security organs.
- All the men from Srebrenica were called to surrender.
- Surrendering men would have to be detained prior to killing them.
- That mission would require significant manpower and resources.
- The people assigned to that mission would have to have some information about their tasks.
- Karadžić, Deronjić, and Mladić had coordinated the public deceit that detention of the men was necessary to enable screening for war criminals, a deception which was consistent with the ongoing objective to avoid "condemnation by the international community and international public opinion."

The evidence establishes that sometime before the moment that Nikolić was assigned his coordination task, the plan to detain and kill the Muslim men from Srebrenica was developed. The Panel has insufficient information on which to conclude the exact time that this occurred. However, that the plan existed, at least as a contingency, prior to the fall of Srebrenica is evidenced by the efficiency with which the tasks were assigned at the level of coordination and implementation and assembly of resources; and the speed with which the false rationale for detaining the males was created and circulated.

2. The Killing Plan: 12 July 1995

The evidence established that the killing plan that was carried out against the Bosniak men who went to Potočari and who attempted to escape in the column was essentially the same plan and had the same components and activities: 1) forced or induced surrender; 2) collection and transfer for killing; and 3) killing carried out, depending on location, by murder, organized multiple murder, ambush, and shelling.

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The 2nd Šekovići Detachment was pulled from the field in Srednje at around 20:00 on the evening of 11 July, after the military victory in Srebrenica was complete and well publicized. On 12 July the Detachment reported to their first duty in Budak, above Potočari, at exactly the same time as when the third Hotel Fontana meeting concluded. Along with other VRS and MUP units, the 2nd Detachment began arriving at the Potočari complex around noon. Within 30 minutes of their arrival in the area, separation and collection of the men began in the complex. Butler reports: "Shortly after 1230hrs on 12 July, VRS personnel also began separating men from the women, children, and elderly to 'screen them for war crimes.'"[105] This was confirmed by Maj. Franken, who testified that separating "combatants" is "a normal procedure when you have a great amount of prisoners, but I had my thoughts – no, I had my fears about what was going to happen to the men afterwards."[106] The 2nd Šekovići began its mission in the Srebrenica area at precisely the moment Phase Two of the liberation of Srebrenica commenced.

a. The Killing Plan: Potočari

The forced surrender, collection, and killing of the Bosniak men began first in Potočari, where Franken estimated that approximately 600 to 1000 men, including young boys and some older men, who had accompanied their families to Potočari were forcibly separated from their families and taken to a building called the white house.[107]

Gen. Mladić told the Dutch Bat officers, and those attending the third Hotel Fontana meeting, that this needed to be done to screen the men to see if any were on a pre-existing list of war criminals. However, it became obvious to the UN personnel that they were not being detained for any reason consistent with the laws of war. They were first forced to abandon their belongings, including identification documents, the very items that were necessary if in fact the purpose of their detention was to identify them as listed war criminals or former combatants, or to negotiate their exchange. Momir Nikolić confirmed that "personal belongings were seized and thrown onto a pile which was formed on the way to the White House where they were taken."[108] Males were taken without regard for their age, including the old, the sick and the very young.[109]

A few men were permitted to board the buses with their families on 12 July, but Momir Nikolić explained that this was purely for propaganda reasons.[110] Maj. Franken testified that by the end of 12 July they were aware that these men had ultimately not reached Kladanj.[111] It was learned that they had been pulled off at checkpoints[112], or separated at the point at which women and children left the bus, from where they were taken to the school in the Tišće area, from where they disappeared.[113] Other men tried to slip by the separation points and board the buses, but Čatić testified that the buses were stopped several times along the way to Kladanj and searched for men, who, if found, were taken from the busses, thus corroborating Nikolić. She further recounted how one mother attempted to bring her 14 year-old son on the

[105] Butler Report, pg. L01134339 (Exhibit O-225).
[106] Franken *Krstić* Testimony, pg. 2037 (Exhibit O-277).
[107] Franken *Krstić* Testimony, pgs. 2046-2048 (Exhibit O-277).
[108] Nikolić *Blagojević* Testimony, pg. 1697 (Exhibit O-246).
[109] Hajra Čatić.
[110] Nikolić Statement of Facts, section 6, para. 3 (Exhibit O-246).
[111] Franken *Krstić* Testimony, pgs. 2046-2047 (Exhibit O-277).
[112] Nikolić Statement of Facts (Exhibit O-246).
[113] Butler Report, para. 5.26 (Exhibit O-225).

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bus by hiding him under a blanket, but that he was discovered and dragged off the bus away from his hysterical mother, who then collapsed into unconsciousness.

The collection of the Bosniak males at Potočari was an organized and coordinated effort by the VRS and MUP forces, in the presence of and under the supervision of senior officers and commanders, and was in all ways consistent with the plan to eradicate the Bosniak males from Srebrenica and to mislead the international observers as to the true intention, which was to kill them. That intention nevertheless became obvious to the UN personnel as well as to the Bosniak men. Maj. Franken recounted a meeting he had on the evening of 12 July with Mr. Mandžić, the father of one of the UNMO interpreters and a Bosniak community representative. Franken recalled that Mr. Mandžić asked him to stop the evacuation because he feared that the men would all be killed.

> I answered that I feared, in fact, for the men as well but that, in fact, he asked me to make the choice between thousands of women and children and the men. And then he answered that he understood what I meant, and he agreed and went away.[114]

It was also obvious, or was expressly told, to the Bosnian Serb soldiers and police officers involved in the task of separating and detaining the Bosniak men that they were to be killed. S4 testified that while waiting with his platoon in Potočari for transportation to Sandići, he specifically asked one of the Bosnian Serbs what had happened to the Bosniak men. He was told that the men were being separated and would be killed. Šuhra Sinanović corroborated that the soldiers in Potočari knew exactly the planned fate of the Bosniaks, and described how her friend was told in a manner that left little doubt of its meaning that her friend's husband, Hajrudin Begzadić, would have no further need for his suit coat, when she tried to give it to him while he was being taken away to the White House.

Other evidence of the fact that the soldiers and police officers, as well as their commanders and senior officers, shared the knowledge that the Bosniak men were meant to all be killed comes from the atmosphere of controlled lawlessness that existed at Potočari. During the 12 and 13 July in Potočari, soldiers and junior officers were permitted to verbally insult, physically abuse, and kill the Bosniak men with impunity while officers looked the other way. Momir Nikolić described the abuse he witnessed, but about which he did nothing: "There was physical abuse and beating of those men with hands and feet. Then there was verbal abuse; that is, they were called balijas and Turks and Ustashas and the like."[115] Although Nikolić claimed personally not to have witnessed killings by the soldiers and police he was "coordinating", he admits that he was aware of these killings, having been informed by members of the police at Potočari and the Dutch Bat. Maj. Franken recounted that one execution style murder was even carried out in front of Dutch Bat personnel by two Bosnian Serb soldiers in the area of the zinc factory. These acts were perpetrated without any interference from superior officers and without any apparent concern on behalf of the perpetrators that they would be punished or even stopped.

It has been suggested that this level of criminal activity was a natural consequence of the state of chaos that existed in Potočari, given the emotions among the troops and the large number of refugees. However, the operation which the Bosnian Serb soldiers and MUP carried out

[114] Franken *Krstić* Testimony, pg. 2043 (Exhibit O-277).
[115] Nikolić *Blagojević* Testimony, pg. 1697 (Exhibit O-246).

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during those two days was the very opposite of chaotic. Their efficient accomplishment of their mission to transport 25,000 to 30,000 women, children, and elderly and separate and detain almost all of the men, while mounting a propaganda campaign to appease both their own people and the international community, demonstrated an extremely well-planned and disciplined approach to the task. The permissive attitude of those in charge to the physical abuse and murder of the prisoners at Potočari was consistent with that task. First, it added to the level of fear and panic that drove the refugees to desire to leave; and second it is indicative of the fact that the Bosniak men's lives were already known to be forfeit, and whether they died in Potočari or later in Kravica, Bratunac, or some unknown execution site made little difference. Their death was part of the plan.

In addition to random killings and abuse, actively or passively condoned by those in charge, there is evidence that organized multiple killings (executions) had begun and were carried out at Potočari. Witness Hajra Čatić testified that she personally saw about twenty bodies of dead Bosniak men on the morning of 13 July when she went to fetch water from a pump on a property outside the complex. She had previously observed Bosnian Serb soldiers escort around 12 men to the same location. The bodies were covered in blood and had been "slaughtered" rather than shot. That manner of execution is consistent with a report investigated by Jean-René Ruez, about which he testified. He described eyewitness accounts of the execution by machete of approximately eighty men near the zinc factory on the evening of 12 July. The witness reported to him that the victims were taken from the Zinc Factory yard, led through a fence to a house that had a cornfield in front if it. The witnesses also described the location and movement of a truck. There is photographic confirmation of the site and the truck movement taken from the air on 12 and 13 July (Exhibits O-310 through O-314), which substantiates the details about which Ruez testified. Although this was a different execution than the one about which Čatić testified, the manner and timing of the executions corroborate her eyewitness evidence that organized executions had already begun at Potočari.

Maj. Franken added further corroboration. He testified that his lieutenant reported to him that he found nine dead bodies on the morning of 13 July, positioned in execution-style formation, south of the White House, near a brook. Franken reported his men's opinion that "they were obviously executed, because the positions of the bodies gave no occasion whatsoever that it would have been as a consequence of combat." Franken was able to identify the site where the bodies were reportedly found on photographs.[116] Also on the evening of 12 July, some men were transported by bus from Potočari to the Hangar in Bratunac, according to Butler. There many of them they were systematically taken out by Bosnian Serb soldiers and were beaten and killed. This killing in the collection sites in Bratunac continued on 13 July, as confirmed by both Deronjić and Nikolić.[117] When taken together, this evidence is sufficient to corroborate the witness Čatić and to establish that organized executions had begun as early the evening of 12 July.

On 13 July, those Bosniak males who survived Potočari were transported to other temporary detention or execution sites, according to plan, where they were joined by other surviving Bosniak male prisoners who surrendered from the column. Those who surrendered from the column were treated identically to those who were separated at Potočari: they were forced to abandon their belongings, including their personal documentation; they were assured that

[116] Franken *Krstić* Testimony, pgs. 2052-2053 (Exhibit O-277).
[117] Deronjić Statement, para. 206 (Exhibit O-326); Nikolić Statement of Facts, section 11 (Exhibit O-246); Butler Report, 6.3 (Exhibit O-225).

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they would be exchanged or transported to be with their families in Kladanj; they were subjected to the same "controlled lawlessness", whereby physical abuse and random killings were condoned implicitly by commanders; and they were detained in collection centers until arrangements for their execution could be completed.[118]

Momir Nikolić confirmed that the plan to kill the Bosniak men was not limited to the men at Potočari and had never been so limited. When asked by the Prosecutor at the ICTY what he thought on 13 July would happen to the men from Srebrenica captured outside Potočari, he responded firmly: "I didn't have any thoughts about it. I knew what was going to happen to them, Mr. Prosecutor. I knew that those men would be captured, and after that killed. I knew that." When asked for the source of his information, he asserted that it was clear from the conversation he had with Security and Intelligence officers Popović and Kosorić early on 12 July:

> They personally told me what had happened to those men. He told me what would happen to the captured Muslims. So this was all part of a unified operation, so the status of those captured along the roads did not differ in any sense from those in Potočari…. And it was quite clear that if I was told that those men would be captured, temporarily detained, and after that killed, then it is quite clear that the fate of those who did not surrender and who did not come to Potočari would be exactly the same. And there was no other conclusion that I could draw except that those men would suffer the same fate as those separated in Potočari.[119]

From all of this evidence the Panel concludes that there was a plan to kill all the Bosniak men of Srebrenica and that this plan was devised prior to the morning of 12 July. Detention was the necessary precedent, but never the desired end result. Under the circumstances as they existed in Potočari, the killing of the men required that they first be forced to surrender, collected, and transported to execution sites that were not in plain view of international organizations. Under the circumstances as they existed along the Bratunac-Konjević Polje road, the killing of the men required that they first be induced to surrender, collected, and transported to execution sites that were not in plain view of passing vehicles and air surveillance. Detention and transport were preliminaries necessary for the killing to occur, and the manner in which those preliminaries were effectuated provides good evidence of the enormity of the killing plan, the amount of preparation and resources required, and the number of people that were tasked with carrying it out. However, the plan was to kill the men, and the ambushing, shelling and individual acts of murder inflicted on those in the column were also consistent with the killing plan. The Panel has insufficient evidence from which it can conclude when, before the morning of 12 July, the plan to kill all the Bosniak men from Srebrenica was devised. However, the Panel does have sufficient and specific evidence as to when the plan to kill all the Bosniak men of Srebrenica was implemented. The implementation of the plan began at 12:30 on 12 July, when the first men were separated and detained by MUP and VRS forces at Potočari. It was, as Nikolić phrased it, "all part of a unified operation."

b. The Killing Plan: The Column

[118] *See* Section III.B.3, *supra*; Section V.E, *infra*.
[119] Nikolić *Blagojević* Testimony, pg. 1719 (Exhibit O-246).

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The group of Bosniak men from the column was considerably larger than the group at Potočari. However, the size of the group was neither unexpected nor unwelcome. The intelligence was good from the beginning as to the size and the armaments of the column. It was known that they only possessed hand weapons and that there were considerably fewer weapons than there were people, that there were unarmed women and children in the column along with the armed persons, and that the purpose of the column was escape to Tuzla, not military engagement. Those Bosnian Serbs in command always had the option of creating a corridor through which the column could pass without warfare, as ultimately happened for a limited time on 16 July, but only after many Bosnian Serb lives had been lost attempting to stop what was left of the column from crossing to land held by ARBiH.

Safe passage was never seriously considered by the Bosnian Serbs who were in control, except as a measure temporarily forced upon them on 16 July. This was because the plan was to kill the Bosniak men from Srebrenica. The persistence with which that goal was pursued, even after the corridor, once opened, was again closed leaves no doubt of the importance to those in command of the "likvidacija" all Srebrenica males. From the second meeting at the Hotel Fontana, held at 23:00 hours on 11 July, Gen. Mladić insisted on the surrender of all the men, knowing the size of that group. When his threats and false promises failed to effect an organized surrender, units were tasked to kill the members of the column by ambush and artillery attack, and capture the survivors though trickery so that they too could be killed. One of those units tasked with killing the Bosniak men was the resubordinated MUP unit led by Borovčanin. Part of that unit was the 2nd Šekovići Detachment, which was assigned to the road between Konjević Polje and Bratunac in the afternoon of 12 July and told to expect "a huge influx of Bosniak men".[120]

The level and accuracy of the knowledge about the column by those in command is well documented. Butler reports on a Dispatch sent on 12 July from Dragomir Vasić to the MUP, the Cabinet of the Minister (in Pale) and the HQ of the Police Forces in Bijeljina, Zvornik CJB. In it Vasić notes a meeting held at 08:00 hours that morning, with Generals Mladić and Krstić present, where tasks were assigned. Information relayed by Vasić in that Dispatch was that the "Turks are running away towards Sućeska…." In a report written on 28 July, Vasić, in hindsight, refers to the Bosniak column as it existed on 12 July as a "large number of Muslim groups fleeing Srebrenica." Also on 12 July, the Main Staff report (Exhibit O-IX-02), addressed to the President of the Republic and the various Corps, and signed by General Radivoje Miletić, acting Chief of Staff of the VRS, noted for the area of responsibility of the Drina Corps, "From the Srebrenica enclave the enemy tried to pull out together with women and children toward Ravni Buljin and Konjević Polje, but they ran into a mine field." In Borovčanin's report on the redeployment of the MUP forces pursuant to Order 64/95, which covers the period from the evening of 11 July through 20 July, his entry for 12 July indicates: "In the afternoon hours we received information from state security employees that 12,000 to 15,000 able-bodied, mostly armed Muslims were moving from Srebrenica toward Konjević Polje, Cerska, and Tuzla."[121] In a Dispatch posted in the late afternoon on 13 July (Exhibit O-186), based on later intelligence, Vasić reports that the front of the column had crossed the road and that there were about 8000 "men of military age" in the remaining column, but that only about 1300 were armed. He further reports that the 2nd Šekovići Detachment, along with other MUP forces "are blocking this section with the goal of destroying these forces."

[120] S4.
[121] Report by Ljubomir Borovčanin ("Borovčanin Resubordination Report") (Exhibit O-258).

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The information was accurate, although all but Vasić exaggerated the level of armaments in their reports. The way the column was composed, the head of the column was comprised of the units of the 28th Division, then came civilians mixed with soldiers and the last section of the column was the Independent Battalion of the 28th Division.[122] The column consisted of between 10,000 and 15,000 people, mostly men, of which about one third were armed.[123] When the head of the column, which was the best armed, crossed the road, the remaining number of armed soldiers within the column was greatly reduced, reflecting the accuracy of the Vasić intelligence that the trapped men were approximately 8000 in number, of which approximately 1300 were combatants. The regular combat report of the Drina Corps Command, number 03/2-214 of 13 July 1995 (Exhibit O-268) states "that the enemy from the former enclave was in total disarray."

On 13 July, Dragomir Vasić dispatched a report (Exhibit O-185) citing an armed conflict which occurred when the members of the column tried to cross the road at predawn and "a fierce battle ensued". In fact, Bosnian Serb forces launched an artillery attack against the column that was crossing an asphalt road between the area of Konjević Polje and Nova Kasaba en route to Tuzla.[124] Although he states that "the enemy suffered heavy losses", he reports only one fatality for the Bosnian Serb side and three men injured, suggesting that, if accurate, the Bosniak column was clearly outgunned. Vasić further reported in that dispatch that the MUP, working without the help of the VRS, is "sealing off and destroying the large number of enemy soldiers." In a separate Dispatch (Exhibit O-186) also dated 13 July, Vasić reported for the second day in a row a morning meeting with General Mladić at which tasks were assigned. The MUP was tasked with among other things, the "killing (likvidacija) of about 8,000 Muslim soldiers whom we blocked in the woods near Konjević Polje." He adds "this job is being done solely by MUP units." Based on the information he received and reported the preceding day, the term "soldiers" is imprecise, since 6,700 of them were known to be unarmed.

It is clear that by 13 July, those in command knew that the Bosniaks were fleeing, the column was largely unarmed and had with it some women and children, that they were in disarray, and that the part of the column that had still not passed over the road numbered around 8,000. It is also clear that at the meeting at 08:00 the morning of 13 July, the MUP forces were given tasks. The task of the MUP along the road, including the 2nd Šekovići, was to kill (likvidacija) the 8000 Bosniaks trapped behind the road. It was not to capture them and transport them to Kladanj or put them in a camp or use them in exchanges for Bosnian Serb prisoners, or to let them escape to the free territory. It was to kill them. Furthermore, according to Vasić's dispatch, the MUP forces were the only forces present along the road and the only forces given this task in this location.

Other than the predawn incident that morning at the road crossing, MUP forces were not tasked with nor were they confronted with armed engagement with an enemy. The MUP members were setting ambushes to kill the Bosniak men. The MUP members were firing large artillery repeatedly from the road into the woods where they thought the men were hiding in order to kill the Bosniak men. Individuals moving among the prisoners and abusing them were being allowed to kill the Bosniak men. The MUP members were engaging in trickery to induce the Bosniak men who were not yet killed by ambushes and shelling to surrender in the thousands, so that they could be detained and killed according to a plan that

[122] Established Fact T76.
[123] Established Fact T75.
[124] Established Fact T79.

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was articulated at least a day before, known to at least some of their counterparts in Potočari, and known to the Accused (see Section VI.A, *infra*).

The killing plan was ambitious. It required complex coordination of people and resources. With obvious knowledge of the numbers involved, arrangements had been made for acquisition and distribution of artillery and other supplemental weaponry, extra manpower, logistical support for that manpower, transportation for troops and for prisoners, arrangement for drivers and fuel to carryout that transport, control of press, information and propaganda, temporary detention facilities out of site from ground and air, and limitation of international access, all at the same time that the transfer of 25,000 to 30,000 women and children and elderly was requiring similar resources and coordination. All of this attests to a well-considered plan designed in anticipation of the fall of Srebrenica. All of this attests even more certainly to a plan that had as its purpose the killing of the Bosniak men.

What compels the conclusion that the plan from the outset was designed to effectuate the death of the Bosniak men from Srebrenica is the complete and utter absence of any provision for their continued life. No part of this elaborate, complex, and well-coordinated plan addressed, or even contemplated, the provision of food, water, sanitation, medical care, or proper shelter for even one prisoner, let alone the 10,000 to 15,000 men they had hoped to capture.

The Geneva Conventions were clear as to the services required to be provided for POWs under international law. The Law of the RS and the regulations of the VRS gave specific instructions as to the basic requirements for detaining prisoners.[125] The war had been going on for more than three years, during which time all sides had captured prisoners, detained prisoners, and maintained camps for prisoners. The commanders involved in the liberation of Srebrenica knew they were calling for the surrender of more than 10,000 men. When no more than 1000 were captured in Potočari, they relentlessly pursued the remainder of the men in the column, knowing their numbers. Yet no preparation whatsoever was made to feed or house them or to provide them sanitation, adequate water, or medical care, in the event they were successful in capturing them. It is not credible that such an oversight was unintentional. There was simply no part of the plan that contemplated doing anything with the prisoners besides killing them. Given the zeal with which they pursued the surrender of these men from the moment that the Safe Area fell, and the absence from the start of any means to hold these men under conditions that would keep them alive, the only credible conclusion that can be drawn is that the Bosniak men were always meant to be killed. There is no reason to doubt that Karadžić was being sincere and factual when, on 9 July, the day he ordered his troops to take the safe area, he told Deronjić, "Miroslav, they must be killed."

That this killing plan was to extend to all Bosniak males from Srebrenica, including the members of the column who had managed to cross the road, was clear when, on 13 July 1995, the Drina Corps Command issued an order (Exhibit O-272) to all subordinate units to, among other things, "engage all men in detecting, blocking, disarming and capturing the spotted Muslim groups and in preventing them from crossing over to the Muslim territory, and to organize the ambushing activities along the Zvornik - Crni Vrh – Šekovići - Vlasenica road communication." It was also ordered that "those captured and disarmed should be placed on the premises which suit that purpose and which can be secured by minor forces, of which the superior Command should be informed immediately."

[125] JNA Brigade Manual, quoted in Butler Report, 3.22 (Exhibit O-225).

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The kind of premises which would "suit the purpose" was made clear in the 13 July "Procedure for treatment of war prisoner" (Exhibit O-346), sent at 14:00 on 13 July to the Commander of the VRS Main Staff "for his information." In that communication, Lt. Col. Milomir Savić relates what the Assistant Commander for Security and Intelligence affairs of the VRS Main Staff has instructed him to do with the 1000 Bosniak prisoners in the custody of the Military Police Battalion of the 65th Motorized Protection Regiment. Notwithstanding the title of the document, there is no mention of the Geneva Conventions. Instead, the representative of the Security and Intelligence organ for the Main Staff instructs that a site that would "suit the purpose" for holding the prisoners would be "somewhere indoors or in the area protected from sighting from the ground or air." In addition, they are ordered to prohibit filming, photographing or "unauthorized" access to the prisoners and to close the road around the site to any UN vehicles. There is no mention that such a site required access to water, toilets, or bedding, or that it be provided with food, or that it be accessible to medical personnel. The order indicates that there would be further orders; the implication was that those further orders would be oral.

Selection of sites "suitable for purpose" around Bratunac occurred prior to Col. Savić's report. Momir Nikolić had already suggested to Colonels Popović and Kosorić on the morning of the 12 July several sites.[126] Not surprisingly, these were some of the same places Miroslav Deronjić and ICTY Witness 161 reported were used to temporarily detain men in the "liberation of Bratunac", the Vuk Karadžić school gymnasium, and the hangar nearby. In addition, the cooperative at Kravica was at some point prior to the morning of 13 July designated as premises that would "suit the purpose". Luka Marković testified that in the morning of 13 July, a car with three uniformed men arrived to look at the warehouse and asked him for a chain and padlock with which to secure one of the entrances. That this site had already been selected was evidenced by the fact that the three men were followed directly by a bus filled with prisoners.

The 2nd Detachment were deployed along the Bratunac – Konjević Polje road from Kravica past the Sandići meadow and tasked with that part of the plan that required the capture and collection of Bosniak men surrendering from the woods and collected in the meadow.[127] On the meadow and at various locations along this part of the road, as in Potočari, an atmosphere of controlled lawlessness prevailed, in which robbing the prisoners of money and valuables, threatening them, physically abusing them, and even murdering them was permitted to occur with impunity, notwithstanding the number of senior officers reported to be in the area. Kristina Nikolić testified that while she was at the Kravica Cooperative where she was employed, on either 12 or 13 July, before the killings in the warehouse, she observed a wounded Bosniak man approach to surrender. She testified that she saw soldiers force him to call into the woods for others to surrender, and then she saw them kill him. In ICTY testimony introduced by the defense, Witness K described the murder of one man with him on the meadow on 13 July, after that man asked for water.[128] Other acts of a similar nature, conducted on the Sandići meadow where the prisoners were collected, are recounted above.

That these activities persisted in the presence and with the participation of members of the MUP Special Police, considered to be part of the "most elite forces" by Kovač, and praised by Borovčanin and Deronjić as the best forces in the RS (see Section V.F.2, *infra*) is

[126] Nikolić Statement of Facts, section 4, para. 2 (Exhibit O-246).
[127] S4.
[128] *Krstić*, Testimony of 10 April 2000, pg. 2455 (Exhibit O-VII-01).

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particularly indicative that there was no official condemnation of the criminality. It also confirms that, like the soldier at Potočari who knew that Hajrudin Begzadić would no longer have need for his coat, the treatment of the prisoners along the road and the meadow demonstrated that it was generally known these prisoners also would no longer have need of their belongings. It is particularly telling that members of the 3rd Skelani platoon, which was known to be particularly well-trained and disciplined, most of its members having begun with the Skelani Red Berets (see Section V.F.2, *infra*), were also involved in the theft from the prisoners. Several witnesses reported that Skelani platoon members were directly involved in extorting valuables from the prisoners.[129] The likelihood that troops of this caliber and with this reputation would engage in these activities in contravention of orders is small.

3. The Killing Plan: 13 July 1995

The evidence establishes that the killing plan as it was being carried out on 13 July required engagement with all three components identified by the Panel: 1) forced or induced surrender; 2) collection and transfer for killing; and 3) killing carried out, depending on location, by murder, organized multiple murder, ambush and shelling. All three of these activities had been implemented in Potočari the day before and were ongoing from 12:30 on 12 July. All three of these activities required different resources and separate coordination and all three were being carried out simultaneously on 13 July.

a. Killing

i. Ambush, Shelling, and Murder

Killings took a variety of forms on 13 July. Witnesses S1, S2, and E.H. testified to the continuation of the ambushes in the forest as they wandered disoriented after a night of artillery attacks and ambushes. They report that many people were killed and wounded. In addition, artillery fire from the road continued relentlessly. Artillery crews, equipment, and ammunition were ordered to the sites along the road, and mortars and Pragas kept up a steady barrage of shelling into the forest where the men were hiding, also causing death to members of the column. Video footage from Zoran Petrović confirms these activities and records at least one dead body along the path taken by the surrendering men. E.H. described in his testimony coming upon a place in the woods with approximately 200 dead bodies, slain by ambush. Killings also occurred on the Sandići meadow that day as described above. Troops and equipment were needed to carry out these tasks. The MUP unit and its equipment were used and were present during the ambushing, shelling and murders that occurred along the Bratunac – Konjević Polje road and the Sandići meadow on 13 July.

ii. Organized Multiple Killings

Also on that day, as on the preceding day at Potočari, organized multiple killings (execution style) occurred. Evidence of the planned and coordinated nature of these executions is apparent not only in the preparation and manpower that was necessary to affect them, but also because they were occurring in three completely different locations.

The first execution on that day occurred in Cerska Valley. Jean-René Ruez testified to interviewing a witness in the summer of 1995, who described being with "a small group of

[129] S4; Miladin Stevanović.

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men" who had become separated from the column and who, on 13 July, were on a hill above Konjević Polje overlooking the asphalt road, waiting for an opportunity to cross over. They saw three buses with people inside coming from Konjević Polje towards Nova Kasaba. The buses turned right off the asphalt and entered the Cerska Valley. The three buses were followed by an APC and then by an excavator. The witness told Ruez that he then lost sight of the vehicles as they entered the Valley, but shortly thereafter they heard intense shooting coming from the area where the convoy had headed. Approximately half an hour later, the buses returned, but they were empty. Sometime after that the excavator also left the valley. During the night the "small group" crossed the road and went into the valley. They stayed there a week and then decided to go back towards Srebrenica. On their way back, they noticed "at one point a disgusting stench. They also noticed that on the part of a hill there was soil that had been removed...."[130] Ruez corroborated the statement from the witness by personally accompanying him back to the Cerska Valley to the area from which he indicated the stench had come. Ruez personally noted shell casings at that location, as well as evidence that an excavator had removed soil from one particular place to another. On probing the land where the new earth was placed, bodies were found. The excavation of that location resulted in the exhumation of one hundred fifty bodies. Ruez memorialized the scene and the evidence with video footage.[131]

A second organized multiple killing that occurred on 13 July was at the Jadar River. Jean-René Ruez testified to his interview with a survivor of the execution, and reported that the survivor, was captured and taken to a hangar from which he and fifteen other men from the column were bused to the Jadar River. The prisoners were ordered out of the bus and told to line up on the river bank while the soldiers fired at them from behind. The survivor was shot and fell into the river, from which he later escaped. Ruez accompanied the survivor to the site which was as the survivor had described. Because of the river currents, no evidence or remains were found in that place.[132]

A third organized multiple killing that occurred on 13 July was at the Kravica warehouse.

Troops and equipment were needed to carry out these tasks. The MUP were used and were present during the multiple organized killings that occurred at Kravica.

b. Induced Surrender

An equally important part of the killing plan that was ongoing on 13 July was the inducement of the men in the column to surrender using trickery, false promises, and threats. Eyewitnesses S1, S2, and E.H. testified to hearing calls throughout the day from amplification equipment, encouraging them to surrender and promising that they would be cared for and exchanged. Most compelling to the surrender, they were told that their safety was guaranteed because the UNPROFOR was there as well. Those promises were reinforced by what the men in the column were led to believe was the presence of the UN in the area. What made this all the more convincing was the fact that Bosnian Serb soldiers, dressed in UN uniforms and riding in vehicles taken from UN personnel, were driving up and down the road in sight of the men hiding in the woods. As a consequence, several thousand Bosniaks surrendered. Adequate numbers of troops were required to receive these men, relieve them of their belongings, and guard them. Troops and equipment were needed to carry out these

[130] *Blagojević*, Testimony of 16 May 2003 ("Ruez *Blagojević* Testimony"), pgs. 439-440 (Exhibit O-243).
[131] Ruez *Blagojević* Testimony, pg. 444 (Exhibit O-243).
[132] Ruez *Blagojević* Testimony, pgs. 447-448 (Exhibit O-243).

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tasks. The MUP were used and were present during the induced surrender of thousands on Bosniak men from Srebrenica along the Bratunac – Konjević Polje road.

c. Transfer and Collection for Execution

The third activity in the killing plan was the transport of the surrendering men, in buses or trucks, or by foot, to collection and execution sites. For this task, buses with drivers and fuel had to be obtained and ordered to particular destinations, armed escorts for those transported on foot had to be assembled and instructed, collection sites needed to be procured, and guards on both the transport as well as the collection sites deployed.

All three of these component activities were being carried out simultaneously, and also while the last 15,000 women, children, and elderly were being transported from Potočari.[133] Troops and equipment were needed to carry out all of these tasks and justified the call-up of additional personnel, including the 2nd Šekovići, for this phase of the liberation. Their resubordination was clearly part of a pre-conceived plan.

d. Simultaneity

On 13 July, all of the elements that constituted the killing plan were being carried out simultaneously, by different MUP and military units and in different locations.

- Throughout the day, shelling, ambushing and forced or induced surrenders continued.[134]

- At the same time S1 and S2 were induced to surrender along the Kravica section of the Bratunac – Konjević Polje road, forced to abandon their belongings, and collected on Sandići Meadow:

    - the last of the men at Potočari were forcibly separated from their families, forced to abandon their belongings, and collected at the White House[135]; and

    - two to three thousand men were induced to surrender along the Milići Road, forced to abandon their belongings, and collected on the Nova Kasaba football field.[136]

- While S1 and S2 were held prisoner on the Sandići meadow and marched and bused to the Kravica warehouse:

    - Bosniaks were being executed in the Cerska Valley.[137]

    - Bosniaks were being executed at the Jadar River.[138]

[133] Vasić 13 July Dispatch (Exhibit O-186).
[134] *See* Sections III.B.3 and V.E.3.a.ii, *supra*.
[135] Vasić Dispatch report dated July 13 (Exhibit O-186); Franken *Krstić* Testimony, pgs. 2051, 2096 (Exhibit O-277); Deronjić Statement, paras. 198, 203 (Exhibit O-326); Nikolić Statement of Facts, section 8 (Exhibit O-246).
[136] Memorandum of Lt. Col. Milomir Savić, Report on treatment of prisoners of war, FCP 65th Motorized Protection Regiment (Exhibit O-346); Ruez *Blagojević* Testimony, pg. 397 (Exhibit O-243).
[137] *See* Section V.E.3.a.ii, *supra*.

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- Bosniaks were being bused to collection points in Bratunac to await execution.[139]

- As the Accused opened fire on the more than 1000 men in the Kravica warehouse:

  - Bosniaks were being taken out and murdered at the hangar in Bratunac.[140]

  - Bosniaks by the thousands were packed in trucks and busses and collection centers in Bratunac, without food, water, sanitation or medical care for the wounded and sick, to await execution.[141]

- At about 19:00, while the killing of the survivors at Kravica was ongoing by the unit that replaced the Accused,

  - Dragan Obrenović, Commander of the Zvornik Brigade of the VRS, was speaking on the phone with his Security and Intelligence Officer, Dragomir Nikolić, who was asking to be replaced as duty officer because Col. Popović had ordered him "to take the prisoners [collected in Bratunac] and execute them in Zvornik."[142]

As the bodies began to mount, those in authority arranged for excavators, fuelled and manned, to scoop them up and deposit them in pre-selected excavated mass graves, or cover them with earth at execution sites, or simply planned the execution so that they would be washed away in rivers.[143]

4. The Killing Plan: 14 July – 19 July 1995

In the days that followed 13 July, the killing plan continued in all its aspects. On 14 July at Kravica, at least two groups of men were brought to the front of the warehouse, where they were lined up and shot by execution squads.[144] Buses full of prisoners began pulling out of Bratunac for Zvornik late on 13 July and continued to arrive at collection and execution sites in Zvornik over the course of the next 2 days.[145]

The executions in Zvornik began on 14 July. The collection sites were located at the Grbavci School, Pilica School, Petkovci School, and the Pilica Cultural Center.[146] On the afternoon of 14 July, prisoners were taken in groups form the Grbavci School by tam truck to nearby sites in Orahovac where they were executed by gun fire.[147] Similarly those held at Petkovci school were transported in groups to the Petkovci Dam and executed throughout the

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[138] *See* Section V.E.3.a.ii, *supra*.
[139] Deronjić Statement, paras. 204, 205, and 209 (Exhibit O-326); Nikolić Statement of Facts, sections 9, 10 (Exhibit O-246).
[140] Deronjić Statement, para. 206 (Exhibit O-326); Nikolić Statement of Facts, section 11 (Exhibit O-246).
[141] Ruez *Blagojević* Testimony, pg. 484 (Exhibit O-243).
[142] *Blagojević*, Testimony of 2 October 2003 ("Obrenović *Blagojević* Testimony"), pg. 2469 (Exhibit O-245).
[143] *See* Section III.B.5 and Section V.E.3.a.ii, *supra*.
[144] Jovan Nikolić; Luka Marković.
[145] Ruez *Blagojević* Testimony, pg. 482 (Exhibit O-243).
[146] Obrenović *Blagojević* Testimony, pgs. 2535-2545 (Exhibit O-245); Butler Report, pg. L01134297 (Exhibit O-225).
[147] Ruez *Blagojević* Testimony, pg. 490 (Exhibit O-243).

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night of 14/15 July. According to Jean-René Ruez's testimony, the survivors, whom he interviewed, reported that "they were taken directly to... this rocky plateau at the bottom of a dam, where they were instructed to get off the vehicles and an execution squad was there waiting for them. They were requested to line up among the dead bodies and they were then shot."[148] The last group of prisoners transported from Bratunac to Zvornik were taken on 15 July to the Pilica School.[149] Three survivors were interviewed by Ruez, and they told how one group of prisoners was lined up and executed by firearms in front of the school directly upon their arrival, while the rest were transported by bus from the school to Branjevo Farm and escorted behind a garage, where an armed execution squad was waiting.[150] The executions at this cite were confirmed by aerial photographs from 17 July that show bodies and disturbed earth at the farm in the place where evidence of a mass grave further corroborated the victims statements. Executions from which there are no known survivors occurred on 16 July at the Pilica Cultural Center, where, like Kravica, the prisoners (an estimated 500) were fired upon while still in the building; and the Kozluk gravel pits, from which exhumation results from that location and a secondary grave have yielded the figure of 500 deaths by firearms, and for which there is confirmation through aerial photos, also confirmed by Richard Butler and introduced before the ICTY.[151]

Not only were the killings occurring simultaneously and in different geographic areas, but so were the cleanup and hiding of the bodies. On 13 July, while the Kravica victims were still on the Sandići meadow, an excavator was travelling to an execution cite in the Cerska Valley to place earth on the 150 men executed there that afternoon.[152] While buses were transferring prisoners to Zvornik for mass executions, and executions had already begun at Orahovac, excavation equipment and five to six trucks were carrying bodies from Kravica to an excavated grave in Glogova.[153] While ambushes and dog searches and summary executions were being carried out on stragglers in the woods above the road on 17 and 18 July[154], heavy equipment associated with the Engineering Company for the Zvornik Brigade was burying the dead at Orahovac, Petkovci Dam, and Kozluk.[155]

5. No Deviation from the Killing Plan

There is no question that the plan was to kill all the Bosniak men, and any deviation from that plan was not tolerated. On 15 July, the armed head of the Bosniak column, the part that had managed to cross the road, was moving toward Tuzla and had to pass by Zvornik. There was never, according to Tomislav Kovač, a consideration that the column had any plans to take the town: it was clear that all they wanted to do was escape. As Kovač described it:

> I knew that no unit which is in disarray and which is making a tactical move of withdrawing can carry out such a mission and engage in seizing another town especially because there were experienced people who led the unit, and they knew that it would not be possible to stay there after that …, it was not possible for them to stay there and they would not survive there which would

[148] Ruez *Blagojević* Testimony, pg. 504 (Exhibit O-243).
[149] Butler Report, pg. 01134342 (Exhibit O-225).
[150] Ruez *Blagojević* Testimony, pg. 528 (Exhibit O-243).
[151] Butler Report, pg. 01134298 (Exhibit O-225); Ruez *Blagojević* Testimony, pg. 517 (Exhibit O-243).
[152] *See* Section V.E.3.a.ii, *supra*.
[153] *See* Section III.B.5, *supra*.
[154] *See* Section V.E.5, *infra*.
[155] Obrenović *Blagojević* Testimony, pgs. 2499 and 2540-2545 (Exhibit O-245).

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> be their destruction, so by looking at this from a military – tactical point of view and from a distance, there was no danger.

Dragomir Vasić testified essentially to the same: that he believed the column would have passed without the use of weapons against the Bosnian Serbs if the path had been open. In a meeting held in Zvornik between Vasić and Dragan Obrenović, it was agreed that a passage should be opened to allow the column to pass in order to avoid bloodshed.

Vasić testified: "I suggested then to open our line and let the column pass. Obrenović in principle agreed with me, but he asked for approval from the army. He called someone at the Corps or Headquarters, and said that General Miletić [acting Chief of Staff of the VRS] answered and he did not approve that." Obrenović relates in greater detail the conversation with both the military leadership and the Ministry of the Interior.[156] He related Gen. Miletić's response when he suggested that they open a path for the column to escape: "He ordered me to use all the technical equipment available and that this column had to be destroyed. He objected. Why was I using this line that was not secure? And he slammed the phone. He simply disconnected the line." Thereafter, Obrenović described the conversation between Vasić and the Ministry, which he heard over the speaker phone:

> And he called somebody in Pale. I think he referred to an advisor of the Ministry of the Interior. He was calling from the civilian phone. The speakerphones were on. And the person on the other end of the line - …this person said, after Vasić… said that the column should be released, and this other man said: How did you ever get this idea? Call up the army, get the air force in, and destroy all of them.

After one unsuccessful attempt to move forward to the ARBiH frontlines on 15 July 1995, the head of the column finally managed to break through to ARBiH-held territory on 16 July 1995.[157] In an attack from Tuzla, ARBiH forces came to the rescue of the incoming column, breaking a kilometer and a half wide line.[158] Finally, after the Zvornik Brigade had suffered many casualties, on 16 July, Lt. Colonel Vinko Pandurević, commander of the Zvornik Brigade, and the Commander of the Bosniaks at the head of the column, Emso Muminović, negotiated a 48-hour cease fire to allow the head of the Bosniak column to pass through.[159]

The ceasefire did not mark a change in the determination to kill all the Bosniak men but was rather a temporary military necessity. The continued determination to kill all of the men was evident from the fact that the executions in Zvornik, at Branjevo Farm and Pilica Cultural Center, took place during these days, and killings continued in areas other than Zvornik. Groups of Bosniak men who were unable to cross the asphalt road with the armed head of the column continued to wander about in the woods above the Kravica – Konjević Polje – Kasaba road, and continued to be shot at by tanks, and pursued by the two MUP Companies from Jahorina, the platoon PJP CJB Zvornik, and "part of the forces for the Center for Dog Breeding and Training."[160] On 17 July, the passage in Zvornik for the column was closed. In the days that followed, Borovčanin reported that VRS and MUP troops continued to pursue any Bosniak men who had failed to make it through the passage, and forces were sent

[156] Obrenović *Blagojević* Testimony, pg. 2524 (Exhibit O-245).
[157] Established Fact T93.
[158] Established Fact T94.
[159] Borovčanin Resubordination Report (Exhibit O-258).
[160] Vasić 15 July Dispatch (Exhibit O-191).

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in to continue to "comb the area" for any Bosniak men in Zvornik, Cerska, Nova Kasaba, Kamenica, Johanica, Liplje, Afin Kamen, Crni Vrh, and Snagovo.[161] Those who were not killed in ambushes or by shelling were, after the 18th, according to Obrenović, "killed on the spot".[162] These men were generally not combatants. According to Obrenović, these were groups of "stragglers" numbering five to ten men.[163]

Even hospital patients were subject to disappearance. Maj. Franken testified to one such example: On 17 July he met with a Bosnian Serb delegation about the transfer of 59 Bosniak Médecins Sans Frontières patients still in the compound, and a "number of wounded" Bosniaks still in the Bratunac Serb Hospital, to "safe territory".[164] Seven men were transported "on the spot" with a Bosnian Serb "escort" to the Bratunac hospital. They subsequently disappeared. Butler reports that 23 Bosniak male patients taken to Bratunac hospital were disappeared in total, and the remainder of the patients from the compound were transported successfully by international humanitarian organizations.

In July 1995, following the take-over of Srebrenica, Bosnian Serb forces executed several thousand Bosniak men. The total number of the victims is likely to be within the range of 7,000 - 8,000 men.[165]

F. Phase Two: Eradication of Bosniaks – The Decision to use the MUP Special Police to Implement the Plan Came From the Top

That the plan was organized "from the top" was obvious by its complexity and use of resources. The Accused Trifunović told his platoon in Srednje on 11 July that there was no way to avoid their mission in the liberation of Srebrenica because the order requiring them to participate came "from the top."[166] The evidence establishes that the statement was a truthful one. The selection of the MUP Special Police for the mission in Srebrenica was not random, their presence at the Kravica warehouse on 13 July was not coincidental, and their participation in the killing plan was not an accident.

The involvement of "the top" with the MUP Special Police mission in the liberation of Srebrenica can be traced through both the civilian and military chains of command: involving Miroslav Deronjić and Dragomir Vasić on the civil side; General Mladić and Col. Ljubiša Beara on the military side; and Radovan Karadžić as both President of the Republika Srpska and Commander-in-Chief of the VRS. The evidence supports the conclusions that: 1) the order to use MUP forces in the plan came "from the top"; 2) the mission of the resubordinated MUP Special Police was devised "at the top"; 3) the activities of the resubordinated MUP Special Police were known "to the top"; and 4) the killings at the Kravica warehouse, involving some of the resubordinated MUP Special Police, were consistent with the plan generated "by the top."

1. The Order to Use the MUP Special Police came "From the Top"

[161] Borovčanin Resubordination Report (Exhibit O-258).
[162] Obrenović *Blagojević* Testimony, pg. 2497 (Exhibit O-245).
[163] Obrenović *Blagojević* Testimony, pg. 2496 (Exhibit O-245).
[164] Franken *Krstić* Testimony, pgs. 2054-57 (Exhibit O-277).
[165] Established Fact T25.
[166] S4.

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On 5 July 1995, President Karadžić met with Tomislav Kovač, Deputy Minister of the Interior and acting Minister at that time. According to Kovač's testimony, Karadžić made clear to him at this meeting that he wanted MUP troops involved in the liberation of Srebrenica. When Kovač resisted for operational and legal reasons, Karadžić went directly to Ljubomir Borovčanin. According to Kovač's testimony, Borovčanin, under heavy pressure from Karadžić and knowing of Kovač's opposition, took command of the MUP Special Police for the Srebrenica liberation.

Based on the testimony of Dragomir Stupar, logistics officer for the 2nd Šekovići Detachment of the MUP, Karadžić must have found and conferred with Borovčanin shortly after his 5 July meeting with Kovač, and in that conference must have conveyed the information that the "new mission" would not begin until after 9 July. Dragomir Stupar testified that Borovčanin ordered him to travel to Bratunac on 9 July and install the logistics base for his detachment and other MUP troops at the *Lovački Dom* restaurant. Dragomir Stupar received this order two to three days before 9 July. Stupar related a telephone call he received from Borovčanin on either 6 or 7 July in which Borovčanin ordered him to make provisions for logistical support for MUP forces that Borovčanin intended to command in the Srebrenica area after 9 July.

Dragomir Stupar further testified during the trial that prior to his receiving the call from Borovčanin, he accidentally met the Accused Miloš Stupar, commander of the 2nd Šekovići Detachment, in Šekovići. Miloš Stupar warned him two to three days before 9 July and informed him that Borovčanin would contact him soon about a new mission. Indeed, it was shortly thereafter that Borovčanin telephoned Dragomir Stupar, giving the order to set up a logistics base in Bratunac. On 9 July he went to Bratunac to carry out the order, to set up a logistics base for the 2nd Detachment and other MUP troops, at the *Lovački Dom* restaurant.

In order for Dragomir Stupar to carry out this order, he needed specific details about the mission. This is the type of information that was required by law to be provided by the commanding authority when resubordination of MUP troops to the VRS was ordered.[167] These details did not appear on the subsequent order of resubordination, Order 64/95. However, there is evidence that the details were provided to Borovčanin in advance of that order because on 6 or 7 July Borovčanin was able to instruct Stupar as to: the area of operation; the prearranged location for the logistics base; the number of troops to be supported; the approximate amount of time for which support would be necessary; the kinds of supplies that would be needed; and the amount of assistance Stupar should be prepared to take with him to help with the logistics. Borovčanin even advised Stupar as to where in Bratunac to collect fuel that had already been allocated for his task. 9 July was the day *before* the issuance of Order 64/95 that authorized the resubordination of the MUP troops to the VRS under the command of Borovčanin.

The decision as to which units were to be redeployed "was made directly by the President of the Republic, Radovan Karadžić."[168] It is apparent that by 6 or 7 July, it was already determined that part of Borovčanin's unit would include the 2nd Šekovići Detachment,

[167] Article 14 of the *Law On The Implementation Of The Law During An Imminent Threat Of War Or A State Of War* (Gazette No. 1, 19 November 1994), and Presidential Order, 22 April 1995 (Exhibit O-I-03), issued to alleviate "problems and confusions regarding the engagement of MUP in combat activities." The law required that resubordination orders "shall precisely specify the responsibilities of the commanding officers and commanders when they resubordinated to the commander of the VRS unit…."
[168] Tomislav Kovač Witness Statement.

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because Borovčanin tasked the 2nd Detachment's logistics officer with the assignment; and because someone had already informed Miloš Stupar, commander of the 2nd Šekovići Detachment, that his detachment would be involved. As has already been noted, Miloš Stupar told Dragomir Stupar to expect to be contacted by Borovčanin about a new mission even before Borovčanin actually made the contact, according to Dragomir Stupar's testimony. It is obvious from the timing of events that the mission was to be the post-military phase of the liberation of Srebrenica: Stupar was to begin to set up the logistics base on 9 July; the resubordination order was issued on 10 July; the order required that the troops report on 11 July; and the actual time that the 2nd Detachment was ordered to leave Srednje was after 20:00 on the night of 11/12 July.

Kovač testified that he continued to oppose the redeployment and purposely made himself unavailable to the President when it came time to sign Order 64/95, forcing Karadžić to find a subordinate authorized to sign Kovač's name. Kovač denied that he knew the use to which the MUP would be put, but his further testimony undercuts his denial. When asked to explain his resistance to his president, and his reason for making himself unavailable to sign the resubordination order, he said that he disagreed as a tactical matter with withdrawing troops from the Sarajevo front, where they were badly needed, and sending them to Srebrenica, where they were not needed for the military takeover. However, for a deputy minister to have gone to such lengths to defy his president over a disagreement as to which front was most in need of military support is not credible. His additional explanation is much more revealing, and he testified: "This time I also hoped that as long as there were no agreements with me, that we are buying time, that I would not have to send them out, to withdraw some units and it was a matter of days, I mean, if we had managed to hold it for two more days we could have pulled through this." Two days would not have meant any difference to the Sarajevo front, but two days (12 and 13 July) were precisely the period in which the MUP units found themselves engaged in major crimes in Phase Two of the Liberation of Srebrenica.

2. Importance of the MUP Special Police

The MUP Special Police were known to be well-disciplined and professional military units. Miroslav Deronjić, apparently not realizing that Karadžić had already made plans to use Borovčanin and MUP troops in the liberation of Srebrenica, urged the president to do so in his meeting with Karadžić on 9 July. Deronjić described his conversation with Karadžić on 9 July in his interviews with Jean-René Ruez, later summarized and made part of Deronjić's sworn ICTY statement. According to Deronjić, he and Karadžić first discussed the future of the safe area, and the president told Deronjić that he favored the takeover of the entire safe area (described by Deronjić as Variant B). Karadžić then asked for Deronjić's opinion as to how many Bosniaks were living in Srebrenica and what should become of them. It is within this context that Deronjić suggested to Karadžić: "If they intended to enter Srebrenica then it was indispensible to bring a serious military unit into the area. I told Karadžić frankly that I had confidence in Ljubiša Borovčanin as a man and in his military abilities. Karadžić agreed in principle with my opinion, but he explained to me quickly that this unit was engaged in the Sarajevo front…."[169] Deronjić pointed out to Karadžić that the MUP Special Police, in his opinion, were needed for an operation like the liberation of Srebrenica because they were

[169] Deronjić Statement, para. 172 (Exhibit O-326).

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"real soldiers", whereas the other troops involved in the liberation of Srebrenica, except for the Drina Wolves, "were just ordinary people."[170]

Deronjić was not alone in his high opinion of the MUP Special Police. Borovčanin explained in his ICTY statement that the MUP Special Police were trained to do "complex police tasks".[171] Kovač confirmed in his testimony before this Court that the MUP troops Karadžić wanted to pull out from the Sarajevo front and send to Srebrenica were "the most elite forces." Kovač testified that the MUP Special Police were repeatedly used for significant combat operations throughout the war.[172] The 2nd Šekovići Detachment in general and the 3rd Skelani Platoon in particular had excellent reputations. Many in the platoon had been together since the platoon was established under the authority of the Ministry of the Interior in Spring 1993.[173] Before that, some of these same men had been members of the Red Berets, formed 8 June 1992. Five of the Accused began their service together in the Red Berets.[174] Deronjić said of the Red Berets that they were set up in 1992 and trained by instructors and commanders from Serbia. "Twenty to thirty of the best young men were supposed to be recruited at municipal level for training."[175] The first Red Beret unit was set up in Skelani and they were "the youngest and most capable young men."[176]

Members of the Skelani platoon likewise attested to the level of discipline and organization within that platoon. In his statement, Mirko Sekulić, who had served in the platoon, remarked that the reason he joined the Skelani Platoon was because of their reputation for order and good organization. The platoon had a reputation for discipline, and two other former members, Nebojša Janković and Ljubiša Bečarević confirmed that. They described that principles of command and control were in place in the platoon, and that orders, though not originating at the platoon level, were always issued by the platoon commander and every operation needed an order. Nebojša Janković testified that the Accused Trifunović was the well-respected commander of the Skelani platoon, and that "no one disobeyed Čop."

Karadžić's insistence that he have the MUP forces, and his selection of the 2nd Šekovići Detachment, evidenced a recognition on his part that the tasks that were necessary in Srebrenica at that given time required the use of trained, experienced, and well-disciplined troops. The 2nd Šekovići Detachment, and the 3rd Skelani platoon in particular, met those requirements, and their members had earned their reputation as military professionals with a history of working together and obeying orders. It is reasonable to conclude that these were men who could be counted on to follow orders and complete difficult tasks in a professional manner. They were not men who would be likely to act on whim or impulse.

3.The Mission of the MUP came "From the Top"

Borovčanin and his unit did not act independently in the Srebrenica area. Their tasks were ordered "from the top" by the military structure and monitored "from the top" by the civilian structure. Those tasks were consistent with the plan to eradicate the Bosniaks of Srebrenica.

[170] Deronjić Statement, para. 171 (Exhibit O-326).
[171] Borovčanin February 2002 Statement, pg. L0068842 (Exhibit O-337).
[172] Butler Report, para. 215 (Exhibit O-225).
[173] Report on Establishment of a Special Purpose Unit (Exhibit O-344).
[174] Milenko Trifunović, Aleksandar Radovanović, Velibor Maksimović, Dragiša Živanović, and Petar Mitrović. Report on Establishment of a Special Purpose Unit (Exhibit O-344).
[175] Deronjić Statement, para. 138 (Exhibit O-326).
[176] Deronjić Statement, para. 139 (Exhibit O-326).

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a. Civilian Structures

Miroslav Deronjić, Civilian Commissioner for Srebrenica, was "the top" civil officer in Srebrenica. He was answerable directly to the president of the RS, Radovan Karadžić, who appointed him. Already a leader in Bratunac, and member of the SDS Main Board since Summer 1993,[177] Deronjić's selection as Commissioner was announced to the media by Karadžić on 11 July, at the same time as the Bosnian Serb victory in Srebrenica was made public. From 11 July on he had free access to Karadžić and was in "constant" contact with the President, according to his own statement, in which he reveals several radio and telephone conversations, as well as direct meetings with the president in Pale on the evening of 11/12 July[178] and again on the morning of 14 July.[179] His close relationship with Karadžić as well as his ongoing communication with the President during these days is confirmed in the statements of Borovčanin and the testimony before this court of both Vasić and Kovač.[180] Deronjić was accepted as the civilian representative of the President.[181] As Kovač testified of Deronjić, "Those days he was constantly with the president, and intensively giving him the security information and all other information."

Although Borovčanin and the MUP Special Police were not technically within any official civilian reporting hierarchy during their resubordination to the VRS, Borovčanin nonetheless was frequently with Deronjić, and Deronjić reported that Borovčanin was a source of information. Borovčanin reported being in Deronjić's headquarters on 12 July[182], and Deronjić confirmed that Borovčanin was one of the people who relayed news to him on that day about the enclave.[183] On 13 July, Borovčanin was cited by Deronjić as one of the people who told him that "Muslims were being captured and liquidated in Konjević Polje." It was Borovčanin who told Deronjić that Mladić had issued the order for the troops to set out for Žepa on 14 July; and Borovčanin briefed Deronjić on the killings at Kravica.[184] Likewise Dragomir Vasić, Chief of the Zvornik Regional Public Security Center, was in no command or control hierarchy that officially included the resubordinated MUP Police. However, Vasić reported the tasks and performance of the resubordinated MUP troops in his dispatches to the Ministry of the Interior in Pale.[185] It was to Vasić that Borovčanin personally presented the report he prepared covering the period during which he commanded the Special Police unit constituted under Order 64/95.[186]

b. Military Structures

General Mladić, Commander of the VRS Main Staff, was "the top" military officer in Srebrenica. He was answerable to the Commander-in-Chief, President Karadžić. His appearance in the Srebrenica area was first noted on 10 July[187], and thereafter he became the major focus of the military victory, directing the cameras through the streets of Srebrenica;

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[177] Deronjić Statement, para. 2 (Exhibit O-326).
[178] 21 October 1999 Statement of Miroslav Deronjić, pg. L0080913 (Exhibit O-326).
[179] Deronjić Statement, para. 212 (Exhibit O-326).
[180] Borovčanin March 2002 Statement, pg. L0066380 (Exhibit O-337).
[181] Borovčanin March 2002 Statement, pg. L0066304 (Exhibit O-337).
[182] Borovčanin February 2002 Statement, pg. L0068900 (Exhibit O-337).
[183] Deronjić Statement, para. 197 (Exhibit O-326).
[184] Deronjić Statement, paras. 200, 202, 205 (Exhibit O-326).
[185] Vasić Dispatches of 12 and 13 July (Exhibits O-184, O-185, and O-186).
[186] Borovčanin Resubordination Report (Exhibit O-258); Dragomir Vasić.
[187] Butler Report, para. 12.2 (Exhibit O-225).

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and the man in charge of Phase Two of the eradication of the Bosniaks, conducting the three Hotel Fontana meetings, and appearing to be "in charge" both on and off camera. Borovčanin stated in his Resubordination Report that as of 11 July, General Mladić "personally commanded over the operation." As head of the Main Staff, he topped a command structure in that geographic area that included in descending order: the Drina Corps, commanded by General Milenko Živanović and then General Radislav Krstić; the brigades of the Drina Corps, including the Bratunac Brigade, commanded by Colonel Vidoje Blagojević; and the Zvornik Brigade commanded by Lt. Col. Vinko Pandurević, whose deputy, in Pandurević's absence, was Major Dragan Obrenović.

However, there was also what Borovčanin described as a parallel hierarchical structure: the Security and Intelligence organs that operated both within the Main Staff, Corps and Brigade levels, but also coordinated together in a hierarchy that extended from the Main Staff through the Corps and throughout the Brigades.[188] Gen. Mladić was "the top" of both hierarchies, and through them he ordered the implementation of phase two of the Liberation of Srebrenica. Those officers within the Security and Intelligence hierarchy whom the evidence established were present and participated in the activities at Srebrenica at the operative time were: Colonel Radislav Janković, Intelligence Officer for the VRS Main Staff, who was seen with Gen. Mladić throughout the Fontana meetings[189] and Colonel Ljubiša Beara, VRS Chief of Security for the VRS Main Staff, whom Borovčanin reported seeing in Bratunac on 12 July and who was active in implementing the killing plan.[190] At the Drina Corps level were Lt. Col. Vujadin Popović, Assistant Commander for Security, and Lt. Col. Svetozar Kosorić, Chief of Intelligence. At the Brigade levels, Captain Momir Nikolić was Assistant Commander for Security and Intelligence for the Bratunac Brigade and Lt. Dragomir Nikolić was Assistant Commander for Security for the Zvornik Brigade. They in turn had subordinates whom they tasked as well. It was this hierarchy that was tasked with primary responsibility for the plan to eradicate the Bosniaks of Srebrenica.

The evidence showed that this hierarchy interacted in a highly coordinated manner using exclusively verbal orders. The following are but a few examples. Lt. Colonels Popović and Kosorić first verbally tasked Momir Nikolić with coordinating the forcible transfer and killing on the morning of 12 July, soon after the conclusion of the meeting at which Mladić assigned tasks for that day.[191] Popović called Dragomir Nikolić in the evening of 13 July to pass to him the order from Mladić to locate execution and collection sites for prisoners who were being bused to his location.[192] Colonel Beara a few hours later verbally ordered Momir Nikolić to go to Zvornik and meet with Dragomir Nikolić to confirm Popović's order and further coordinate the killing activity in Zvornik.[193] Col. Beara arrived in Deronjić's office also on the night of 13 July, telling Deronjić he was there on Mladić's order and that all of the male prisoners were to be killed.[194] Popović told Momir Nikolić in September that the Main

[188] Borovčanin February 2002 Statement, pg. L0068886 (Exhibit O-337); Borovčanin March 2002 Statement, pgs. L0066306-L0066307 (Exhibit O-337); Butler Brigade Report, paras. 3.17-3.18 (Exhibit O-226).
[189] Video Footage (Exhibit O-193); Butler Report, para. 12.8 (Exhibit O-225).
[190] Borovčanin February 2002 Statement, pg. L0068900 (Exhibit O-337).
[191] Dragomir Vasić, Dispatch Note No. 277/95 (Exhibit O-259).
[192] Dragan Obrenović, Statement of Facts and Acceptance of Responsibility ("Obrenović Statement of Facts") (Exhibit O-245).
[193] Nikolić *Blagojević* Testimony, pgs. 1744, 1745 (Exhibit O-246).
[194] Deronjić Statement, para. 209 (Exhibit O-326); Dragomir Vasić; Nikolić *Blagojević* Testimony, pg. 1751 (Exhibit O-246); Borovčanin March 2002 Statement, pg. L0066304 (Exhibit O-337).

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Staff ordered him to rebury the bodies of the Bosniaks killed in Bratunac and Zvornik, and he enlisted Nikolić's assistance.[195]

It was into this parallel hierarchy that Borovčanin and the resubordinated MUP Special Police were folded. Order 64/95 required Borovčanin to report to General Krstić for resubordination. However, according to Borovčanin, when he attempted to reach General Krstić by phone on the afternoon of 11 July, his call was diverted to General Mladić, who said to him, "Don't try to avoid anything, but do your tasks."[196] Thereafter, also according to Borovčanin, all of the orders he received came from Gen. Mladić. All were verbal orders. Some of those orders Borovčanin claimed were delivered to him from Mladić personally.[197] However, Gen. Mladić also conveyed orders through other members of the command chain to Borovčanin. The Panel finds it significant that those orders were not communicated through the Corps or Brigade command structure. Instead, Gen. Mladić chose to pass these orders through the Security and Intelligence organs, and according to Borovčanin, most of the orders came through Momir Nikolić.[198] When asked specifically by the ICTY investigator, "Were you coordinated with any Commanders of the Bratunac Brigade Troops?" Borovčanin responded: "No, I just saw Momir Nikolić."[199] Momir Nikolić's task on 12 and 13 July was to coordinate the eradication of the Bosniaks of Srebrenica through forcible transfer and killing. Use of Nikolić as the conduit through which Mladić issued particular tasks to Borovčanin to be performed by the MUP troops under his command confirms not only that the orders "came from the top", but that they involved tasks that fell within Nikolić's mission: to coordinate the eradication of the Bosniaks of Srebrenica.

4. Activities of the MUP were known "To the Top"

The military and the civilian "tops" were not working independently. Miroslav Deronjić and Dragomir Vasić were frequently together.[200] Vasić also was meeting with Mladić on the mornings of 12 and 13 July when tasks were distributed, and he was reporting to Pale to the Ministry of the Interior about those tasks and how they were being carried out by the MUP in that area, including not only the police units from Zvornik but also those Special Police units that were resubordinated under Borovčanin's command.[201] Deronjić was in "constant" contact with Karadžić and frequently received information from Borovčanin. Although Kovač testified to the rivalry between Mladić and Karadžić, there is evidence that these two were also communicating and coordinating the implementation of the plan. An example that communication flowed between Karadžić and Mladić was the arrival of Colonel Beara in Deronjić's office on the night of 13 July in response to Karadžić's promise to Deronjić that, "I will send a man who has instructions as to what has to be done."[202] On that occasion Beara declared that all the prisoners had to be killed.[203] All of this shows an organizational structure in which those "at the top" engaged in effective and frequent communication and coordination during the operative time.

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[195] Nikolić *Blagojević* Testimony, pg. 1767 (Exhibit O-246).
[196] Borovčanin February 2002 Statement, pg. L006886634 (Exhibit O-337).
[197] Borovčanin Resubordination Report, 11 and 12 July (Exhibit O-258).
[198] Borovčanin February 2002 Statement, pgs. L0068885-L0068886 (Exhibit O-337); Borovčanin March 2002 Statement, pgs. L0066296, L0066335 (Exhibit O-337).
[199] Borovčanin March 2002 Statement, pg. L0066306 (Exhibit O-337).
[200] Dragomir Vasić; Deronjić Statement, paras. 197, 198, and 200 (Exhibit O-326); Borovčanin February 2002 Statement, pg. L0068874 (Exhibit O-337).
[201] Vasić Dispatches of 12 and 13 July (Exhibits O-184, O-185, and O-186).
[202] Deronjić Statement, para. 206 (Exhibit O-326).
[203] Deronjić Statement, para. 209 (Exhibit O-326).

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The activities of the men "at the top" on the afternoon and evening of 13 July are therefore relevant to the events that occurred at the Kravica warehouse at that time. The most prominent military representative of the "top" was of course General Mladić. There is overwhelming evidence that around 12:00, or somewhat later, Mladić showed up at Sandići meadow, where at that time a considerable number of prisoners were held. According to witness testimony, Mladić stayed there for about 10 or 15 minutes, addressing the prisoners and telling them that no harm would befall them, that they would be safe. After making this speech, he was seen in the company of several other officers, including Borovčanin. Dragomir Stupar testified further to observing Borovčanin and Mladić conversing together. Mladić then left in the direction of Konjević Polje. Momir Nikolić testified before the ICTY that on 13 July, he drove from Bratunac to the crossroads at Konjević Polje where he saw a number of captured Bosniaks, totaling about 200-250, who were being kept in some houses and buildings and on a meadow. Mladić arrived at about 13:15 and Nikolić reported to him on the crossroads. As he had at Sandići, Mladić addressed the prisoners at the meadow, telling them that they would be safe and that they would be transferred to ARBiH-held territory.[204]

Nikolić, having learned of the killing plan from Lt. Col. Popović the previous day, found the speech somewhat confusing.

> When he completed that speech, in the middle of the road where I had reported to him, I asked him: "General, sir, what is going to happen to these men?" And he simply gestured. He didn't say anything. With his hand in answer to my question, he waved his hand and showed me what would happen. I understood that to mean that those men would be killed. Actually, I saw that to be a confirmation of what was already happening.[205]

Later that afternoon, Borovčanin was seen by S4 at the Kravica warehouse, observing the killing for a few minutes and then leaving the scene. The killing continued for more than an hour after Borovčanin's departure. Ilija Nikolić testified that he saw and spoke with a person whom Momir Nikolić confirmed was Col. Beara at a place 400 meters away from the Kravica warehouse, during the killing. They exchanged comments about the killing while the firing of weapons and explosions of grenades from Kravica were clearly audible. Kovač testified that he encountered Mladić on the afternoon of 13 July at the Drina Corps Command in Vlasenica. While there he heard Mladić speaking on the radio, ordering preparations for the burial of bodies.[206] Deronjić, the most prominent on-site civilian representative of the "top", admitted in his statement that in the afternoon of 13 July, while the killings were still going on, he "received a report" of the massacre at the Kravica warehouse. Thereafter, he further admitted, he was briefed on the details of the killings at Kravica by Borovčanin. Since he reported on this briefing to Karadžić on the morning of 14 July, when he traveled to Pale to see the President[207], it is clear that the briefing with Borovčanin took place either late on 13

[204] Nikolić *Blagojević* Testimony, pgs. 1712-1719 (Exhibit O-246).
[205] Nikolić *Blagojević* Testimony, pg. 1718 (Exhibit O-246). In his March 2002 Statement, pg. L0066347, Borovčanin attests to seeing Nikolić at the meadow when Mladić gave the speech (Exhibit O-337).
[206] Vasić testified that Kovač had told him that at this meeting he heard Mladić order the killings at Kravica; however Kovač denied hearing anything except the order regarding the burial of bodies.
[207] Deronjić Statement, para. 212 (Exhibit O-326).

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July or early on 14 July, probably before the final executions at Kravica were concluded.[208] The proximity in time and location of these particular people to the killings at the Kravica warehouse supports the conclusion that the executions carried out by members of the resubordinated MUP Special Police were known and condoned "by the top".

5. The Killings at Kravica were Consistent with the Plan "By the Top"

Miroslav Deronjić, the top civil officer in Srebrenica, believed there was a plan "from the top" to have all of the prisoners killed in the Bratunac area.[209] It was to Deronjić that Karadžić had made the comment on 9 July in reference to the Bosniaks of Srebrenica: "Miroslav, they should all be killed." Deronjić had reason to remember this comment on 13 July when he learned of the killings at Kravica, the "liquidations" along the Konjević Polje road, the killings at the Vuk Karadžić school, and the presence of thousands of prisoners bused in from Potočari and areas around Bratunac and even from Milići municipality. He stated in his ICTY summary: " I remembered what Karadžić told me in Pale on the 9th and I thought they would kill them in Bratunac."[210] It is clear from Deronjić's statement that he never doubted that these men would be killed. His concern was that they not be killed in Bratunac.

That he was correct in his fear that they would be killed in Bratunac is supported by the fact that the killings had already begun there, as well as by his encounter with Colonel Beara on the night of 13 July. Beara expressly confirmed that he was there to see that the prisoners were killed. Even though Beara had already made plans to transport prisoners to Zvornik[211], he nonetheless insisted to Deronjić that there would be additional executions in Bratunac.[212] On 14 July, after some of the prisoners had begun their journey to Zvornik collection and execution sites, the evidence shows that additional prisoners were taken to the Kravica warehouse and executed (see Section III.B.5, *supra*). In the early morning of 14 July, Col. Beara visited the Bratunac brickyard to look at possible execution sites near Bratunac in addition to the Kravica warehouse. Upon Deronjić's continued insistence that all further killings be done elsewhere, Col. Beara capitulated and all the prisoners were eventually sent to Zvornik.[213]

It has been argued by the defense for all the Accused that there was no preconceived plan to execute the prisoners prior to Colonel Beara's arrival at Deronjić's office late on the night of 13 July, and that the VRS had little choice as of the evening of 13 July but to execute the

[208] In addition to the Kravica survivors who S1 and S2 testified continued to be executed throughout the night and early morning of 13/14 July, Luka Marković testified that he saw an additional ten prisoners brought to the front of the warehouse by soldiers at around 08:00 and shot execution style, and Jovan Nikolić testified to seeing another twenty prisoners similarly brought to the warehouse and killed after 09:30 on the morning of 14 July.
[209] Deronjić Statement, para. 205 (Exhibit O-326).
[210] Deronjić Statement, paras. 200-205 (Exhibit O-326).
[211] In the early evening of 13 July, Lt. Col. Popović spoke to Dragomir Nikolić by phone and conveyed the order that several thousand prisoners would be transported to Zvornik and he was required to secure temporary collection and execution sites. Dragan Obrenović in his Statement of Facts and in his testimony confirmed that Dragomir Nikolić called him around 19:00 with this information, asking to be relieved as duty officer. Obrenović *Blagojević* Testimony, pg. 2469 (Exhibit O-245). A short time later, Col. Beara ordered Momir Nikolić to drive to Zvornik and meet with Dragomir Nikolić and coordinate with him. Nikolić *Blagojević* Testimony, pgs. 1744, 1745 (Exhibit O-246). These events had already occurred when Colonel Beara went to Deronjić's office.
[212] Deronjić Statement, para. 209 (Exhibit O-326); Dragomir Vasić; Nikolić *Blagojević* Testimony, pg. 1751 (Exhibit O-246).
[213] Deronjić Statement, para. 211 (Exhibit O-326).

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prisoners because the numbers were so overwhelming: they created a security risk for the Serb civilians; there was no way to feed and house and care for the prisoners; and the situation was "chaotic". The evidence does not support this interpretation of events. The number of prisoners was actually less than had been hoped, since the orders were to capture all Bosniak men at Potočari and all those fleeing in the column, a known number (see Section V.E, *supra*). Likewise, the Bosnian Serbs were not faced with a situation in which they had underestimated the amount of food, water, sanitation, shelter, and medical assistance that would be required for the Bosniak prisoners that were being forced or induced to surrender. There never was *any* preparation or intention to provide *any* prisoner with food, water, adequate shelter, sanitation or medical care (see Section V.E.2.b, *supra*). Nor can the situation be seen as chaotic from an organizational perspective. There was in place the organization and manpower to systematically and effectively transport thousands of prisoners to Zvornik, secure them in designated collection sites, kill them at designated execution sites, and bury them in designated mass graves. It would have required considerably less effort and fewer resources to transport the prisoners in those same buses and trucks to Kladanj, just as it would have required considerably less effort and fewer resources to provide a corridor through which the remaining members of the column could reach Tuzla. These options were never considered. Col. Beara was not expressing a new plan, brought about by the exigencies of unexpected circumstance, but simply confirming the existing plan when he announced to those assembled in Deronjić's office on the night of 13 July:

> Mr. Deronjić, I have an order from the top, an order from the top, to kill the prisoners.[214]

G. Genocide was Committed in Srebrenica in Accordance with this Plan

Based on the facts adduced and reasoned above, the Panel concludes that there was a plan to destroy a protected group in part, perpetrated against the Bosniaks in Srebrenica by the Bosnian Serb forces, and implemented by forcibly transferring the women children and elderly and killing the males.

That these acts were carried out with genocidal intent can be inferred from the following factors, *inter alia*, which have been identified by international tribunals as relevant to this analysis: the number of victims; the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the systematic and methodical manner of killing; the weapons employed and the extent of bodily injury; the methodical way of planning; the targeting of victims regardless of age or sex; the targeting of survivors; and the manner and character of the perpetrator's participation.[215] The victims in this case were the 40,000 men, women, and children targeted solely because they were Bosniaks. Their destruction was systematically and methodically planned and relentlessly carried out over several days, during which they were indiscriminately targeted, first by the disproportionate shelling on the town and on the road to Potočari, and then by treatment that made their continued life in Srebrenica an impossibility and their exit from Srebrenica a horror. The intended and inevitable personal consequences could only be death, and irreparably shattered

[214] Deronjić Statement, para. 209 (Exhibit O-326).
[215] *See, e.g., Kayishema and Ruzindana* Trial Judgment, paras. 93, 531-540; *Prosecutor v. Athanase Seromba*, ICTR-2001-66-T, Judgment, 13 December 2006, para. 320; *Prosecutor v. Goran Jelisić*, IT-95-10-A, Judgment, 5 July 2001, paras. 47-49; *Akayesu* Trial Judgment, para. 523; *Rutaganda* Trial Judgment, para. 399; *Cyangugu* Trial Judgment, paras. 689-690.

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lives. The intended and inevitable collective consequences could only be destruction of a substantial part of the protected group.

The Panel concludes that consistent with the genocidal plan described above, genocide was committed in Srebrenica.

In so concluding, the Panel is in accord with the conclusions reached by the ICTY in the *Krstić* and *Blagojević* cases and the ICJ in the case of *Bosnia and Herzegovina v. Serbia*.

The Trial Chamber in *Krstić* relied primarily upon evidence establishing that there was a concerted attempt to kill "the Bosnian Muslim men of military age, regardless of their civilian or military status."[216] The Trial Chamber implicitly recognized that this fact excluded a military or security rationale for the killings, highlighting that "the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society."[217] The Trial Chamber further recognized that the eradication of the Bosniak male population of Srebrenica proceeded hand in hand with the forcible transfer of "the remainder of the Bosnian Muslim population present at Srebrenica, some 25,000 people, …to Kladanj." Accordingly, the Trial Chamber concluded that "[t]he Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica."[218] Finally, the Trial Chamber considered that the concealment and reburial of the bodies of the massacred Bosniak men also strongly indicated the intent to destroy the group.[219]

The Trial Chamber in *Blagojević* adopted the same approach and conclusion, holding: "The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group."[220] The Trial Chamber specifically noted that "[t]he separation of the men from the rest of the Bosnian Muslim population shows the intent to segregate the community and ultimately to bring about the destruction of the Bosnian Muslims of Srebrenica."[221] The Trial Chamber also explained:

> The forcible transfer of the women, children and elderly is a manifestation of the specific intent to rid the Srebrenica enclave of its Bosnian Muslim population. The manner in which the transfer was carried out – through force and coercion, by not registering those who were transferred, by burning the houses of some of the people, sending the clear message that they had nothing to return to, and significantly, through its targeting of literally the entire

[216] *Krstić* Trial Judgment, para. 594. *See also Id.*, para. 547 ("a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately").
[217] *Id.*, para. 595. *See also Krstić* Appeal Judgment, para. 26 ("Though civilians undoubtedly are capable of bearing arms, they do not constitute the same kind of military threat as professional soldiers. The Trial Chamber was therefore justified in drawing the inference that, by killing the civilian prisoners, the VRS did not intend only to eliminate them as a military danger.")
[218] *Krstić* Trial Judgment, para. 595.
[219] *Id.*, para. 596.
[220] *Blagojević* Trial Judgment, para. 677.
[221] *Id.*, para. 674.

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> Bosnian Muslim population of Srebrenica, including the elderly and children – clearly indicates that it was a means to eradicate the Bosnian Muslim population from the territory where they had lived.[222]

The International Court of Justice likewise concluded:

> [T]he acts committed at Srebrenica falling within Article II (a) and (b) of the [Genocide] Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.[223]

[222] *Id.*, para. 675.
[223] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)*, Judgment of 26 February 2007, para. 297.

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VI. THE ACCUSED – GENOCIDAL INTENT

The context in which the Accused acted, taken together with an analysis of those acts, can establish the intent with which the acts were committed.[224] In this case, the context in which the Accused acted when they killed hundreds of Bosniak men at the Kravica warehouse was the larger context: the genocidal plan discussed above. Their knowledge of that context is evidenced by two circumstances: 1) what they *heard* of the plan while still at Srednje on 11 July (Section VI.A); and 2) what they *saw* of the plan in its implementation while on their mission in the Srebrenica area on 12 and 13 July (Section VI.B). When the acts of the Accused were viewed in light of their knowledge of the context (Section VI.C), the Panel concluded beyond doubt that the intent with which the acts were committed was the aim to destroy a protected group, in whole or in part.

A. The Accused knew the Basic Elements of the Genocidal Plan

There is no requirement under law that genocide involve a plan. Where such a plan exists, the extent to which the accused know of the plan is relevant to the question of genocidal intent, that is, as to whether they acted with the aim to destroy a protected group. A perpetrator need only "*seek* to achieve the destruction in whole or in part" of a protected group.[225] Likewise, the necessity of establishing genocidal intent does not in turn demand proof that the group was destroyed in fact.[226] While destruction in fact may certainly provide evidence of genocidal intent, it is assuredly not necessary to establish that the perpetrator, alone or together with others, successfully realized his aim to destroy the group. Failed attempts at genocide do not relieve the perpetrators of responsibility for their acts of genocide.[227]

Of course, the consequences of the principal perpetrator's actions are a relevant evidentiary consideration with respect to genocidal intent, but proof that the principal perpetrators, by their acts alone, did not or could not achieve the destruction in whole or in part of the protected group is legally irrelevant. One act, if the perpetrator performed it with the aim to destroy the protected group, is theoretically sufficient, even if the aim was an unrealistic one. On the other hand, whether or not the aim could be realistically achieved is relevant in determining whether the act was committed with such an aim. The killing of several hundred Bosniak men in isolation could in fact be committed with the aim to destroy the protected

[224] *Kayishema and Ruzindana* Trial Judgment, para. 93. *See also Rutaganda* Appeal Judgment, para. 525 ("In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from the relevant facts and circumstances"); *Cyangugu* Trial Judgment, para. 663; *Semanza* Trial Judgment, para. 313; *Akayesu* Trial Judgment, para. 523; *Krstić* Appeal Judgment, para. 34 ("Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime"); *Jelisić* Appeal Judgment, para. 47 ("As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive discriminatory acts").

[225] *Jelisić* Appeal Judgment, para. 46 (emphasis added).

[226] *See Brdjanin* Trial Judgment, para. 697; *Prosecutor v. Milomir Stakić*, IT-97-24-T, 31 July 2003, para. 522.

[227] *See* 1996 ILC Report, pg. 46 ("The article clearly indicates that it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.").

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group of Srebrenica Bosniaks, depending on the other evidence adduced. However, if the killing was committed in the context of a larger plan to destroy the group by transferring the women, children, and the elderly and killing all of the men, and the perpetrators were aware of that context, the killings would constitute a realistic contribution to the goal of the plan and render the goal more achievable. It would also be a relevant, although not decisive, factor in considering the intent of the perpetrators. As the plain meaning of Article 171 makes clear, it is not required that the perpetrator act pursuant to or in furtherance of a plan or policy to commit genocide.[228] However, the existence of a plan or policy to commit genocide and the perpetrator's knowledge of that plan or policy is a highly relevant evidentiary consideration in determining intent.[229]

The plan as described by S4 and as known to the Accused in the Skelani platoon on July 11 was a rudimentary version of the larger plan that was formulated by the political and military leaders of RS. "[I]t is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy."[230] What they did know of the plan, and the context, was sufficient for them to understand the significance of the killing of hundreds of Bosniak men and boys at Kravica and it is therefore relevant to the Panel in assessing the intent with which they committed that act. The credibility of S4 has been reviewed in Section II.B, *supra*, regarding the incidents that he described and the *actus reus* of the offense. The Panel for the same reasons discussed above, also finds him a credible witness to what the Accused knew and spoke about of the plan for the "liberation" of Srebrenica.

S4 in his statement given to the Prosecutor on 22 May 2008, his direct examination on 29 May 2008, and his cross-examination on 11 June 2008, was absolutely consistent about what he and the other Accused in the platoon knew when ordered to pull out of their assignment at Srednje. On all three occasions, subject to cross-examination by all eleven Accused and defense teams on 11 June, S4 remained clear and consistent on this point. Specifically, he asserted that he and the other members of the Skelani platoon, including the platoon commander Trifunović, spoke together while still in Srednje and learned that they were being redeployed from the Sarajevo front lines to the Srebrenica area and that their mission would be the "liberation of Srebrenica". He further asserted, consistently and without wavering, that the liberation of Srebrenica as they understood it had the goal of permanently eradicating the Bosniak population from what had been the Safe Area, and that the method of eradication was the killing of the men and the forcible transfer of the women, children, and the elderly to areas outside those held by the RS. Furthermore, S4 was consistent in his assertion that this was confirmed impliedly by the platoon commander, Trifunović, who ordered that this was "not to be spoken of" outside the detachment and expressly stated that this mission was ordered "from the top", mentioning Ljubomir Borovčanin, deputy commander of the Special Police Brigade, in that context as well.

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[228] *See Jelisić* Appeal Judgment, para. 48 ("The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime."). *See also Kayishema and Ruzindana* Trial Judgment, para. 94. *Cf.* Article 211-1 of Code Pénal Français ("Genocide occurs where, *in the enforcement of a concerted plan* aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion…") (emphasis added).

[229] *See, e.g., Prosecutor v. Edouard Karemera, et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 36 ("Whether genocide occurred in Rwanda is of obvious relevance to the Prosecution's case; it is a necessary, although not sufficient, part of that case. …[T]he fact of the nationwide campaign is relevant; *it provides the context for understanding the individual's actions*.") (emphasis added).

[230] *Kayishema and Ruzindana* Trial Judgment, para. 94 (citing Virginia Morris and Michael Scharf, The International Criminal Tribunal for Rwanda, pg. 168 (1998)).

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S4's testimony is corroborated by its accuracy when tested against the larger plan itself, which the Panel finds to be genocidal and as described in Section V, *supra*. It is also corroborated by other contemporaneous events and evidence: 1) the timing of that knowledge; 2) the content of the knowledge shared among the Accused; 3) the manner in which the knowledge was communicated; and 4) the reaction of the other platoon members to the information.

1. Timing

S4 testified that the Platoon discussed among themselves their mission in the Liberation of Srebrenica on the day that they were ordered to leave the Srednje front line and redeploy to Srebrenica. He was uncertain as to the date. However, Marko Aleksić testified that, as acting platoon commander of the 1st Platoon of the 2nd Šekovići Detachment, he was told by Čuturić on 11 July that they would be redeployed to the "Srebrenica Zone". This timeframe is likewise confirmed by Ljubiša Bečarević, who in his statement (Exhibit O-57), confirmed by his testimony at the main trial, stated that in the evening hours of 11 July, they were ordered to deploy to Bratunac. The Accused Radovanović also admitted that the order for redeployment came on 11 July, although he denies having been told that they were being sent to Srebrenica to take part in the "liberation". He said that the Platoon had been in the trenches at Srednje and they received the radio order to return to their base in Srednje around 7 or 8 in the evening, at which time they were given the redeployment order.

This timing comports with the content of redeployment Order 64/95, which orders that the 2nd Šekovići Detachment "will start out toward the destination [Srebrenica sector] in the afternoon of 11 July." Borovčanin confirmed that the 2nd Detachment in fact left Srednje the night of 11 July and arrived at Bratunac at 03:00 on 12 July.[231] The Accused Džinić, in his 22 June 2005 statement to the Prosecutor (Exhibit O-322), confirmed this: "My unit was, based on an order, transferred, one of those days, to the area of Bratunac, and, I think on 12 July we arrived and were accommodated at a school…." Stevanović in his statement likewise reports that the unit was "moved to Bratunac", arriving on 12 July.

The Panel therefore concludes that the information relayed to S4 and the Accused, regarding their redeployment and mission to Srebrenica occurred on 11 July, the day they left Srednje, several hours after the Srebrenica safe area fell to the VRS.

2. Content

Evidence corroborates S4's assertions as to the content of what the Accused in the platoon knew on July 11.

a. Content: Liberation of Srebrenica

It follows from the testimony of S4 that the term "Liberation of Srebrenica" was used on 11 July to describe both the place to which the Detachment was being redeployed and the mission to eradicate Bosniaks from that area.

[231] Borovčanin February 2002 Statement, pg. L0068876 (Exhibit O-337).

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i. Liberation of Srebrenica meant the Eradication of the Bosniaks

The Panel confirmed, through contemporaneous evidence, that "Liberation of Srebrenica" was the popular way to refer both to the military take-over of the safe area as well as the subsequent treatment of the Bosniak people who had lived in the safe area. From the evening of 11 July onward, Liberation of Srebrenica referred to what would happen to the inhabitants of Srebrenica after the success of the military operation (see Section V.A, *supra*).

S4 is corroborated in his assertion that the mission about which the platoon spoke while still at Srednje was not the military "liberation" of Srebrenica, but the follow-up to the military victory: the eradication of the Bosniak population. The word "liberation" after the afternoon of 11 July no longer concerned military victory, but rather the fate of the refugees. The 2nd Šekovići Detachment was never redeployed to assist in the military phase. Srebrenica had already been "liberated" militarily by the evening of 11 July, when the platoon was discussing their upcoming redeployment. Gen. Mladić and his generals had already made their victorious march through the empty streets of Srebrenica, accompanied by TV cameras. There was no need for the 2nd Šekovići to assist militarily, and, in addition, there never had been.[232] The evidence is clear that the unit was never envisioned as necessary for the military attack on the safe area. Their duties involved a different aspect of the liberation.

That aspect, as discussed by the platoon, dealt with the eradication of the Bosniak people who lived in the Srebrenica safe area. That the Bosniaks from Srebrenica would be eradicated once the safe area had fallen militarily was a reasonable expectation. Eradication of the Bosniaks from the Podrinje region had been the publically proclaimed goal of the RS since the beginning of the war.[233]

When S4 was questioned on cross-examination as to how it would be possible for him to know while in Srednje that there was a plan to eradicate Bosniaks in Srebrenica, he looked quizzically at defense counsel and responded: "Why else would there be a war?"[234]

ii. Eradication of the Bosniaks meant Killing the Men and Forcibly Transferring the Women, Children and Elderly

It is also reasonable that the platoon believed, according to S4, that the second phase of the "liberation", the eradication of the Bosniaks, would be carried out by forcibly expelling the women, children and elderly and killing the men. Historically, since the beginning of the war, when the expressed goals were clear, the method by which borders were established to separate the Serb people from the other two ethnicities was precisely that. This occurred throughout the war, however it is fair to say it was practiced by all sides. The Accused were from Eastern Bosnia, some from Srebrenica and Bratunac municipalities. S4 was asked on cross-examination, as were many other witnesses, whether they were familiar with the events of the war in the Srebrenica, Bratunac, and Kravica areas in 1992 and 1993, and all were. Although defense questions generally focused on attacks against Bosnian Serb towns and villages by the ARBiH, these events also included the "liberation" of Bosniak-held territory by Bosnian Serbs (see Section V.A, *supra*).

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[232] Tomislav Kovač. *See also*, Section V.F.1, *supra*.
[233] "*Decision On Strategic Objectives Of The Serbian People In Bosnia And Herzegovina*", Momčilo Krajišnik, President of the RS National Assembly, executed 12 May 1992. *See also*, Section V.A, *supra*.
[234] Cross-examination by Defense Counsel for the Accused Radovanović, 11 June 2008.

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On the evening of 11 July, S4 and the men of the Skelani Platoon were not alone in their belief that eradication of the Bosniaks would include the killing of the Bosniak men. 15,000 men in Srebrenica, and the 25,000 women and children who were related to them, believed it as well.[235] The fact that 15,000 men, most of whom were unarmed, were willing to attempt an escape on foot through enemy territory and mine fields and uncompromising terrain for over 60 kilometers attests to a deeply held belief, which turned out to be true: they would be killed if they surrendered or remained in Srebrenica, or went with their wives and families to Potočari. The fact that 25,000 of their family members went without their fathers, brothers and sons to Potočari, splitting up several generations of families, attests to their deeply held belief, which turned out to be true, that the men would be killed if they accompanied them and fell into Bosnian Serb hands. It is therefore very reasonable that S4 and the Accused in the Skelani Platoon, believing that they were about to be redeployed to assist in the "liberation of Srebrenica", would also entertain the belief, which turned out to be true, that the mission would involve killing the Bosniak men.

Further confirmation was provided by General Mladić, who hours before the platoon learned of their redeployment, on the afternoon of 11 July, stood on the empty streets of Srebrenica and addressed his television audience with these words:

> Here we are, on the 11th of July 1995, in Serb Srebrenica. On the eve of yet another great Serb holiday, we give this town to the Serb people as a gift. Finally, after the rebellion against the Dahis, *the time has come to take revenge on the Turks in this region*. (emphasis added)

b. Content: The Order for Redeployment of the Platoon to Srebrenica to Assist in the Liberation came From the Top

According to S4, Trifunović told the platoon that the assignment to Srebrenica had come "from the top" and mentioned Borovčanin in connection with the redeployment. Specifically, S4 recounted that Trifunović said of Borovčanin that "he was to supervise us, he would visit us and, if necessary, issue further instructions."[236] In fact, Borovčanin was assigned to command the joint police force units, which included the 2nd Šekovići, by Order 64/95, which had been signed on 10 July with the name of the Deputy Minister of the Interior, Tomislav Kovač. Under the law existing in the RS at that time, redeployment of MUP troops could only occur if both the Ministry of the Interior and the Commander in Chief, President Karadžić, agreed. It is unlikely that Trifunović would have known all of the details that supported the assertion that the redeployment came for the top, but his assertion, based on whatever knowledge had been shared with him by his commanders, was accurate both as to the commander of the operation, Borovčanin, and as to the level from which the order had come. It was reasonable that the S4 and the Accused believed it.

c. Content: The Details of the Detachment's Part in the Liberation of Srebrenica were not to be Talked About

S4 testified that an element of the mission was deception: the platoon was told by Trifunović not to speak of what they believed their mission to be. This element too was born out by future events demonstrating the role of deceit to the success of the mission and its cover-up.

[235] E.H.; S1; S2.
[236] Statement of S4 to the Prosecutor's Office of BiH of 22 May 2008 ("S4 22 May Statement"), pg. 5 (Exhibit S-2).

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There is also contemporaneous evidence to corroborate S4's assertion that Trifunović ordered discretion. The redeployment order (Order 64/95) was itself a deceit. The order purposely misstated the mission, according to the testimony of Tomislav Kovač. The stated task for which the units were being redeployed was "to crush the enemy offensive from the Srebrenica protected zone." This, according to Kovač, was a "cover-up". On July 10, when the order was issued, and the subsequent days of redeployment, there was no enemy offensive from the Srebrenica protected zone, and Kovač testified that he, Karadžić and Gen. Krstić all knew this to be true. The mission itself was based on deceit, and Trifunović instructions to keep quiet about their presumed purpose of the mission is completely consistent with this deceit. Deceit and cover-up is also consistent with the illegal nature, known to be illegal, of the mission on which they were to embark.

3. Manner

The defense asserts that it was not normal practice to tell the platoons before their actual departure for a field mission where they were going or what that mission might entail. However, the overwhelming evidence confirms that this was no normal mission, and that in fact the men were expressly ordered to Srebrenica while at Srednje and knew what their mission would be.

The deployment of the 2nd Detachment to Srebrenica on 11 July 1995 was different in almost all respects from previous field missions to which the 2nd Detachment had been assigned. First, according to Tomislav Kovač, it was the normal practice for the Detachment to complete the mission to which they were originally assigned. The Srednje mission was not complete. Borovčanin confirmed that the 2nd Detachment was "pulled out" of Srednje.[237] Second, between field missions, the Detachment normally returned to its base in order to be rested and psychologically prepared for its next assignment. In this case, it was pulled out of one front line and sent directly to the next field mission. Third, resubordination of the Detachment to the VRS was normally carried out according to law and the presidential orders which implemented the law.[238] On 10 July, the Detachment was resubordinated to the VRS in a manner that contravened the law and the official Presidential orders in several respects.[239] Fourth, according to Kovač, normally the order resubordinating the Special Police to the VRS would accurately reflect the task of the deployed forces. In the case of the order that resubordinated the 2nd Detachment, that is, Order 64/95, the expressed task was designed as a cover-up. This was not a normal field mission.

That the information shared with the platoon leaders and their men would be handled differently and conveyed in a different manner than on a "normal" field mission was therefore not only reasonable but necessary. The men in the platoon in Srednje would not have known of all the irregularities involved in their redeployment, but they would have known and did know that being ordered out of one front line, before their mission was complete, and then sent to another, without rest or a return to base, was out of the ordinary. When confronted on cross-examination, S4 agreed that usually when going on field missions, they were not told of the mission and location prior to transport to the new site, "but this was different."

[237] Borovčanin February 2002 Statement, pg. L0068876 (Exhibit O-337).
[238] Article 14 of the *Law On The Implementation Of The Law…During An Imminent Threat Of War Or A State Of War* (Official Gazette, 19 November 1994).
[239] *See* Section III.B.5, *supra*

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There is other evidence that information was not handled in the "normal" way, and that several members of the Detachment already had knowledge of the redeployment to Srebrenica even in advance of 10 July. Days before 10 July, when Order 64/95 was issued making Borovčanin the commander of the resubordinated unit of which the Second Šekovići was a part, the Accused Miloš Stupar told the Detachment's head of logistics, Dragomir Stupar, that Borovčanin would be calling him about arranging additional logistical support for a new mission. Shortly thereafter, and still prior to 10 July, Borovčanin contacted Dragomir Stupar and ordered him to set up a logistics base in Bratunac, and told him specifically that he should set it up at the *Lovački Dom* restaurant. He should take additional staff if he needed to and be prepared to supply food water and uniforms both for the 2nd Detachment and additional MUP troops that Borovčanin would command. By 11 July, Dragomir Stupar was already in Bratunac and functional logistical support was in place.

In addition, S4 was not the only member of the 2nd Detachment who testified that they knew while in Srednje that they were going to Srebrenica. Marko Aleksić, who was the acting commander of the 1st platoon of the 2nd Detachment, testified that while in Srednje, Čuturić told him that they were going to the "Srebrenica zone", and that their role would be a "supportive" one. Ljubiša Bečarević, a member of the 2nd Platoon who also testified, stated in his statement to investigators that when they were ordered to leave Srednje, they were told that they were going to Bratunac. Tomislav Dukić, a member of the armored platoon, tank crew, 2nd Šekovići Detachment, was ordered directly by Čuturić while at Srednje to go directly to Bratunac. S4 is entirely credible in his assertion that Trifunović told them while still in Srednje that they were being redeployed to Srebrenica. In light of the protests of the men against leaving Srednje, it is likewise entirely credible that he put the information in the form of an order, as S4 testified.

S4 also testified that once they were ordered to redeploy to Srebrenica, the men spoke among themselves of their mission there. Trifunović, in his cross-examination of S4, insisted on questioning the witness about the proximity of himself to the other men in the platoon, and S4 confirmed Trifunović's assertion that they "stuck together" as a platoon in the field. Other evidence supports S4 in the conclusion that it would be inevitable that the men, ordered to depart for a field mission to Srebrenica on July 11, would talk together about that mission.

The liberation of Srebrenica was a major media event that had been anticipated for months. Zoran Petrović, whose ICTY testimony was introduced by the defense, told the Trial Chamber in the *Popović* case: "On the 11th of July all news agencies of the world announced that Serbs entered Srebrenica, in the world of journalists it is madness because everyone wants to be there. …There was this excitement among the journalists, there were dozens of them from Serbia and all over." He further explained: "It was long expected that Srebrenica would fall. It was expected to happen for months and all the world agencies were reporting on that and that's why I wanted to go there."[240] The Accused Radovanović admitted in his statement given in the trial that some of the men at Srednje "may have had" transistor radios, and they had heard earlier that there was shelling in Srebrenica. The actual fall of Srebrenica was a major news event. As Radovan Karadžić confirmed in his interview on Serb television the following day: "You are right in saying that Srebrenica is top news but it should also be. And as such it is a complete example of the superiority of both the Serb weapons and the Serb Army…." Miroslav Deronjić further confirmed that the events of Srebrenica were broadcast on radio on 11 July, as it was by public radio broadcast that he learned that

[240] *Popović*, Testimony of 4 Dec 2007, pg. 18744 (Exhibit O-I-53).

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Karadžić had appointed him Commissioner of Srebrenica, and it was by public radio broadcasts that the president of the municipality of Bratunac, who was on business elsewhere, learned of the fall of Srebrenica and immediately returned to Bratunac on the evening of 11 July. Dragomir Vasić, Head of the Zvornik PSC, also testified that he heard of the fall of Srebrenica from media broadcasts on 11 July.

Within this context, the Panel finds highly credible S4's testimony that Trifunović and the other men spoke together about their mission in the liberation of Srebrenica and about their belief that the task would involve the eradication of Bosniaks, by the transfer of women, children, and the elderly and the killing of Bosniak men. This belief was held so strongly that it motivated several of them to protest leaving the front line in Srednje. According to S4, Trifunović never specifically confirmed that belief while in Srednje by way of an order. At the same time, he did not disabuse them of that belief, but impliedly confirmed it when he told them not to speak of it and told them that the "Commander will explain in Bratunac."

4. Reactions

Finally, evidence that the rest of the platoon understood the situation in the same way that S4 did is confirmed by the fact that some of them protested. Their protest, about which S4 testified, is a detail that contributes to the credibility of his overall testimony. The defense avers that S4 was incriminating the Accused as a means to secure for himself an advantage in plea negotiations. S4's assertion that he protested the mission may in fact be self-serving. However, the additional detail that many of the others in the platoon, including some of the Accused, also protested is a detail which exculpates some of the Accused and mitigates against the formation of genocidal intent, at least at the time that the platoon learned of their redeployment. This was clearly not added by S4 as a means to improve his position with the Prosecutor. The Panel believes S4 when he testified that he and several others in the platoon protested to Trifunović about leaving Srednje and going to Srebrenica, fearing "the worst". The protests, according to S4, were motivated by their understanding of their mission in Srebrenica, and their fear that they would encounter and have to "eradicate" Bosniaks they knew and with whom they had been friends. The fact that they requested to remain on the frontline in Srednje – on a mission that Tomislav Kovač explained in his testimony was considerably more dangerous and under-supported in manpower, ammunition and supplies – instead of leaving for Srebrenica, an area closer to their homes in which the military operation had been completed, lends strength to S4's conclusion that all of the platoon understood exactly what S4 understood their mission there to be: the eradication of the Bosniaks of Srebrenica by killing the men and forcibly transferring the women, children, and elderly.

B. The Accused's Knowledge of the Genocidal Plan was confirmed by the Genocidal Context Obvious to Them

The genocidal context from which evidence of intent can be derived is the existence of a genocidal plan and facts which confirm that the plan was in effect. Since the inquiry is as to the state of mind of the accused, the plan and its effectuation cannot be viewed in the abstract, but rather the relevant inquiry must be what the accused knew of the plan and what objective evidence was available to the accused to substantiate that the plan was being carried out. Knowledge of the genocidal plan cannot alone support the inference that the accused possessed genocidal intent. It is not even required that the perpetrator act pursuant to or in

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furtherance of a plan or policy to commit genocide.[241] However, the Panel concludes that there was a genocidal plan in place, and further concludes that the Accused knew the fundamentals of that plan before 13 July, and that during the time leading up to the killings at the Kravica warehouse, they witnessed activities that confirmed that knowledge. Their acts at the warehouse, when viewed together with that context, provide proof of the requisite genocidal intent.

The 3rd Skelani Platoon, on the evening of 11 July while still in Srednje, was ordered to redeploy to Srebrenica and knew that their mission was to assist in the Liberation of Srebrenica. At Srednje, "there were some things that we knew and some things we did not", according to S4. However, during 12 and 13 July, the knowledge of the plan as they had envisioned it was corroborated and strengthened by the events that unfolded. Those same events would have made it clear to the other members of the Detachment that were not part of the 3rd Skelani Platoon, including the Accused Džinić, that: 1) they were involved in phase 2 of the mission to "liberate Srebrenica"; 2) the goal of the mission was to permanently eradicate the Bosniaks who lived in the safe area of Srebrenica; 3) permanent eradication of the Bosniaks meant the forcible transfer of the women, children, and the elderly and the killing of the men; 4) the orders were coming "from the top"; and that 5) the mission was "not to be spoken of" outside the Detachment.

1. The 2nd Detachment was Involved in Phase Two of the Mission to "Liberate Srebrenica"

When the Detachment arrived in Bratunac, in the early morning hours of 12 July, it was obvious to all of the Detachment that Srebrenica had fallen militarily and that they had been deployed in the Srebrenica zone.[242] This conformed with the platoon's understanding: that they would be redeployed to Srebrenica where their mission would be something other than the military attack on the safe area.

2. The Goal of the Mission was to Permanently Eradicate the Bosniaks who lived in the Safe Area of Srebrenica

The Detachment's first task, assigned when they left the school in the late morning of 12 July, was to "sweep the terrain" on Budak Hill, the location of Bosniak villages. Specifically, according to several witnesses from the detachment, they were ordered to remove and secure people who were in the villages; remove and secure men who surrendered from the surrounding woods or remained in the village; and take the people to Potočari.[243] They were further ordered to search the homes for civilians and to form a combat line next to the forest where Bosniak men were believed to be hiding. They found the village and the houses deserted and all Bosniaks in the area gone.[244]

[241] *See Jelisić* Appeal Judgment, para. 48 ("The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime."). *See also Kayishema and Ruzindana* Trial Judgment, para. 94. *Cf.* Article 211-1 of Code Pénal Français ("Genocide occurs where, *in the enforcement of a concerted plan* aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion…") (emphasis added).
[242] Predrag Čelić.
[243] Dragan Kurtuma; Milenko Pepić; Miladin Stevanović.
[244] Slobodan Stjepanović.

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These events conformed with the platoon's understanding that their mission would involve them in the eradication of Bosniaks from the Srebrenica area: the Bosniaks had fled or been forced from their homes and their land; the Bosniaks would not be permitted to remain in their homes or on their land; and any Bosniaks who were found attempting to remain in their homes or on their land would be taken into custody. This would be obvious as well to all members of the Detachment.

3. Permanent Eradication of the Bosniaks meant the Forcible Transfer of the Women, Children, and Elderly

Members of the Detachment could see Potočari on 12 July, some from their location on Budak Hill while they were performing the "sweep" and certainly all when they entered Potočari, where they boarded transportation to their next task. Many witnesses from the Detachment described seeing buses and trucks being boarded by Bosniak women, children, and elderly whom they knew were refugees from the safe area.[245] Many witnesses also described the squalid and desperate conditions of the thousands of Bosniaks who had gathered there.[246] Petar Mitrović acknowledged in his statement that the platoon was in Potočari on 12 July and saw women, children, and elderly boarding buses. S4 concluded, based on what he saw, that the women and children and elderly were being forced to leave. He pointed out a simple truth: "People do not leave their homes if they do not have to."

In the afternoon of 12 July, the Accused Trifunović issued the verbal order to the 3rd Platoon to assume stations on the Bratunac – Konjević Polje road near Sandići and Kravica, along with the rest of the Detachment.[247] Any women or children that surrendered from the column were to be put on passing busses from Potočari that were carrying refugees to Kladanj.[248] These buses were numerous and passed frequently, filled with women, children, and the elderly. Buses travelling in the direction of Tuzla were full, while those travelling in the opposite direction were empty.[249] On 13 July, the 2nd Detachment was again assigned along the Bratunac – Konjević Polje road, and the Skelani Platoon was deployed in the area of the Sandići meadow.[250] Buses full of women children and elderly Bosniaks continued to travel the road from Potočari toward Tuzla.[251]

These events conformed with the platoon's understanding of part of the eradication plan: Bosniak women, children and elderly would be forcibly transferred out of the area under the control of the RS. This would be obvious as well to other members of the Detachment, including the Accused Džinić, whose position along the road on 13 July was near the Sandići meadow.

4. Permanent Eradication of the Bosniaks meant Killing the Men

On 12 July at Potočari, S4, who was there with his platoon waiting for their transportation, confirmed that they saw only women, children, and the elderly entering buses, and that they saw no men. Petar Mitrović in his statement likewise fails to mention seeing any men in

[245] Marko Aleksić; Slobodan Stjepanović; Danilo Zoljić; Predrag Čelić.
[246] Dragan Kurtuma; Jovan Nikolić.
[247] S4; Slobodan Stjepanović.
[248] S4.
[249] Dragan Kurtuma; Stanislav Vukajlović; Milenko Pepić.
[250] Danilo Zoljić; Dragomir Stupar; Tomislav Dukić.
[251] Milenko Pepić; Slobodan Stjepanović.

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Potočari. S4 asked one of the Bosnian Serbs at Potočari about the fate of the men and was told specifically that they would be killed. S4 recounts that the men from his platoon spoke together in Potočari about the likelihood that the men would be killed. When ordered to their next task that afternoon along the Bratunac – Konjević Polje road, Trifunović told the platoon that "there would be a huge influx of Bosniaks" whom they expected to surrender. Marko Aleksić received this order from Čuturić, as well as the information that people would be surrendering from the woods. Two facts are significant in assessing the understanding of the Accused at this point: 1) they were tasked with accepting men who were expected to surrender, not fighting men who were expected to engage in combat; and 2) although the expected number was "huge", there was no evidence of any provision being made for food, water, or sanitation facilities for the prisoners that they were expected to capture in the areas where they were assigned.

They received verbal orders regarding their task: they were to take the surrendering Bosniaks into custody, place women and children in the buses going along the road to Kladanj; search the men and remove their personal belongings, including their identification documents; and detain the men. According to S4, Trifunović told members of the platoon that the men who were surrendering would ultimately be taken to the agricultural warehouse in Kravica, about 1 kilometer down the road from the Sandići meadow. Notwithstanding the fact that they received no instructions that the column was expected to attack them, and in fact learned that women and children were believed to be among those in the column, members of the MUP were ordered to fire artillery and anti-aircraft guns into the woods where the column was hiding and set ambushes along their escape path. To the Accused, stationed along the road, the shelling and ambush activity could be heard, as well as the screams and groans of the injured Bosniaks.[252]

On 13 July, the "huge" number of surrendering Bosniaks materialized. Consistent with the orders of the preceding day, members of the 2nd Detachment, including members of the Skelani Platoon, searched the surrendered prisoners, taking their valuables and money; and forced prisoners to discard their personal belongings, including their documents.[253] Piles of discarded belongings and papers were left by the side of the road, visible on the video taken contemporaneously, as well as to all those in the area, and even found months later by Jean-René Ruez when he examined the Sandići meadow in 1996.[254] The condition of the Bosniaks that were surrendering was "shocking", according to Stevanović. There were wounded, ragged men of all ages and boys as young as 7th grade who surrendered on the road and were taken to the meadow.[255] The results of the ambushes and shelling was apparent from the injures many suffered. Two facts are significant in assessing the understanding of the Accused at this point: 1) the condition of the men and boys who were surrendering confirmed that they did not pose a military threat and were, in any event, non-combatants once they surrendered; and 2) the "huge" number of surrendering Bosniaks predicted on the day before was accurate, but still there was no provision for food, sanitation, adequate water, medical care for the wounded, or shelter from the intense heat.

Shooting from weapons and artillery into the woods at the people who were trying to escape continued throughout the day and was captured on film by television journalist Zoran

[252] Stanislav Vukajlović; Milenko Pepić; Marko Aleksić; Zoran Erić.
[253] S1; S2; Stevanović; Stanislav Vukajlović.
[254] S2; Jean-René Ruez; Srebrenica Video (Exhibit O-193).
[255] Miladin Stevanović; S1; Srebrenica Video (Exhibit O-193).

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Petrović.[256] This could be heard by the Accused and the other MUP troops stationed along the road.[257]

These events conformed with the platoon's understanding of part of the eradication plan: Bosniak males were intended to be killed. Those who did not surrender were being killed by ambush and artillery fire; those who did surrender were no longer in need of their personal documents or belongings, nor was there any need to provide them with food or adequate water or medical care. This would be obvious as well to other members of the Detachment, including the Accused Džinić, whose position along the road on 13 July was near the Sandići meadow.

5. The Orders were coming "From the Top"

The Accused and the other men of the 2nd Šekovići Detachment could have no doubt that the operation to which they had been assigned was approved and overseen by those "at the top". In addition to the constant presence of the platoon commanders and the deputy commander, Rade Čuturić, who were present with the platoons throughout 12 and 13 July, Miloš Stupar, the Detachment Commander, was seen on the Bratunac – Konjević Polje road driving back and forth along the stretch of road to which the Detachment was assigned.[258] In addition, Ljubomir Borovčanin, about whom the platoon had spoken in connection with this assignment while still in Srednje, confirmed his connection with the unit by his presence both on the road and at the meadow. The Petrović video memorializes his presence, and he is seen joking with a member of the Skelani platoon, Mirko Milanović, about Milanović's possession of a Dutch pistol. It would have been clear to the Accused that the mission was overseen at an even higher level when General Ratko Mladić himself arrived on the meadow and spoke with the prisoners who were in the control of the Detachment. Stupar, Čuturić, and Borovčanin travelled up and down the portion of the road to which the detachment was assigned, and spoke to the members of the Detachment.[259]

These events conformed with the platoon's understanding that the eradication plan was ordered "from the top". This would be obvious as well to the other members of the Detachment, including the Accused Džinić, whose position along the road on 13 July was near the Sandići meadow.

6. The Mission was "Not to be Spoken of" Outside the Detachment

Trifunović warned the platoon in Srednje that the mission in Srebrenica was not to be spoken of outside the detachment. He likewise warned them at Sandići that they were not to tell the surrendering Bosniaks of the fate that awaited them. Both of these statements are an admission that the real mission to which the Accused were assigned involved activity other than that publically disclosed to the media and the international community. The second warning by Trifunović was, in addition, an admission that the true fate of the Bosniaks was different than that which was being deceitfully told them.

These deceptions were obvious to S4 and would have been obvious to the other Accused, all of whom were at or around the Sandići meadow and the Bratunac – Konjević Polje road on

[256] S1; S2; Srebrenica Video (Exhibit O-193).
[257] Milenko Pepić.
[258] S4; Miladin Stevanović; Marko Aleksić; Danilo Zoljić; Tomislav Dukić.
[259] Miladin Stevanović; Marko Aleksić; Predrag Čelić; S4.

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13 July. They saw, as can anyone who views the Petrović video, that Bosnian Serbs dressed in UN helmets and driving UN vehicles went up and down the road; megaphones were used to call to the column of escaping people, promising that they would be safe if they surrendered and assuring them that the UN were present.[260] Gen. Mladić came to the meadow and addressed the prisoners on the meadow, telling them they would be exchanged, although it was clear that no procedures to identify the prisoners for the purpose of processing for war crimes, exchange, or incarceration was undertaken, and in fact the identification papers necessary to process the prisoners were in the belongings the Detachment members were ordered to force the Bosniaks to discard.

These events conformed with the platoon's understanding of part of the eradication plan: that it's true purpose was not to be revealed. This would be obvious as well to the other members of the detachment.

C. The Genocidal Act

The five Accused (accused Milenko Trifunović, Aleksandar Radovanović, Brano Džinić, Slobodan Jakovljević, and Branislav Medan) are principal perpetrators of one of the genocidal acts committed against the Srebrenica Bosniaks during the period between 10 and 19 July 1995. That act was consistent with a larger genocidal plan, and committed within the genocidal context of the Srebrenica area during 12 and 13 July 1995. The Accused were not the architects of the plan, nor were they the tacticians or commanders who had responsibility for its overall accomplishment. Rather, they were the instruments by which the plan was carried out. Without people willing to carry out the genocidal plan by commission of the kinds of acts prohibited in Article 171, genocide could not be committed. As instruments for the commission of genocide, they are only criminally liable for commission of the underlying crimes, and not for genocide itself, *unless* they committed the underlying crimes with the specific genocidal intent to destroy the protected group. Tribunals have in a number of cases determined beyond doubt that principal perpetrators possess the required genocidal intent by examining both the context in which they committed the underlying acts, including the existence of a genocidal plan and their knowledge of it, and by examining the acts themselves. The crime of genocide is indisputably *not* limited in application to those who organize, plan, or order the perpetration of genocide. In particular, the Panel notes the ICTR Trial Chamber's conclusion in *Cyangugu* that soldiers who perpetrated the massacre of Tutsi civilians committed those killings with genocidal intent, as well as the Trial Chamber's conclusion in *Ndinibahizi* that the participants in the attack against Tutsi civilians on Gitwa Hill committed genocide.[261]

It is not necessary that the perpetrator participated in multiple events or incidents in order to establish that the perpetrator had genocidal intent. For example, the Appeals Chamber of the ICTR in *Seromba* convicted the accused of genocide solely with respect to a single incident, concluding that "no reasonable trier of fact could have reached the conclusion that Athanase

[260] E.H.; S1; S2; Predrag Čelić; Milojko Milovanović; Milenko Pepić.

[261] *Cyangugu* Trial Judgment, para. 690; *Ndindabahizi* Trial Judgment, para. 461. There are a number of other examples of implicit findings that principal perpetrators of killings committed genocide, particularly where the accused are found to have aided and abetted the principal perpetrators, such as *Ntakirutimana*. *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* ("*Ntakirutimana*"), ICTR-96-10 and ICTR-96-17-T, Judgment, 21 February 2003.

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Seromba did not have genocidal intent" when he participated in the killing of 1500 people.[262] Similarly, in *Ndinibahizi*, the Appeals Chamber did not disturb the Trial Chamber's finding that the accused possessed the necessary genocidal intent with respect to the single incident on which the accused's conviction was upheld.[263]

Likewise, the number of victims, though relevant, is not dispositive. The Appeals Chamber in *Seromba* convicted the Accused of committing genocide with respect to the murder of 1,500 Tutsis; whereas the Trial Chamber of the ICTR in *Ndinibahizi* concluded the existence of genocidal intent in the killing of a single individual at a roadblock. In concluding that the principal perpetrators of that killing committed the killing with genocidal intent, the Trial Chamber specifically noted, "The fact that only a single person was killed on this occasion does not negate the perpetrators' clear intent, which was to destroy the Tutsi population of Kibuye and of Rwanda, in whole or in part."[264] The Trial Chamber instead looked at all the facts, including the broader context of events, and concluded that the perpetrators of that single killing committed the killing with genocidal intent.[265]

The underlying criminal act of killing co-perpetrated by five of the Accused constitutes probative evidence from which the Accused's genocidal intent can be inferred beyond doubt when viewed in light of their exposure to the broader context of the events of Srebrenica, and their basic knowledge of the genocidal plan. In considering the inferences that can be drawn from the act of killing, the following factors, *inter alia*, have been identified by other Tribunals as relevant to this analysis: the number of victims; the use of derogatory language toward members of the targeted group; the systematic and methodical manner of killing; the weapons employed and the extent of bodily injury; the methodical way of planning; the targeting of victims regardless of age; the targeting of survivors; and the manner and character of the perpetrator's participation.[266] The Panel addressed each of these factors as it applied to the five Accused.

1. The Number of Victims

Of all of the organized multiple killings that were planned and carried out during the operative period, the murders at the Kravica warehouse probably involved the largest number of victims. The approximation of "more than 1000" has been used in the Indictment and the operative part of this verdict, and the number actually killed by the Accused has been characterized as "the majority" of these. For the purpose of determining intent, it is not critical that the exact number of Bosniaks killed by the Accused be precisely calculated. What is important is that there were a great many people killed by the Accused in the warehouse that day. What is even more important is that the Accused made it clear by their actions that their intent was that *all* the Bosniaks in the warehouse be killed, no matter how large the number.

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[262] *Prosecutor v. Athanese Seromba*, ICTR-2001-66-A, Judgment, 12 March 2008, para. 181.
[263] *Prosecutor v. Emmanual Ndindabahizi*, ICTR-01-71-A, Judgment, 16 January 2007.
[264] *Ndindabahizi* Trial Judgment, para. 471.
[265] *Id.*, para. 470. The Panel recognizes that this conclusion was not considered on appeal, as the Appeals Chamber quashed the conviction for this incident on other grounds. Nonetheless, the Panel considers that this discussion emphasizes the crucial point, namely that the number of victims must be considered with respect to all the facts and that there is no "magic number".
[266] *See, e.g., Kayishema and Ruzindana* Trial Judgment, paras. 93, 531-540; *Seromba* Trial Judgment, para. 320; *Jelisić* Appeal Judgment, paras. 47-49; *Akayesu* Trial Judgment, para. 523; *Rutaganda* Trial Judgment, para. 399; *Cyangugu* Trial Judgment, paras. 689-690.

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2. Physical Targeting and Language

As established above, the Accused knew that the men on whom they opened fire were Bosniaks, and specifically Bosniaks who had been living in the Srebrenica safe area (see Section IV.E.1, *supra*). S4 testified that after the shooting began, verbal exchanges between the prisoners and the shooters contained ethnic and religious slurs and curses.

3. Systematic and Methodical Manner of Killing

The killing proceeded in a methodical manner. Three of the Accused were assigned to keep guard at the back of the warehouse to prevent any of the victims from escaping through the window openings along the back wall. Other Accused, along with other members of the Detachment who had marched the column to the warehouse, were ordered to make a semi-circle in front of the warehouse. The right section of the warehouse, where the column was deposited and which was not secured, was the side first targeted; while the left side, which was secured, was targeted second, after the Accused had "finished" with the first. Between the massacre in the right side and the massacre in the left, the Accused took a break. The manner in which they targeted the rooms was also organized. In the first room, the first to fire was the operator of the M84 machine gun, shooting from the side of the door opening. He was followed by the other shooters who cross-fired from both sides of the opening into and through the room of dying men. The shooters would change places at the doorways in order to reload their weapons. Clips were being refilled by one person designated for this task from additional ammunition supplies on the site.[267] At the conclusion of the shooting, the Accused Džinić and at least one other man threw hand grenades into the room full of dead and dying men. The grenades came from two boxes that had been supplied to the site. After a break during which the men relaxed, the Accused resumed the killing and commenced firing on the Bosniaks held in the left side of the warehouse, in the same order and in the same manner. Throughout, the three Accused at the rear of the warehouse continued to ensure that no prisoner escaped death. The task was undertaken in a calculated and thorough way. The Accused remained at the warehouse until officially relieved by another unit sent for that purpose.

4. Weapons Employed

The weapons used against the unarmed men crowded into the two warehouse rooms included one M84 machine gun, which used ammunition belts fed into the weapon by one or two assistants. The weapon produced sound and explosions which sounded to S2, from his position inside the warehouse, like anti-aircraft fire. The M84 could be fired while hand held, but there is evidence that at least for the killings that occurred in the second room, it was assembled and positioned on a table at the side of the entrance and fired from its tripod.[268] The weapons used by the shooters, including the Accused Trifunović and Radovanović, were automatic rifles that fired bullets in rapid succession from rifle magazines, or clips, that were on this day methodically refilled by a designated person, the rifles reloaded and repeatedly reused. The third type of weapon used was hand grenades, of which there were two boxes at the killing site. These produced explosions that were heard by witnesses several kilometers away and appeared to S2 within the enclosed space to be bombs, emitting incredible sound blasts.

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[267] S4.

[268] Miladin Stevanović. Luka Marković also testified that a table was taken into the hangar prior to the killings.

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5. Extent of Bodily Injury

The extent of the injury done by these weapons to the bodies of the men crammed into the spaces at the warehouse was horrendous. Unlike firing squads, where the victim can be cleanly and quickly killed, firing of this kind was completely indiscriminate. Men were multiply wounded and mutilated, surrounded by carnage created by their own wounds and the bodies of the others. Years after the incident, the Manning Reports (Exhibits O-236, O-239, and O-241) catalogued evidence of blood and human tissue remaining on the walls and ceiling. The screams of the men who were dying in agony were obvious to the Accused, as well as to the witnesses who were in the area, and were reported by Mitrović in his statement. S1 found the screams of the dying the most unbearable aspect of his horrendous experience. Yet the methodical killing continued for around one and one half hours.

6. Targeted Regardless of Age

The men surrendering along the road and taken to the Sandići meadow were of all ages. The Petrović video shows young boys and old men among those on the meadow and coming out of the woods. Likewise Hajra Čatić and Maj. Franken testified that young boys and old men were included among those separated at Potočari and placed on buses headed toward Bratunac. The males whose lives were ended at the Kravica warehouse on 13 July came from those collected on the meadow and those collected in the buses. There was no effort to segregate anyone on the basis of age or any other basis.[269] The youngest victim so far connected with the Kravica killings was between the ages of 12 and 14 years old, although all of the bodies of those killed have not yet been found.[270]

7. Targeted Survivors

The very length of the initial massacre, in which the Accused were involved, and the fact that the killings in each room concluded with the use of grenades, speaks to the intended thoroughness of the undertaking. The evident purpose was to kill all of the men in the warehouse. The Accused carried out the purpose with a persistence and use of weaponry that evidenced obvious determination that there would be no survivors.

8. Methodical Planning

Genocidal intent can arise spontaneously without planning. The Kravica executions were, however, planned. The warehouse was intended to be a collection site as well as an execution site, and the executions were intended to take place at the point at which the warehouse was entirely full, that is, at the time when it did in fact take place. Evidence for this comes from the following facts:

a) The hand grenades and additional ammunition were already at the site when the shooting began. Witness Marko Aleksić and Mitrović confirmed that the men in the 2nd Detachment only carried the normal field kit during their duties at Sandići. Based on the testimony regarding how the killings were carried out and the amount of time the firing continued as

[269] The Panel was not provided with up-to-date evidence of the exhumation results. However, even from the relatively small sample of the remains found by 2001, three of the bodies of victims recovered from the total killed in all locations were estimated to have been as young as 13 years. Baraybar Report.
[270] 2nd Manning Report (Exhibit O-236).

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well as the use of hand grenades, it is clear that the field kit was entirely insufficient to complete the killing on the scale undertaken. Mitrović corroborated this fact in his statement as well.

b) There were officers present and none took any action to stop the killings. Čuturić, deputy commander of the detachment, was present when the shooting began and remained for about 10 minutes before leaving for Bratunac to seek treatment for his burned hand. Čuturić did nothing to stop the killings. Trifunović was the platoon commander and was not only present but an active participant in the shooting. He obviously did nothing to stop the killings. Borovčanin arrived 10 to 15 minutes after the killings began and sat watching for a few minutes before turning his vehicle about and travelling down the road. He did nothing to stop the killings.

c) Milenko Pepić, a member of the 2nd Platoon controlling traffic along the road above Kravica, received an order over the Motorola to stop the traffic before the killings began, at the point at which the column was passing down the road. He was then ordered to keep the road around Kravica closed during the entire massacre. Stevanović stated that when he returned on foot from Bratunac, the road blockade was still in place. This was after the people in the first room had been shot but before the shooting began in the second room. It was not until the shooting finally stopped that Pepić was ordered to reopen the road.

d) The Accused stayed at the warehouse until they were officially relieved by another unit, which had been ordered to take over.

e) After the Accused left, the units that replaced them continued to kill any survivors who moved or made any sound and in fact called out to wounded survivors hiding under the bodies, claiming that they would get them medical treatment. Those who believed them and ventured out were then shot.

f) The warehouse was used the next morning as an execution site for additional prisoners who were brought there, lined up in front of the building, and shot.

g) An excavator and five to six trucks with the requisite fuel and operators were assembled before the final executions were completed on the morning of 14 July, and the bodies which were removed from the warehouse by that equipment on that day were taken to a mass gravesite in Glogova which had already been dug and was waiting.

9. Manner and Character of the Perpetrators' Participation

From the manner and character of their participation, it is apparent that the Accused did not simply intend to kill the victims; they intended to destroy them. The acts in which the Accused participated for around an hour and a half were the most physically destructive acts imaginable, committed and experienced at close range, within the sight and smell of the carnage and of the sounds of the dying. Trifunović and Radovanović stood at the entrance of the rooms and emptied one clip after another into the mutilated bodies of the dying men piled on the floor. Mitrović, Jakovljević, and Medan stood at their stations at the open windows at the other side of the rooms witnessing the slaughter, guns ready to prevent any attempts by the victims to escape. Džinić lobbed grenade after grenade at close range into the masses of dying human beings. All persisted in their task for a total of around an hour and a half, in a

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systematic and methodical way, and even took a break after the first room, before starting all over again to reduce the living men in the second room to the condition of those in the first.

To persist in imposing this level of devastation for the length of time that they did manifests a determination to destroy that has few equals. Whether the Accused were in front of the warehouse shooting and throwing grenades through the open door and windows, or behind the warehouse with guns aimed at the open windows, they were submerged in the sounds, sights and smell of human destruction.

While not admitting that any of the accused took part in the massacre, the defense has attempted to link the killing of Krsto Dragičević with the ensuing massacre in order to exculpate the Accused, claiming that it was the killing of Krsto, rather than any preconceived genocidal plan, that led to the massacre that followed. The Panel finds any suggestion that the Accused were forced to shoot in self-defense, or out of uncontrollable fear, unconvincing and contrary to the evidence, for reasons discussed above (see Section IV.C.1, *supra*). However, the death of Krsto Dragičević is relevant to determining the intent of the Accused. The evidence establishes that immediately preceding the massacre, Krsto, who entered the warehouse against the orders of Trifunović, was killed, apparently by a Bosniak who had grabbed his rifle and commenced shooting. Within seconds, that Bosniak was dead, Čuturić had suffered burns to his hands, Krsto's gun was retrieved, and Krsto's body was dragged out from the doorway of the warehouse.

When this incident is taken together with all of the other evidence, it provides even stronger support for the inference of genocidal intent. The perpetrator of Krsto's killing was identified and already dead before the butchery began. None of the Bosniaks in the warehouse were in any way responsible for Krsto's death, nor could the Accused have any reason to believe that they were. It can therefore be inferred that the intention which drove the Accused to destroy those very Bosniaks, by inflicting on them death and unimaginable suffering that afternoon, was not the intent to destroy individuals who might have wronged them, or even individual Bosniaks who might have wronged them. The intent with which the Accused acted was the intent to destroy all Bosniaks – as a group – as such. The only limitation to their achieving the destruction of all Bosniaks as an entire group was the limitation imposed by the number of Bosniaks actually within their control.

D. Conclusion

"[T]he circumstances and facts surrounding the perpetrator's acts can, as a matter of law, establish genocidal intent beyond doubt".[271] In this case, the Panel considered evidence of the acts of the principle perpetrators (Section VI.C) and analyzed that evidence together with the general context in which the acts occurred (Section V) and the perpetrators' knowledge of

[271] *Kayishema and Ruzindana* Trial Judgment, para. 93. *See also Rutaganda* Appeal Judgment, para. 525 ("In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from the relevant facts and circumstances"); *Cyangugu* Trial Judgment, para. 663; *Semanza* Trial Judgment, para. 313; *Akayesu* Trial Judgment, para. 523; *Krstić* Appeal Judgment, para. 34 ("Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime"); *Jelisić* Appeal Judgment, para. 47 ("As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive discriminatory acts").

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that context (Sections VI.A and B).[272] Based on that analysis, the Panel concludes beyond doubt that the murder of the majority of the more than 1000 Bosniaks in the Kravica warehouse was co-perpetrated by the Accused with the aim to destroy Bosniaks, a protected group, in whole or in part.

[272] In accord with this analysis, see *Akayesu* Trial Judgment; *Ndindabahizi* Trial Judgment; *Cyangugu* Trial Judgment.

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VII. CRIMINAL RESPONSIBILITY OF THE ACCUSED

The Panel finds that the Accused Milenko Trifunović, Aleksandar Radovanović, Brano Džinić, Slobodan Jakovljević, and Branislav Medan together participated in the killings in the Kravica warehouse, each one individually through their individual acts. All their acts, which included marching the captives in a column to the warehouse and ultimately killing the captives in the warehouse by personally shooting at them from firearms, throwing hand-grenades, or preventing the captives' escape through the warehouse's windows, were committed through their joint participation, and as such they decisively contributed to the perpetration of the criminal offence for which they are accountable as co-perpetrators under Article 180(1) in conjunction with Article 29 of the CC of BiH.

A. Accused Milenko Trifunović

Ample evidence was adduced about the participation of the Accused Trifunović and his status as a member of the 2nd Šekovići Detachment and Commander of 3rd Skelani Platoon, based on which the Panel found that the Accused was responsible for the criminal offense as described in the operative part of the Verdict.

The Prosecutor's Office proved beyond reasonable doubt that the Accused was a member of the 2nd Šekovići Detachment, in his capacity as Commander of 3rd Skelani Platoon, which was corroborated by many witnesses who were also members of the Detachment – including Marko Aleksić, Tomislav Đukić, Predrag Čelić and others – and which was also proved by the documentary evidence, namely: list of members of 2nd Šekovići Detachment, Skelani Platoon (Exhibit O-176) and Payroll for July 1995 (Exhibit O-176). Both documents prove that, at the relevant time, he was a member of the 2nd Šekovići Detachment and Commander of the 3rd Skelani Platoon. The defense did not contest that fact.

There are those who eyewitnessed the involvement of the Accused Trifunović, in a manner as described in the operative part of the Verdict, based on whose testimonies the Panel reached its conclusion on the criminal responsibility of the Accused Trifunović.

Firstly, witness S4 mentioned the Accused Milenko Trifunović as the Commander of the 3rd Skelani Platoon and stated that he had been in Sandići at the relevant time in his capacity as commander, and ordered them to perform other duties. This witness recognized him in the courtroom, and he also recognized him on the footage produced by Zoran Petrović, in which Trifunović, standing in the Sandići meadow, armed, instructed one captive to call on others to come out of the woods, which the captive did, calling on "Nermin to come along to the Serbs". In the same clip of footage, Trifunović was also recognized by other witnesses, members of the Detachment who testified at the trial, that is, witnesses Nebojša Janković and Milojko Milovanović.

Furthermore, Petar Mitrović stated that the Accused Trifunović had been the commander of the Skelani Platoon, which the witness was also a member of. With regard to Trifunović, Mitrović stated that this Accused was together with the other members of the Platoon who were deployed at the road near Sandići and tasked with receiving surrendering Bosniaks who had been hiding in the woods.

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The statement of Miladin Stevanović corroborates the statement of Mitrović. Stevanović stated that Trifunović was Platoon Commander and also on the road near Sandići on the referenced day. Prior to coming to the Srebrenica area and while they still were in Srednje, Stevanović complained to Trifunović that he did not want to go to Srebrenica, nor should he go, as he was a warehouseman. However, Trifunović insisted. Stevanović also stated that, in front of the building of the Kravica Farming Cooperative, he saw dead people in one part of it, heard cries and shrieks, saw a young man throwing a hand grenade into that building, and saw, among others, Milenko Trifunović as well.

Apart from the fact that he commanded the Skelani Platoon, Trifunović was a direct perpetrator of the execution in the Kravica Warehouse, as clearly established by the evidence.

Witness S4 also stated that, while still in Srednje, Trifunović ordered the platoon to move to Bratunac. Also, all further orders were issued by the Accused Trifunović as of the moment of their arrival in Bratunac. Witness S4 also stated that, in the Sandići meadow, Trifunović ordered the platoon members to gather around the column, escort them to the building of the Farming Cooperative Kravica, and detain them there. Trifunović also escorted the column. The witness stated that, having reached the warehouse building, they formed a semi-circle from both corners of the building and took the positions so that Trifunović and Čuturić were on his right. According to the witness, when Krsto Dragičević entered the hangar, just before his death, he was warned by Trifunović, who ordered him not to enter. Shortly thereafter, Dragičević was shot, and Čuturić wounded. Then Trifunović ran up to them and took the rifle from under the body of Dragičević. S4 testified that when the firing at the captives in the hangar commenced, he saw that Trifunović also began to shoot at the captives.

The Accused also took the opportunity to cross-examine the witness S4. During the cross-examination, the Accused did not manage to raise doubts concerning the credibility of this witness. On the contrary, the Accused did not deny that he had been in Sandići, nor did he contest the allegations of the witness S4 as to the Accused's presence at the warehouse.

Corroborating the statements and testimony of S4, Petar Mitrović in his statement given on 21 June 2005 to the Prosecutor (Exhibit O-320) stated that the Accused Trifunović had been the commander of the 3rd Skelani Platoon. Mitrović further stated that the Accused Trifunović, a.k.a. Čop, was together with the other members of the Platoon who were deployed on the road near Sandići and tasked with receiving surrendering Bosniaks who had been hiding in the woods. Furthermore, Mitrović stated that, while at the warehouse, he saw all those persons he had mentioned earlier in his statement, including the Accused Trifunović, shooting from their weapons through the entrance door of the warehouse at the Bosniak captives.

In his statement of 4 October 2005 given during a crime scene investigation (Exhibit O-323), Mitrović repeated that he saw Trifunović while standing together with other members of the Skelani Platoon on the road in front of the Kravica Warehouse.

The defense noted that, after the incident in the warehouse in which Krsto Dragičević got killed, the Accused went to Skelani together with other members of the platoon. This was also corroborated by witness Đorđe Božić who, between 19:00 and 20:00 on 13 July 1995, saw a group of members of the Special Police who came in front of the Health Centre in Bratunac and, within that period of time, took over the body of the killed police officer from

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the mortuary. Witnesses Boriša Janković and Predrag Krsmanović corroborated that, on 13 July 1995 at about 23:00, the body of Krsto Dragičević arrived in Skelani.

The evidence establishes that the shooting in the hangar began in the late afternoon according to several witnesses, including Stevanović, S1, S2, and S4, and lasted for about one hour and a half, according to witnesses S4 and Marko Aleksić. Therefore, it is perfectly consistent that the members of the Skelani platoon could have been at the Health Centre in Bratunac at the time mentioned by witness Đorđe Božić, which is from about 19:00 or somewhat later. This is also evident from the Protocol of the Health Centre (Exhibit O-182), which documents that they received the body of Krsto Dragičević at 19:00. Stevanović stated that they left Kravica with the body of Krsto Dragičević at about 16:30, but that they had to wait in Bratunac for the doctor and the key-keeper of the chapel, which explains the lapse of time between 16:30 and 19:00.

The defense witnesses for the Accused attempted to contest his involvement in the killings in the warehouse, however, the defense witnesses heard by the Panel did not provide evidence that was sufficiently convincing to successfully challenge the statements of S4, Mitrović and Stevanović, who were eye-witnesses. Mirko Trifunović, the Accused Trifunović's brother, witness for the defense, only stated that the Accused had told him at the funeral that he did not know what had happened, that he had had not been there, and that he did not feel guilty. However, such allegations are contrary to the convincing statements of the witnesses, therefore, the Panel cannot accept them as reliable and accurate.

Consequently, having considered all evidence individually and as a whole, the Panel concluded that by his actions, the Accused Trifunović participated in the joint perpetration of this crime, and by so doing contributed decisively to the perpetration of the crime, so the Prosecution has proven beyond a reasonable doubt the participation of the Accused in the manner described in the operative part of the Verdict.

Also, under Count c) of the Amended Indictment, all Accused are charged with encouraging the Bosniaks in the column to surrender by giving them false promises. However, based on all presented evidence, the Panel finds that this was specifically mentioned by S4 only with regard to one of the accused, that is, Milenko Trifunović, when he saw him on the footage (Exhibit O-193) while encouraging one of the captives on the meadow to call on the others to "come to the Serbs". Other witnesses also recognized him on the same footage, which lead the Panel to conform the operative part of the Verdict to the established facts, whereas it found that the Accused Trifunović was solely responsible for this particular act.

It is noteworthy that the Prosecutor charged the Accused Trifunović with the following:

> together with other accused persons, he personally participated in the killings of the Bosniak captives in the warehouse of the Farming Cooperative Kravica (under Article 180(1) in conjunction with Article 29 of the CC of BiH), and that, as the Platoon Commander, through his presence at the execution site and failure to protect the captives, he aided and abetted the perpetrators in the killings whereas his presence served as tacit encouragement to the perpetrators (Article 180(1) in conjunction with Article 21 of the CC of BiH),
>
> furthermore, as a superior, he is also criminally liable for the actions of his subordinates pursuant to Article 180(2) of the CC of BiH.

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As the evidentiary procedure established Trifunović's responsibility as a co-perpetrator, insofar as he personally participated in the killings of the captives in the warehouse, regardless of his other possible involvement in this event as the Platoon Commander, according to the governing principle in the criminal theory (the principle of concurrent convictions), it is not founded to establish every form of criminal responsibility and to criminally evaluate every form of participation in the criminal offence as a separate criminal offence. In this particular case, the Accused Trifunović is criminally responsible for his personal participation in the killing of the captives, being the gravest form of participation, whereas that gravest form of participation trumps the less serious forms of participation. ICTY jurisprudence also refers to such a position.[273] The superior status of the Accused Trifunović is a separate fact which may be significant in tailoring the sentence. Therefore, considering the foregoing, the Panel conformed the operative part of the Verdict to the established facts and the criminal responsibility of the Accused Trifunović, insofar as it omits the parts of the charges under Count 2 (a) and (b) of the Indictment of the Prosecutor's Office regarding the Accused Trifunović. The Panel finds that this has not disturbed the objective identity of the Indictment, nor has it essentially violated the criminal procedure.

[273] *Accord Kordić and Čerkez* Appeal Judgment, paras. 34-35; *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgment, 29 July 2004, paras 91-92. *See also Prosecutor v. Juvenal Kajelijeli*, ICTR-98-44A-A, Judgment, 23 May 2005, para. 81; *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF Case"), SCSL-04-14-T, Judgment, 2 August 2007, para. 251.

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B. Accused Brano Džinić

The Accused Džinić has been charged with committing the criminal offense as a member of the 2nd Šekovići Detachment. It has been found that the Accused Džinić did not belong to the 3rd Skelani Platoon, as most Accused did, but rather to the 2nd Platoon of the Detachment. Based on the testimonies of the witnesses for the Prosecutor's Office Ljubiša Bečarević, Predrag Čelić, and Slobodan Stjepanović, who knew the Accused, and defense witnesses Zoro Lukić and Zoran Tomić, all of whom were members of the 2nd Platoon as well, and also based on the documentary evidence, namely, Payroll for July 1995 (Exhibit O-176), it is evident that the Accused Džinić was a member of the 2nd Detachment. The Accused Džinić himself stated in his investigative statement given to the Prosecutor's Office (Exhibit O-322) that, at the relevant time, he was assigned tasks in Sandići as a member of the 2nd Šekovići Detachment.

Petar Mitrović, in his statement of 21 June 2005 to the Prosecutor, mentioned that one Čupo, together with one Vojvoda, had thrown hand grenades into the hangar. Mitrović said that he did not know their real names, but that they were police officers from the 2nd Šekovići Detachment. He described Čupo as a person with longer hair tied in low ponytail, skinny, about 1.65 cm tall. Mitrović stated that he has not seen him after these events.

In the further proceedings, the Prosecutor's Office argued that it was exactly the Accused Džinić, a.k.a. Čupo, who was throwing hand grenades at the captives in the building of the Farming Cooperative Kravica.

During the proceedings, the Prosecutor endeavored to prove and the defense strove to contest that the Accused Džinić had the nickname Čupo at the relevant time.

The Panel heard the witness Nebojša Janković, who stated that Džinić, whom he recognized in the courtroom and on the photograph Exhibit O-62 was nicknamed Čupo.

Witness Dragomir Stupar stated that, among others, he also knew the Accused Džinić, whose nickname was Čupo.

Witness Đorđo Vuković stated that he knew Džinić and that they called him Čupo because of his long hair.

Witness Stanislav Vukajlović stated in the investigation phase that Brano Džinić was nicknamed Čupo and that he knew him from before, from the football matches.

Witness Slavoljub Gužvić testified in his investigative statement that Brano Džinić was nicknamed Čupo, and that he had seen him together with Zoran Lukić, Zgembo, and Oficir on the road. He recognized him at the trial and said that he had had longer hair. The defense witness for the Accused, Dalibor Džurđić, also confirmed that, in 1995, Džinić had longer hair tied in low ponytail.

Finally, witness S4 recognized the accused Brano Džinić during the trial and stated that his nickname was Čupo.

The defense presented witnesses who knew the accused Džinić and stated that he was not known by a nickname. Also, not all prosecution witnesses stated that Džinić had been

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nicknamed Čupo. Some alleged that his nickname was Mali Džin, Džin, Džine, or Div. Defense witnesses Slađan Stanković, Dalibor Džurđić, Dejan Dabić and Miloš Lakić stated that it was unknown to them that he had been nicknamed Čupo. However, the Panel finds that the number of nicknames which one may have is not absolute. The use of one nickname does not necessarily exclude the use of one more or several more nicknames. The Panel does not find that the testimonies of some witnesses about different nicknames for the Accused contradict the fact that the Accused, among other nicknames, also had the nickname Čupo, which was not necessarily known to all his acquaintances.

Considering that it has been proven that the Accused Džinić was a member of the 2nd Platoon of the 2nd Šekovići Detachment, the Panel analyzed the testimonies of the witnesses who were also members of that platoon. Therefore, Ljubiša Bečarević stated that Džinić had been a member of the 2nd Platoon and added that he had seen him at the time when the Platoon was positioned on the road. He stated that Džinić mainly socialized with Zoran Lukić and Jelenko Lukić.

Witness Slobodan Stjepanović stated that, after coming there from Srednje, he was deployed on the road, together with Predrag Čelić, Zoran Tomić, Zoran Lukić and Brano Džinić. The next day, after staying there overnight, Brano Džinić and Zoran Tomić headed towards Sandići.

The defense witness Zoro Lukić, member of the 2nd Platoon, stated that, while on the road, Brano Džinić did not go in the direction of the column of Bosniaks who were lined up and taken towards Kravica, and also stated that he was with him all the time, as was Zoran Tomić. This witness stated that Džinić had no nickname, and that Zoran Tomić's nickname was Zgembo.

Witness Zoran Tomić also testified as a witness in favor of the Accused Džinić and stated that, early in the morning on 13 July, shooting began at the road on which they were positioned. He stated that Čuturić asked him and Džinić to come along and help them as a police officer from Bratunac had been killed, and said that the attack was launched and a hand grenade thrown. Then they left and were deployed around the house in Sandići, when Mladić came along. That was about 14:00. The witness stated that Džinić had been with him the entire time.

If Zoran Tomić's testimony that Džinić was with him the entire time is compared with the testimony of S4, who stated that Zgembo and Čupo Brano also escorted the column of Bosniaks, and with Zoro Lukić's statement that Tomić's nickname was Zgembo, it is clear that Lukić's testimony that Brano Džinić was on the road and did not go towards Kravica cannot be accepted. Specifically, Lukić himself stated that Džinić and Tomić were with him the entire time, which was disputed by Tomić, who stated that he and Džinić left after being called up by Čuturić.

Moreover, Zoran Tomić's statement that he was together with Džinić at the time Gen. Mladić was at Sandići at 14:00 is not inconsistent with Džinić escorting the column of Bosniaks, as it is clear from the evidence that the column was formed after Gen. Mladić left from Sandići.

From the evidence mentioned above, the Panel concludes that Mitrović was an eyewitness in the respect that he saw the Accused Džinić, a.k.a. Čupo, together with someone else, "Vojvoda", throwing hand grenades into the Kravica warehouse.

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Corroboration of this evidence is to be found in the testimony of witness S4, who testified that the Accused Džinić was a participant in the events on 13 July at the Kravica warehouse. He testified that, once the shooting ceased, hand grenades were used for killing the captives in the warehouse. Witness S4 stated that he personally saw Vojvoda and Čupo throwing hand grenades from two boxes into the warehouse.

Corroborative hearsay evidence is witness Jovan Nikolić, who testified that he had heard the rumors spreading in Bratunac that Vojvoda and Čupo threw hand grenades into the hangar, but that he did not know Džinić.

Finally, the Panel takes into consideration as corroborative evidence, the evidence which pertains to the fact that hand grenades were indeed used in the killing of the Bosniak prisoners in the Kravica warehouse. Several on-site investigations were conducted after the events. On 30 September and 1 October 1996, a U.S. Naval Criminal Investigation team found traces of explosive detonations and explosive residue at several places along the walls in the Warehouse.[274] Similarly, the 2nd Manning Report refers to findings related to the Glogova 1 mass grave:

> A particular feature of some of the graves (subgraves of Glogova 1) was the high incidents of apparent blast and shrapnel injury to the bodies. Located within some of the graves were grenade 'fly off' levers, as well as apparent pieces of grenade and shrapnel. The items located within the graves and the injuries evident in the bodies fully supports witness testimony of the process of execution and body removal at the Kravica Warehouse.[275]

As previously discussed with respect to the Accused Trifunović, the Panel concludes that the Accused withdrew together with other members of the 2nd Detachment to Skelani only after perpetrating the killings.

Therefore, having examined all the evidence individually and as a whole, the Panel found that the accused Džinić, by his actions together with others participated in the perpetration of this criminal offence, thus decisively contributing to the commission of this criminal offence, therefore, the Prosecutor's Office proved beyond reasonable doubt the participation of the Accused, in a manner as described in the operative part of the Verdict.

[274] NCIS Report, pgs. 2-8 (Exhibit O-229).
[275] 2nd Manning Report, pg. 11 (Exhibit O-236).

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C. Accused Aleksandar Radovanović

The Panel has found beyond reasonable doubt that the Accused Radovanović was a member of the 3rd Skelani Platoon. Apart from the statements of witnesses who were members of the Detachment – Tomislav Dukić, Nebojša Janković and Nedeljko Sekula – that fact was also proven by the documentary evidence, namely Payroll for the month of July 1995 (Exhibit O-176) and a List of members of the 2nd Šekovići Detachment, Skelani Platoon (Exhibit O-176). The Accused Radovanović himself stated that, as of July 1993, he was in the Special Police Brigade, in the Detachment named Sarajevo-Romanija at that time, considering that the 2nd Šekovići Detachment was established at a later point in time.

The evidence establishes that the Accused participated in the referenced events, based on which the Panel found beyond doubt that the Accused was criminally responsible.

Witness S4 testified that the Accused Radovanović was one of those who escorted the column of Bosniaks to the Kravica warehouse, together with others. He also stated that he saw that, when the shooting began, the Accused was also firing from his automatic rifle. At one moment during the shooting in front of the Farming Cooperative building, the Accused turned and rebuked him for not shooting, saying: "Shoot, you traitorous Serb fucker."

Corroborating the evidence of S4, in his statement given to the Prosecutor, Petar Mitrović stated that the Accused Radovanović was one of the members of the Skelani Platoon who took part in escorting the group of about 500 captives to the hangar. He further stated that afterwards, in front of the hangar, he saw Radovanović, among others, shooting through the huge entrance door into the hangar where the captives were held.

Also corroborating S4, Miladin Stevanović stated to the Prosecutor that, having returned from Bratunac on 13 July some time after 16:00, after he had visited his relatives in the morning, he arrived at the Kravica warehouse and saw members of the 3rd Skelani Platoon, including the Accused Radovanović, in front of the building.

The Accused Radovanović testified during the main trial about his participation on the road in the area of the Farming Cooperative Kravica and stated that he was moving with the platoon from the pass Sandići towards the village of Kravica. He was in the company of Mirko Milanović, Krsto Dragičević, Slobodan Jakovljević, Milija Jovanović, a.k.a. Župa, and Milenko Savić. He stated that he stayed in Sandići for the rest of that day. At about noon, calls through megaphone were heard. He further testified: "As I have already said, the military units arrived. There have already been calls for the Muslim army to surrender."

The Accused stated that nobody surrendered to him that day, and that according to some information, those who did surrender received food and water. The Accused stated that he was not in a situation to see the captives until the time when the column passed by from Sandići towards Kravica. The Accused stated that Čuturić had singled out several of them, while the Accused stayed near Sandići from where, according to him, he did see the hangar. Soon afterwards, he heard some shooting which lasted for ten minutes, and he stated that Čop had come along and told them that Krsto Dragičević had been killed, and also asked him to go to the building of the Farming Cooperative together with him. He stated that he saw the covered body of Dragičević and 10-20 bodies in front of the hangar, and that there were many soldiers there. The Accused stated that he was told then that no members of the Detachment had been in front of the building, and that only Medan Branislav, Slobodan

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Jakovljević and Petar Mitrović were there as Čuturić had deployed them. Then they all withdrew towards Skelani, after the body of Dragičević had been taken away.

Having analyzed the evidence as provided by witness S4, and the corroborating statements of Mitrović and Stevanović, the Panel has found them reliable and credible. The Panel finds that there is no room for any doubt that the Accused acted in the manner described in the Indictment. Stevanović did not state that the Accused was shooting, but, consistent with the testimony of S4 and the statement of Mitrović, he said that he had seen the Accused Radovanović in front of the hangar, which is contrary to what the Accused stated in his testimony. Credence may be given to the testimony and statements of S4, Mitrović and Stevanović based on the fact that all three provided a consistent description of the events in the Srebrenica area at the relevant time, and that there are no differences in their testimonies about the critical issues, including the description of events that the Accused himself did not contest. The Accused's testimony as witness is unreliable, because he had a good reason to be silent on the truth in order to be acquitted of the charges.

As previously discussed with respect to the Accused Trifunović, the Panel concludes that the Accused withdrew together with other members of the 2nd Detachment to Skelani only after perpetrating the killings.

Therefore, having examined all the evidence individually and as a whole, the Panel found that the Accused Radovanović, by his actions together with others participated in the perpetration of this criminal offence, thus decisively contributing to the commission of this criminal offence, therefore, the Prosecutor's Office proved beyond reasonable doubt the participation of the Accused, in a manner as described in the operative part of the Verdict.

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D. Accused Slobodan Jakovljević and Accused Branislav Medan

With regard to the Accused Jakovljević and Medan, the Panel has found that they were members of the 2nd Šekovići Detachment, 3rd Skelani Platoon. Witnesses who were also members of the Detachment at the relevant time – Nebojša Janković, Nenad Janjić, Živojin Milošević, Mirko Sekulić and Nedeljko Sekula – stated that they knew the Accused as members of the Detachment, Skelani Platoon. The documentary evidence corroborates this fact, namely, the Payroll for the month of July 1995 (Exhibit O-176) and a List of members of the 2nd Šekovići Detachment, Skelani Platoon (Exhibit O-176) which, in addition, their defense did not contest either.

Eyewitness S4, member of the Detachment, also testified about the participation of these two Accused by listing the members of the Detachment who escorted the Bosniak column from Sandići towards the building of the Farming Cooperative Kravica. The witness stated that they all were armed and guarded the column. With regard to Jakovljević, he stated that he was behind him in the escort. The witness also described the participation of these two Accused insofar as they were ordered, together with Petar Mitrović, to secure the back of the Kravica warehouse, thus preventing anyone from getting out of the building through its small windows.

Corroborating S4, in his statement given to the Prosecutor on the 21 June 2005, Petar Mitrović similarly described the participation of the Accused Jakovljević and Medan. He stated that the Accused were initially with him and other members of the Platoon on the road between Sandići and Kravica at the relevant time, and then, after being called on by Čop [Trifunović], who asked for assistance through the Motorola, they were ordered to go behind the warehouse of the Farming Cooperative to secure it and prevent anyone from fleeing through the openings.

Also corroborating S4, Miladin Stevanović initially stated that the Accused Jakovljević and Medan, together with himself and other members of the Skelani Platoon, were deployed along the Bratunac – Konjević Polje road on 12 July. He further stated that on 13 July, having returned from Bratunac to the front of the Farming Cooperative, he saw Branislav Medan and Slobodan Jakovljević, who were standing in front of the Farming Cooperative together with Milenko Trifunović, Aleksandar Radovanović and other members of the Skelani Platoon.

The Accused Radovanović stated in his testimony that the Accused Jakovljević, together with himself, was deployed on the road near the pass leading from Sandići to the village of Kravica on the day between 12 and 13 July. Radovanović testified that Čuturić had called him and some other members of the Platoon, before the column of men was taken towards the building of the Farming Cooperative Kravica. He stated during his testimony that he saw Jakovljević, Medan and Mitrović coming forward from behind the warehouse when the Platoon was to withdraw from the area in front of the warehouse, and that the Platoon then withdrew towards Sandići.

Mitrović's testimony is inconsistent with the testimonies of S4 and the Accused Radovanović regarding the participation of the Accused Medan and Jakovljević in escorting the column, although it is consistent regarding the participation of these two Accused in the actions around the warehouse of the Farming Cooperative. The Panel finds that credence cannot be given to the part of Mitrović's testimony as far as the participation of Medan and Jakovljević

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in escorting the column is concerned, considering that both S4 and the Accused Radovanović eyewitnessed the participation of these two Accused in the escort of the column from Sandići to the warehouse. The Panel finds the testimonies of S4 and Radovanović about this particular circumstance truthful and credible.

Therefore, having analyzed all the foregoing, the Panel finds beyond doubt that the Accused took the actions as described in the operative part of the Verdict. Although the act of perpetration by these two Accused differs from the act of perpetration by the Accused in relation to whom it has been proven that they were in front of the warehouse and were shooting into it, the Panel holds that their participation equally contributed to the acts of perpetration. These two Accused were at the back of the hangar, where they were positioned to ensure that no captives could flee through the windows. Considering that there were windows at the back of the warehouse, which follows from the photograph of the back of the referenced warehouse (Exhibit O-92), these windows were the only chance for the captives to avoid the fire from the front, through the door. It is evident in the testimony of S2 that the windows could have been used for flight, since he stated that he managed to survive by jumping out through the window at the back. Although there is evidence proving that the captives were also shot at from the back, which S2 also confirmed, there is no evidence these two Accused were actually shooting at or through the openings at the captives. However, by their actions, the Accused jointly participated in the commission of the act, by taking actions that are of equal importance and effect as if they had fired at the captives. Covering the openings that were the only chance for the captives to survive, at a time when a mass execution was underway at the front of the warehouse, constitutes a decisive contribution to the act, thus achieving the planned intention – the intention to have no survivors in the warehouse. As previously discussed with respect to the Accused Trifunović, the Panel concludes that the Accused withdrew together with other members of the 2nd Detachment to Skelani only after perpetrating the killings.

Therefore, having examined all the evidence individually and as a whole, the Panel found that the Accused Jakovljević and Medan, by their actions together with others participated in the perpetration of this criminal offence, thus decisively contributing to the commission of this criminal offence, therefore, the Prosecutor's Office proved beyond reasonable doubt the participation of the Accused, in a manner as described in the operative part of the Verdict.

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E. Accused Miloš Stupar: Command Responsibility

Under the principle of Command Responsibility, the Accused Miloš Stupar has been found to be personally criminally liable for the genocide perpetrated by others at the Kravica warehouse on July 13, 1995 because he was found to have a superior-subordinate relationship with those who participated in the *actus reus* of the crimes, he had knowledge of the crimes committed by the accused persons, and he failed to take the measures necessary under the law to punish the crimes.

1. General Considerations

a. Current Law of BiH

Article 180 establishes the mode of criminal liability that the Panel must find in order to convict persons for crimes specifically referenced within Article 180. Article 180(2) is derived from and is identical to Article 7 of the ICTY Statute. The ICTY Statute is international law, by virtue of its having been drafted pursuant to the powers of the United Nations.[276] It is a well-established principle of international law that when international law is incorporated into domestic law, "[d]omestic Courts must consider the parent norms of international law and their interpretation by international courts."[277] When Article 7 was copied into the law of BiH, it came with its international origins and its international judicial interpretation and definitions.

Article 180(2) establishes personal liability for the crimes of subordinates incurred by a commander who fails to prevent or punish subordinates who commit particular crimes set out in Chapter 17, including the crime of genocide (Article 171), with which the Accused are charged. Article 180(2) reads in relevant part:

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

The Accused Stupar is charged under Article 180(2) of the current Criminal Code of BiH. Article 180(2) became part of the CC of BiH after Article 7(3) had been enacted and interpreted by the ICTY, and Article 180(2) brings into the Law of BiH that interpretation.

b. Customary International Law

For the reasons explained below, command responsibility as a principle of criminal liability is now firmly established in customary international law.[278] Customary international law is

[276] *See* Secretary General's Report.
[277] Gerhard Werle, *Principles of International Criminal Law*, (The Hague: Asser Press, 2005), pg. 80. *See also* Richard K. Gardiner, *International Law* (Essex: Pearson, 2003), pg. 156; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), pg. 206.
[278] *See* Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008, 2nd ed.) pgs. 240, 241(" [I]n a matter of a few years after the Second World War the doctrine of command responsibility crystallized into an international customary rule.")

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part of the current law of BiH.[279] As a general principle, "It seems that all national legal systems accept customary international law as an integral part of national law."[280] Article III(3)(b) of the Constitution of Bosnia and Herzegovina establishes that "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."

The Accused Stupar is therefore properly charged under the current criminal law of BiH under the principle of command responsibility: 1) because the Accused is subject to the authority of customary international law, which recognizes command responsibility; and, 2) because the Accused is subject to the statutory law of BiH, specifically Article 180(2) of the CC of BiH, which expressly incorporates command responsibility.

2. Principle of Legality

Because Accused Stupar is subject to liability under a command responsibility principle now does not mean that his liability for committing crimes in the past can automatically be supported on a command responsibility theory. The Accused is charged with commission of a crime occurring in July 1995, prior to the enactment of the current Criminal Code and current Constitution. Under the principle of legality, the Accused cannot be held responsible under a theory of liability that did not exist at the time of the perpetration of the crime.[281] Therefore it must be established beyond doubt that command responsibility was part of the law to which the Accused was subject in July 1995.

Compliance with the principle of legality requires proof not only that the Accused incurred criminal liability under a principle of law to which he was subject at the time of commission, but also that at the time of commission of the crime, it was reasonably foreseeable that the Accused would be criminally liable under that principle. The Panel concludes, as reasoned below, that the Accused was subject to both domestic law and international customary law at the time the offense was committed, that command responsibility was part of both domestic law and the international customary law at that time. Prosecution under a theory of command responsibility was a foreseeable consequence of violating the law at that time and in that manner.

a. The Accused was Subject to Liability under the Principle of Command Responsibility under Domestic Law Applicable at the Time the Crimes were Committed

As a Commander of a Special Police Detachment of the Ministry of the Interior, Stupar was subject to the presidential order "The Application of the Rules of the International Law of War on the Army".[282] That order provided:

1) In an armed conflict, the Army of the Serb Republic of Bosnia and Herzegovina (hereafter: the Army) and the Serb Ministry of the Interior shall apply and respect the rules of international laws of war [which are] - international treaties signed, ratified or

[279] *Rašević and Todović* First Instance Verdict, pgs 104-106.
[280] Eileen Denza, "The Relationship Between International Law and National Law", in Malcolm Evans (ed.), *International Law* (Oxford: Hart Publishing, 2003), pg. 415, 428.
[281] *See* CC of BiH, Art. 3, 4; European Convention, Art. 7; ICCPR, Art. 15.
[282] Karadžić Order 01-53/92. Official Gazette of the Serb People in Bosnia and Herzegovina, no. 9, 13 June 1992 (Exhibit O-281).

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joined by the SFRY; - rules of international customs of war; - generally accepted principles of international laws of war.

2) Commanders and commanding officers and each member of the army or other armed formation taking part in combat activities shall be responsible for the application of the rules of international laws of war. The competent superior officer shall initiate proceedings for sanctions as provided by law against individuals who violate the international laws of war.

In addition, the Accused was subject to the laws, rules and regulations of the VRS on 13 July 1995 by virtue of the resubordination of the 2nd Detachment to the VRS. According to Dr. Matijević, the expert witness on military matters in the RS presented by the defense, "The military rules shall be valid for and applied to the engaged police unit for the reason of observing the principle of unity of command as long as that police unit is subordinated to the commander of the military unit in the zone of combat operations, as provided for also in the Law on VRS, Law on the Military Prosecutor's Office, Law on the Military Courts and the Law on Application of the Law on Military Courts and of the Law on the Military Prosecutor's Office in Time of State of War."

Resubordination was effective 10 July 1995, by order issued under the authority of Tomislav Kovač, acting Minister of the Interior, Order 64/95. Resubordination of the special police units to the VRS was authorized by the Law on the Application of the Law on the Interior During an Imminent Threat of War or a State of War.[283] Article 14 of that Law reads in the relevant part:

> Police units assigned to combat operations by an order of the Supreme Commander of the Armed Forces shall be resubordinated to the commander of the unit in whose zone of responsibility they are performing combat tasks.

The laws and regulations of the VRS at the operative time included the "Rules on the Application of the Rules of International Laws of War in the Armed Forces of the Socialist Federal Republic of Yugoslavia" from the JNA of the former Yugoslavia. Rule 21 of those instructions specifically imposed liability on Stupar under the principle of command responsibility, as commanding officer within a unit resubordinated to the VRS. Rule 21 reads:

> **Responsibility for the acts of subordinates.** A military commanding officer shall be personally responsible for the violations of the rules of laws of war if he knew or had the reason to know that the units subordinated to him or other units or individuals are preparing to commit such violations and, at the time when it was still possible to prevent them from being committed, fails to take measures to prevent such violations. The commanding officer who knows that the violations of the rules of the laws of war were committed but fails to initiate disciplinary or criminal proceedings against the perpetrator or, if he is not competent to initiate the proceedings, fails to report the perpetrator to the competent military commanding officer shall also be personally responsible.

[283] Official Gazette of Republika Srpska, no. 1/94.

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This rule, to which Stupar was subject, reflects exactly the principle of command responsibility as it exists in the current law of BiH under which the accused stands charged.

b. The Accused was Subject to the Authority of Customary International Law at the Time the Crimes were Committed

Both the MUP and the VRS were expressly subject to customary international law by presidential order, "The Application of the Rules of the International Law of War on the Army".[284] Command responsibility was a principle of customary international law in July 1995.

The concept of liability of a Commander for the crimes of subordinates was found in several cases arising out of the Second World War.[285] Although, in 1948, the United Nations War Crimes Commission concluded, "The law on this matter is still developing and it would be wrong to expect to find hard and fast rules in universal application," those universal rules were articulated by 1977 in Additional Protocol I.[286] Article 87(3) of Additional Protocol I set out the principle of command responsibility as it has come to be understood in customary international law.[287] By 1992, command responsibility was "anchored firmly" in customary international law.[288]

"Command responsibility" developed from the concept of "responsible command" which was included in the early conventions on humanitarian law dating to the 1899 Hague Convention with Respect to the Laws and Customs of War on Land and Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the 1907 Hague Convention respecting the Laws and Customs of War on Land.[289] Responsible command placed on a superior the duty to establish conditions within which subordinates were capable of complying with international humanitarian standards. Command responsibility became, over time, the standard by which a superior could be personally criminally liable for failing to exercise the duty of responsible command regarding certain specific duties. It differs from other forms of criminal culpability in that it holds the superior responsible for the crimes of subordinates even though the superior neither ordered the crimes nor participated in them. Nonetheless, the superior's failure to exercise responsible command, by failing to prevent the

[284] *See* fn. 282, *supra*, and corresponding text.
[285] *See, e.g., Trial of Wilhelm List and others* ("*Hostage Case*"), Judgment of 19 Feb 1948, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 ("Green Series"), Vol. XI. Likewise, in the *High Command Case*, the Tribunal offered "the opinion that command authority and executive power obligates the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that… inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality." *Trial of Wilhelm von Leeb and Thirteen Others* ("*High Command Case*"), Judgment of 28 October 1948, Green Series, Vol. XI, pg. 632.
[286] *Law Reports of Trials of War Criminals* ("TWC"), Vol. IV (1948), pg. 87; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), *entry into force* 7 December 1979.
[287] This is consistent with the conclusions drawn by the ICTY Appeals Chamber in *Čelebići*: "The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature." *Zejnil Delalić, et. al* ("*Čelebići*"), IT-96-21-A, Judgment, 20 February 2001, para. 195.
[288] CDF Trial Judgment, para. 233. *See also Čelebići* Appeal Judgment, para. 195.
[289] Thereafter, the concept of "responsible command" appears in Articles 18 and 33 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and Article 43(1) of Additional Protocol I.

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crime and/or by failing to punish the perpetrators, renders them liable for the commission of the underlying crimes.

The specific articulation of command responsibility as it existed in customary international law in July 1995, is set out in the ICTY Statutes Article 7(3), which has been incorporated *verbatim* in the current law of BiH, under which the Accused is convicted. The United Nations, acting on the Secretary General's Report, adopted Article 7(3) as part of the ICTY Statute, and in so doing agreed that it was one of the "rules of international humanitarian law which are beyond any doubt part of customary law."[290] The crime for which the Accused stands convicted occurred two years after this unequivocal acceptance of command responsibility liability as a rule of international customary law by the international community. Because liability under the principle of command responsibility was part of the customary international humanitarian law at the time the crime was committed, the Accused was subject to it.

c. Criminal Culpability and Prosecution for Commission of Crimes under the Theory of Command Responsibility was Foreseeable at the Time the Crimes were Committed

The ECHR, in interpreting Article 7 of the European Convention, has held that in order to be found guilty under a principle of liability, that principle must not only have been part of the law to which the Accused was subject at the time of the commission of the crime but, in addition, that it was reasonably foreseeable that he would be subject to prosecution for commission of crimes under those theories of liability.[291]

The principle of command responsibility was expressly incorporated in Additional Protocol I, to which the former Yugoslavia was a party and which was duly published in 1978 in the Official Gazette and became part of the enforceable domestic law of the former Yugoslavia. Likewise, Article 21 of the 1988 Instruction on the Application of Rules of International Laws of War in the Armed Forces, quoted above, explicitly established command responsibility in the then-JNA. These Instructions were in force in the VRS in 1995 as well.

The ECHR has often had occasion to rule on the principle of legality enshrined in Article 7 of the European Convention. Its pronouncements have not dealt specifically with the application of customary international law within the context of domestic trials. Customary law is, by its nature, unwritten, and evolving. However, the ECHR has had occasion to review the application of Article 7 to domestic criminal law that is both evolving and non specific.[292] In those cases, that Court has examined whether there was a "settled" body of case law which was public and accessible, through which the requirements of the law were made clear. Where such a body of public and accessible case law existed, criminal Accused were deemed to have sufficient notice that their activities were subject to criminal sanction so that they

[290] Secretary General's Report, para. 34.
[291] *Streletz, Kessler and Krenz v. Germany* (Apps. Nos. 34044/96, 35532/97 and 44801/98), Judgment of 22 March 2001, para. 105.
[292] *See S.W. v. the United Kingdom* (App. No. 20166/92), Judgment of 27 October 1995; *C.R. v. the United Kingdom* (App. No. 20190/92), Judgment of 27 October 1995.

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could conform their conduct to the expectations of the law.[293] In those circumstances, Article 7 rights were not considered to be violated.[294]

In July 1995 it was reasonably foreseeable to the Accused that a commander's knowing failure to punish his subordinates for the commission of acts of genocide could subject him to criminal liability under a theory of command responsibility. The ICTY had been in existence since its establishment in 1993 by the United Nations, and Article 7(3) was specifically and expressly in force in connection with the prosecution of "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[295]

Notice of liability for command responsibility was sufficiently accessible through the availability of existing international and domestic law for the Accused to be on notice that a commander's failure to punish subordinates for killing several hundred unarmed men imprisoned in a warehouse carried criminal consequences under this principle.

3. Elements Relevant to Establishing Criminal Liability under the Principle of Command Responsibility

Elements of Command Responsibility

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

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

The Trial Chambers and Appeals Chamber of the ICTY have had several occasions to apply the concept of command responsibility to crimes occurring in the conflicts of the former Yugoslavia between 1992 and 1995, in cases involving military and non-military superiors. In so doing they have refined, but not changed, the understanding of command responsibility as it existed in customary international law within the context of that conflict. This Panel is

[293] *See also Kokkinakis v. Greece* (App. No. 14307/88), Judgment of 25 May 1993, para 40; *Radio France v. France* (App. No. 53984/00), Judgment of 30 March 2004, para 20.
[294] The Constitutional Court of BiH, in interpreting *Kokkinakis v. Greece*, stated the requirements of Article 7 as to foreseeability as follows: "The European Court specifically emphasized that this requirement of Article 7 of the European Convention is met when an individual referred to in the relevant provision, if necessary, by means of the Court interpretation, can understand which criminal activities and mistakes can make him/her subject to criminal prosecution." *Abduladhim Maktouf*, AP- 1785/06 (Const. Ct. of BiH), Decision on Admissibility and Merits on the appeal from the Verdict of the Court of Bosnia and Herzegovina ("*Maktouf* Decision"), 30 March 2007, para. 63.
[295] Secretary General's Report, para. 33.

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not bound by the decisions of the ICTY. However, we are persuaded that the ICTY's characterization of command responsibility, and its elements properly reflects the state of customary international law as it existed at the times relevant to the Indictment. In addition, as Article 180(2) of the CC of BiH directly incorporates Article 7(3) of the ICTY Statute, and the Statute is an instrument of international law, domestic courts "must consider the parent norms of international law and their interpretation by international courts."[296]

The Panel also finds it helpful to review the evidentiary factors which this Court, the ICTY, and other international courts have found relevant to determining whether the prosecution has successfully met its burden of establishing liability under the principle of command responsibility, as guidance in reviewing the evidence in the instant case.

4. Command Responsibility for Stupar

The Panel, as reasoned in this Verdict, has determined that the Accused Stupar is criminally liable for the crime of genocide. Stupar's liability is grounded solely in command responsibility. The law on command responsibility, as charged under Article 180(2) of the CC of BiH, and as it existed at the time of the offenses, is therefore analyzed as to Stupar.

5. Commission of a Criminal Act

Article 180(2) of the CC of BiH requires that the prosecutor prove the commission of a crime as prescribed by Articles 171 through 175 and 177 through 179. The underlying crime must be one of those specifically referenced, and all of its elements must be proven. In addition the perpetrator of the crime must be a subordinate of the Accused, which means that the prosecution must prove beyond doubt that there existed between the perpetrator of the underlying crime and the Accused a superior-subordinate relationship. The ICTY has concluded that it is not necessary that the subordinate be the "principle" perpetrator, that is, that the *actus reus* was committed by the subordinate, and it is sufficient that the subordinate was an aider or abettor.[297] The crime itself, however, must be a completed crime. In this case, the five subordinates of Miloš Stupar have been convicted as co-perpetrators of the crime.

The Panel concludes that the Accused Stupar is responsible for the crime of genocide committed by his subordinates: Trifunović, Medan, Jakovljević, Džinić, and Radovanović.

6. Superior-Subordinate Relationship

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

[296] Werle, Principles of International Criminal Law, p. 80. See also Gardiner, International Law p. 156; Higgins, Problems and Process: International Law and How We Use It, p. 206.
[297] *Prosecutor v. Naser Orić*, IT-03-68-T, Judgment, 30 June 2006, paras. 300-302; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-A, Judgment, 9 May 2007, para. 280.

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criminal activities.[298] The Panel concludes that Miloš Stupar was the superior officer of the five Accused who were primary perpetrators of the crime, and as such had authority over each of them within the MUP and military structure of the RS at the operative time.

a. Hierarchical Structure within the 2nd Šekovići Detachment

As explained by defense expert Dr. Matijević, Special Police Brigade ("SPB") was formed within the MUP of the RS. The Special Police Brigade as a police unit was commanded by a brigade commander and his deputy commander. The brigade commander was responsible to the Minister of the Interior of the RS. The SPB was organized into detachments commanded by detachment commanders. The detachments were themselves organized into platoons commanded by platoon commanders, whose deputies were the squad commanders. The detachment commanders reported to the brigade commander of the SPB of RS MUP.

As the expert further explained – and as prescribed by Articles 12 and 13 of the Law on the Application of the Law on the Interior During an Imminent Threat of War or a State of War – based upon the order of the President of the Republic, the Minister of the Interior was responsible for ordering the use of police forces in combat activities.[299]

b. Effective Control

Regardless of whether the authority held by the Accused is *de facto* or *de jure*, and whether the accused is in a military or civilian hierarchy, the prosecution must prove that the accused had effective control. Effective control has been defined by the ICTY as "the material ability to prevent and punish the commission of these offenses."[300] As one commentator has described it, effective control means that "there is an enforceable expectation of obedience on the part of the giver of that order, and a mirror expectation of compliance on the part of those receiving that order."[301]

Evidence of effective control can be direct or circumstantial. Direct evidence relevant to a determination of effective control includes the title used by the Accused, whether or not formally appointed; the job description for that title; statements made by the Accused regarding his authority; statements made by others about his authority; his issuance of orders to the perpetrators or those in the same class as the perpetrators, and obedience to those orders; conference by him of rewards or punishments on those lower in the hierarchy.

i. *De jure* Authority

De jure authority is that which comes from official appointment to a position of leadership over subordinates within a hierarchical structure. Documentation establishing such an official position is good evidence that the position was officially conferred, but absence of documentation is not fatal to establishing the official position if there is other evidence that

[298] *See Čelebići* Appeal Judgment, para. 192 ("Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a de jure or a de facto form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.").
[299] *See* fn. 283, *supra*.
[300] *Čelebići* Appeal Judgment, para. 197 (quoting *Čelebići* Trial Judgment, para. 377).
[301] Guénaël Mettraux, *Command Responsibility in International Law: The Boundaries of Criminal Liability for Military Commanders and Civilian Leaders* (Oxford: Oxford University Press, forthcoming 2008).

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the authority of a superior position was officially conferred.[302] However, whether established with or without documentation, the position cannot be merely a hollow one, but must carry with it the authority to exercise "effective control" over the subordinate who committed the offense.[303]

It is not sufficient to assume responsibility "solely" from the official title which the Accused held.[304] Nevertheless, as noted in the *Pohl* case:

> People are placed in high positions for the purpose of exercising authority and performing duties pertaining to that position…. If a defendant is designated as head of an *Amtsgruppe*, it is logical to assume that this was done with a purpose that he was expected and authorized to perform the functions of an *Amtsgruppe* Chief, and not merely to occupy an office with no duties or responsibilities or authority.[305]

The ICTY Appeals Chamber has stated that "a court may presume that possession of [*de jure*] power *prima facie* results in effective control unless proof to the contrary is produced."[306] Although this Panel does not agree that *de jure* authority shifts the burden to the accused in any way, the Panel notes that it is an important factor in establishing the element of superior-subordinate relationship between the Accused and the perpetrators, to be considered along with other evidence to determine whether the holder of that authority has the requisite degree of control of the subordinate to prevent and/or punish crimes. Stupar was the *de jure* commander of the 2nd Šekovići Detachment on 13 July 1995.

Although disputed by the defense, Stupar's *de jure* authority is confirmed by the documentary evidence. By the Decision of 24 February 1994 (Exhibit O-96), Miloš Stupar was assigned to the post of Šekovići Police Detachment Commander – Special Police Brigade, effective 23 February 1994. He was not relieved of that command until the Decision on assigning Miloš Stupar to duty and tasks (Exhibit O-94), dated 23 August 1995, which assigned him to compulsory work service at the post of the Head of the Zvornik Section, in the Terrorism-Fighting Administration, as of 21 August 1995. Other documentary evidence confirms that he was Detachment Commander during the intervening period, including Dispatch No. 01/1-14/2-293 (Exhibit O-263) of 16 August 1995 and Dispatch No. 01/1-1-4/2-62 (Exhibit O-101) of 18 July 1995, which the Panel concluded were authentic copies of the dispatches sent by telex machine. Stupar is referred to as the Detachment Commander in these dispatches. Likewise, Official document No. 01/1-1-4.2-278/95 (Exhibit O-262) of 14 August 1995 is correspondence between the 2nd Šekovići Detachment and the 1st Birač Infantry Brigade requesting approval for the transfer of one Nenad Protić from that Brigade to the 2nd Šekovići Detachment. This document again references Stupar as the Detachment Commander.

In addition, Official document No. 01/1-1-4/2-229/95 of 5 July 1995 (Exhibit O-259) and Official document No. 01/1-1-4/2-230/95 (Exhibit O-183) of 5 July 1995 are relevant evidence of Stupar's *de jure* position. These documents are, respectively, the half-year and quarterly reports for the 2nd Šekovići Detachment for 1995, both dated 5 July 1995, and

[302] *Kordić* Trial Judgment, para. 424.
[303] *Čelebići* Appeal Judgment, paras. 197, 306; *Kordić* Trial Judgment, para. 418.
[304] *Blagojević* Appeal Judgment, para. 302.
[305] *US v Pohl and Others*, Judgment of 3 November 1947, Green Series, Vol. V (1950), pg. 1171.
[306] *Čelebići* Appeal Judgment, para. 197.

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describe the work of the Detachment during those periods. Both of these reports state that Miloš Stupar was the Detachment Commander during the relevant period, both were issued under his authority as Detachment Commander, and they both bear his undisputed signature.

Dane Branković, a graphic engineer, testified before the Panel on 17 January and 28 January 2008 as to his evaluation and conclusions regarding the handwritten signatures of the name "Miloš Stupar" appearing on four documents. However, only one of those documents is relevant to the Panel's conclusion that Stupar was the *de jure* Detachment Commander during the operative time: the correspondence between the 2nd Šekovići Detachment and the 1st Birač Infantry Brigade regarding the transfer of Nenad Protić. Branković opined that the signature on that document that purported to be Stupar's was in fact not made by him. The Panel does not find this opinion helpful in determining Stupar's *de jure* status. The document is authentic and official, and as such its significance for this inquiry is that it was issued under the authority of Stupar as Commander, not whether he actually signed the document personally. Tomislav Kovač and other witnesses confirmed that it was not unusual for persons in authority to authorize others to sign documents on their behalf.

The application of Dane Branković's expertise is dubious, and even if the Panel were persuaded by his presentation, it would have no bearing on the issues in this case. Whether or not Stupar actually signed the documents, or someone else signed them, either on his behalf or without his knowledge, the documents still attest to the fact that those who drew them up considered Stupar to be the Detachment Commander. More importantly, the Panel's conclusion that Stupar was both *de facto* and *de jure* commander of the 2nd Šekovići Detachment at the relevant time is based on documentary and testamentary evidence in addition to and beyond the limited number of documents that were the subject of this analysis. That other evidence establishes beyond doubt that Stupar was indeed the commander of the 2nd Šekovići Detachment at the relevant time.

The Defense also summoned as a witness Vujadin Gagić, who was responsible for preparing reports in the Detachment at the relevant time. According to Vujadin Gagić, Stupar's position as commander was terminated in 1995, and Ljubomir Borovčanin, the then-deputy commander of the SPB, ordered that Stupar should be kept on the list pending his other assignment to other duties. Vujadin Gagić denied that Stupar had signed the documents admitted as Exhibits O-262, O-260, and O-183, and stated that the signature on those documents was not Stupar's signature. With regard to Exhibits O-260 and O-263, the witness stated that Rade Čuturić had ordered that Stupar should sign them on Čuturić's behalf.

The Panel finds the statement of this witness illogical in certain parts. In particular, the issue arises why Rade Čuturić, the alleged-Detachment Commander at that time, would authorize his predecessor as Detachment Commander, namely the Accused Miloš Stupar, to sign the documents in Čuturić's place, while, at the same time, Stupar signed the documents as the Detachment Commander. That is, while the Detachment Commander could have authorized another person to sign documents on his behalf, that other person would not have signed as the Detachment Commander himself, but only on behalf of the Detachment Commander.

ii. *De facto* Authority

The formal assignment of *de jure* authority is one important indication of a superior-subordinate relationship; however, as stated above, it is not by itself dispositive. Likewise, it is not necessary or critical. The *Čelebići* Trial Chamber noted, "The mere absence of formal

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legal authority to control the actions of subordinates should, therefore, not be deemed to defeat the imposition of criminal responsibility."[307] Citing the International Court of Justice, that Chamber went on to emphasize: "In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles."[308]

Evidence of *de facto* authority sufficient to exercise effective control includes the manner in which their authority is demonstrated and acknowledged, as evidenced, for example by their practice of issuing orders with the expectation that they will be obeyed.[309] Stupar was the *de facto* commander of the 2nd Šekovići Detachment on 13 July 1995.

Witnesses Danilo Zoljić, Dragomir Stupar, Dragan Obrenović, Jovan Nikolić, Stevo Stanimirović, Duško Mekić, Mirko Sekulić, Nikola Milaković, Živojin Milošević, Đorđo Vuković, and S4 testified about Stupar's *de facto* command authority, as did Miladin Stevanović, Petar Mitrović, and Ljubomir Borovčanin in their investigative statements to the Prosecutor's Office of BiH and the OTP of the ICTY.

In his statements given to the OTP of the ICTY (Exhibit O-337), Ljubomir Borovčanin, in response to the investigator's explicit question as to who had been the commander of the 2nd Šekovići Detachment, stated that the commander was Miloš Stupar. Although during his testimony at the main trial in these proceedings, Borovčanin indicated that this was an error on his part, a review of his previous statements demonstrates that he repeatedly referred to the Accused Stupar throughout those statements as the commander of the 2nd Šekovići Detachment. In addition, in his Borovčanin Resubordination Report, which covers the period between 11 and 20 July 1995 and which he wrote contemporaneously, and prior to charges having been brought against Stupar, Borovčanin stated that Stupar and Čuturić, in that order, led the 2nd Detachment. It should be noted that Borovčanin at the relevant time was deputy commander of the Special Police Brigade, and in that capacity was Stupar's immediate superior. Given that fact, it is impossible to conclude that Borovčanin's statement was erroneous. His current denial that Stupar was commander at the relevant time is therefore neither credible nor plausible.

Witness Danilo Zoljić stated that, in July 1995, Miloš Stupar was the Detachment Commander. Danilo Zoljić was the commander of the Zvornik Police Brigade at the relevant time. In both his testimony during the main trial and his investigative statements (Exhibits O-79 and O-80) Zoljić was consistent and positive that Stupar was Detachment Commander while Rade Čuturić was his deputy. He worked with both in the course of several field missions and knew their capacities and positions. He stated that he met Stupar, Borovčanin and Pantić together at the *Žuti most* on 12 July, and also that on 13 July he saw Stupar on the Bratunac – Konjević Polje road and Čuturić at a different location. On 15 July, Zoljić had a meeting with Stupar, Dragomir Vasić, Head of the Zvornik PSC, Dragan Obrenović, Commander of the Zvornik Brigade of the VRS, and Borovčanin in Zvornik. Stupar had previously spoken to him in a restaurant in Zvornik in May 1995 about wanting to relinquish command and leave the Detachment, but Zoljić was certain he had not done so as of 13 July.

[307] *Čelebići* Trial Judgment, para. 742.
[308] *Id.*, para. 197 (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports, 1971, p. 16 at para. 118).
[309] *Prosecutor v. Ignace Bagilishema*, ICTR-95-1A-A, Judgment, 3 July 2002, para. 59.

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Witness Dragan Obrenović corroborated Vasić and Zoljić regarding Stupar's attendance at the meeting in Zvornik on 15 July in his capacity as commander of the 2nd Šekovići Detachment.

Witness Jovan Nikolić stated that he knew Miloš Stupar from before the war. He further stated that he did not see him in Kravica on the day when he arrived, but he knows that, at that time, Stupar commanded in the Special Police.

Witness Nikola Milaković, Stupar's driver at the relevant time, stated that the accused Stupar commanded the Detachment at the time when it was sent to Bajkovica near Tuzla, after the events in Kravica. Milaković was certain of this because he himself drove Stupar to that location. Milaković stated that, at that time, the 1st and 2nd Platoons went to Zvornik, and that he learned from Stupar that Rade Čuturić had been wounded when a Bosniak grabbed a rifle from a member of the Skelani Platoon. In his statement given during the investigation (Exhibit O-45) and during his testimony, the witness described the event in which, while driving towards Bajkovica on 14 July, he had a car accident and asked Stupar to order the units by the Motorola not to shoot as they were passing through.

Witness Živojin Milošević, the Detachment's driver, stated that, on 10 July, he asked Stupar and Čuturić to leave the Detachment for a furlough. He further stated that there were rumors at that time that Čuturić was to replace Stupar as Detachment Commander, but that Stupar was still the commander at that point. This witness also stated that, upon returning from leave on 14 or 15 July, he found Stupar at the unit headquarters. In his investigative statement (Exhibit O-69), the witness stated that Stupar was commander on July 10 at 20:30 when the witness asked him for a furlough to celebrate Petrovdan, which Stupar granted. Živojin Milošević also saw Stupar again in the field at Baljkovica with the detachment and helped him get the detachment's Golf automobile out of an embankment where Nikola Milaković had left it.

Witness Stevo Stanimirović, the Detachment warehouseman during the relevant period, stated in his investigative statement to the Prosecutor's Office (Exhibit O-339a) that Stupar was the Detachment Commander on 13 July 1995. The witness stated that, before and after the Srebrenica events, Stupar, in his capacity as commander, used to come to the warehouse, and that he never heard that Stupar was relieved of duty. This witness changed his testimony during the main trial, stating that his statement in the Prosecutor's Office was taken unlawfully. However, the Prosecutor's Office also introduced an audio recording of the examination (Exhibit O-339a), which the Panel evaluated. It is evident from the recording that there were no irregularities in the examination of this witness, the statement was not taken under duress or threats, and that it was a voluntary act of the witness. The Panel finds that his statement to the Prosecutor on this point is credible, as it corroborates the testimony of numerous other witnesses.

Witness Dragomir Stupar saw the Accused Stupar in Šekovići a few days before Srebrenica fell, and prior to when Borovčanin called the witness to tell him to organize logistics, as discussed previously. Stupar told the witness on that occasion to expect a call from Borovčanin and to be ready to assemble logistical support. Dragomir Stupar also saw the Accused Stupar on 13 July at the same time and in same area as Gen. Mladić in Sandići, and saw him again at the meeting in Zvornik on 15 July with Borovčanin and the other participants. He knew that Stupar was dissatisfied with his command position and that there were disagreements with Goran Sarić, brigade commander of the SPB. The witness noted

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that the Accused Stupar was often absent from the Detachment and let Čuturić lead the Detachment in the field. However, he testified that, on 13 July, Stupar was present, as well as Čuturić.

Witness Mirko Sekulić was a clerk for the Skelani platoon, responsible for writing up daily orders. He had access to documents and was in the position to know if there was a change of command. In his investigative statement (Exhibit O-74), he stated that Stupar was the Detachment Commander. Sekulić stated that he saw Stupar on 14 July in a wine-colored Golf civilian car. Previously the witness stated that a private company loaned the Detachment a Golf automobile from time to time, which was in addition to the red-colored Golf that belonged to the Detachment. At that time, Stupar was in civilian clothes and was with two military drivers. The witness also stated that he saw the Accused Stupar at the funeral for Krsto Dragičević, and that Stupar was the Detachment Commander when he appeared at the funeral. The witness stated that Čuturić was also at the funeral, but he believed Čuturić was a lower-level commander, closer in authority to "Čop", Milenko Trifunović.

Witness Đorđo Vuković stated that he and the others always turned to Stupar, and that Čuturić replaced Stupar after a six-month probationary period. However, he did not know if there was an official relief and appointment of commanders. In his statement given in the investigative phase (Exhibit O-70), Vuković stated that, in Bratunac on the evening of 13 July, the Accused Stupar ordered him to transport the body of Krsto Dragičević to Bratunac.

Witness Marko Aleksić, commander of the 1st Platoon of the 2nd Detachment, stated in his investigative statement (Exhibit O-51) that he saw Stupar on 13 July along the Bratunac – Konjević Polje road, and on 14 July in Zvornik, standing next to a wine-colored Golf with two other men in uniform.

Witness Tomislav Dukić saw Stupar in July acting as commander after 13 July, but he assumed that because Čuturić was injured, Stupar was "called back". However, Čuturić continued to serve with his injury and was seen on the night of 13 July in the field with the 2nd Platoon at Konjević Polje, which was confirmed by Slobodan Stjepanović and Milenko Pepić in his investigative statement (Exhibit O-73). Witness Marko Aleksić, in his investigative statement, stated that he saw both Čuturić and Stupar with them in the field on 14 and 15 July. In addition, witnesses Radislav Božić and Mirko Sekulić confirmed their presence together on those days.

Witness Siniša Bečarević testified at the main trial; however, his testimony during the main trial differed considerably from his investigative statement. This witness claimed that he did not remember anything and that he was confused, and that he was not capable of testifying. In order to clarify his mental condition, the Panel hired an expert witness in neuropsychiatry, Marija Kaučić Komšić, who established that the witness suffered from acute reaction to stress, and that there were no indications of any mental illness from before or of his incapability of memorizing things, and that he was fit to testify. In his investigative statement (Exhibit O-56), Siniša Bečarević stated that between 1 and 3 July 1995, Stupar granted him a furlough, and that on 14 or 15 July, Stupar ordered him to return to the Praga unit to replace an injured unit member. He reported that Stupar picked him up in Stupar's vehicle and took him to the Praga unit.

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Most of the Accused did not have any questions for Bečarević, although they were given two opportunities to cross-examine him. The expert maintained her opinion that he was fit to testify after hearing his testimony in court. In his investigative statement, Bečarević stated that, while in Srednje, he asked Miloš Stupar to grant him a furlough because his wife, as well as Stupar's wife, was due to have a baby. He was granted the furlough, though Stupar later came along one day and told him that he had to go back to the frontline. Stupar gave him a lift to Konjević Polje, and he heard that Krle had been killed. He did not see Čuturić, but he heard that he was injured at the time when Krle was killed. In his original testimony before the Panel, Bečarević admitted that the investigative statement had his signature and that it was read to him. It is also established that the statement from October 2005 met all the formalities. This statement was given prior to the onset of the "acute reaction to stress" that the neuropsychiatrist described. Therefore the statement is the more reliable evidence.

The Defense for Stupar contested that he exercised effective control over the 2nd Detachment on 13 July 1995, and argued that Stupar ceased to be the Detachment Commander in late June 1995. However, those witnesses that said he was no longer in command as of 13 July had very different ideas about when he ceased to be commander. It is possible that these lower-ranking police officers were remembering when they first saw Čuturić doing field command work, which the Panel accepts that he undertook as the Deputy Commander in order to obtain experience in preparation for later assuming command. The fact is that there is no consistency in the understanding of those witnesses who believed Čuturić was the Commander as to when Stupar ceased to exercise effective control over the Detachment, which is itself evidence that control was never actually formally or informally relinquished either *de jure* or *de facto*.

Witness Ljubiša Bečarević claimed that Stupar was the commander up to the assignment to Srednje. The same was stated by Nikola Milaković in his investigative statement (Exhibit O-68). Milenko Pepić in his investigative statement (Exhibit O-73) said Stupar was commander immediately before their task in Srednje. Witnesses Duško Mekić and Predrag Čelić said that it was in June 1995, and witness Slobodan Stjepanović said it was between April and June 1995. On the other hand, witnesses Tomislav Dukić, Nebojša Janković, and Nedeljko Sekula said that replacement of the commanders took place in March 1995, and Nedeljko Sekula in his investigative statement (Exhibit O-78) said it was the end of 1994. Witness Marko Aleksić in his investigative statement (Exhibit O-49) said it was Spring 1995, but during the trial he said it was at the end of June 1995. Witness Đorđo Vuković in his investigative statement (Exhibit O-70) stated that it was in September 1994. Also, several testified that a commander must have deputies but no one could name Čuturić's deputy in July 1995 or before.

The Panel deems it credible that according to dividing responsibilities within the 2nd Detachment, Čuturić, as the more junior officer, was with the lower-ranking policemen in the field, whereas Stupar, as senior officer, was responsible for more logistical and administrative matters and for meetings – also in the field – with superiors, as has been testified to by several witnesses.

The Panel therefore concludes that the witnesses who testified that Čuturić had taken command prior to August 1995 were incorrect. The Panel finds credible those witnesses who testified that Stupar continued to command the 2nd Detachment throughout the relevant period until his reassignment in August 1995, because these witnesses were in a position to take orders directly from Stupar, witness him exercising command duties, or needed to know

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precisely who was commander and who was deputy in order to coordinate information and exercise command and control, due to their higher rank or their assigned tasks.

c. Effective Control by the Accused

Command responsibility requires: 1) that there exist a hierarchy, military or civilian, formal or informal; 2) that the Accused are within that hierarchy; and 3) that the perpetrators are less senior than the accused.[310] As the Trial Panel of the Court of BiH has held, there is no necessity that the perpetrator be the immediate subordinate to the Accused.[311] More than one person may be held responsible under the principle of command responsibility for the same crime committed by a subordinate.[312]

The Accused Stupar held *de jure* and *de facto* authority as the Commander of the 2nd Šekovići Detachment, with the official designation by order dated February 1994; the 2nd Šekovići Detachment was a unit within an official military hierarchy; Stupar was the commander of that unit; and the five Accused who perpetrated the crime of genocide were less senior than Stupar. There was an enforceable expectation of obedience on the part of the Accused vis-à-vis the members of the 2nd Šekovići Detachment.

The Accused Stupar also had effective control of the Detachment in the field. Witnesses confirmed that they saw him on 13 July on the road while inspecting the positions of the Detachment.

The Accused Stevanović stated regarding Stupar that, on 13 July 1995 at about 10:30, Stupar went down the road where they were positioned in order to check if everything was all right and as planned. Stevanović also stated that Stupar had been "the chief commander of the Detachment, and that Oficir [Čuturić] was his deputy."

Witness Dragomir Stupar also stated that he firstly met Stupar on the road near Sandići, on the same day when he saw General Mladić and Borovčanin.

Witness Duško Mekić stated that the order for the Detachment to go in the field in the area of Udrič near Zvornik was issued on 14 July by Miloš Stupar.

Witness Danilo Zoljić stated that he met Stupar on 13 July on the road near Sandići and that they greeted one another.

Witness S4 testified that, on 13 July, while the Platoon members were at the meadow he saw Stupar in the car passing by on 2-3 occasions.

7. Disciplinary Procedures

The Accused Stupar, as the Commander of the 2nd Šekovići Detachment of the MUP Special Police, had the obligation to take disciplinary action against those members of the Detachment who perpetrated the killings at the Kravica warehouse. There were in effect at least two disciplinary procedure he could have followed to meet his obligation to punish the Accused.

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[310] *Prosecutor v. Sefer Halilović*, IT-01-48-A, Judgment, 16 October 2007, para. 59.
[311] *Momčilo Mandić*, X-KR-05/58 (Ct. of BiH), First Instance Verdict, 18 July 2007, pg. 153.
[312] *Prosecutor v. Pavle Strugar*, IT-01-42-T, Judgment, 31 January 2005, para. 365.

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The punishment of war crimes and genocide in particular within the national criminal legal system is central to international humanitarian law. The obligation to punish genocide is one of the primary obligations established by the Genocide Convention. That obligation was accepted by the former Yugoslavia when it ratified the Genocide Convention and incorporated it into the domestic law by publication in the Official Gazette of SFRY 16/78. That obligation was expressly effectuated when Article 141 of the SFRY Criminal Code was enacted.[313] Cooperation with investigations of war crimes, including genocide, became a personal legal obligation of each person in the RS with the enactment of the RS Law on the Mandatory Reporting of Crimes Against Humanity and International Law[314]; and criminal liability for failing to comply with that law was punishable by imprisonment. Obligations under the Mandatory Reporting Law attached to all citizens regardless of their position within a military or state structure.

There was in addition a particular obligation to punish war crimes placed on the members of the VRS and the MUP in times of armed conflict. Radovan Karadžić, in his Order 01-53/92, "The Application of the Rules of the International Law of War on the Army", commanded:

> In an armed conflict, the Army of the Serb Republic of Bosnia and Herzegovina (hereafter: the Army) and the Serb Ministry of the Interior shall apply and respect the rules of international laws of war [which are]
> - international treaties signed, ratified or joined by the SFRY;
> - rules of international customs of war;
> - generally accepted principles of international laws of war.
>
> ….
>
> The competent superior officer shall initiate proceedings for sanctions as provided by law against individuals who violate the international laws of war.[315]

Within the VRS and the MUP, there were additional laws, rules and regulations establishing the processes by which superiors were obligated to initiate disciplinary measures against subordinates who committed any type of crime and other breaches of military rules and practice. These processes envisioned both a criminal and disciplinary response to violations that breached both the criminal law and internal regulations. All State Bodies, including the Ministry of the Interior, were subject to the Law on Labor Relations in State-Level Bodies.[316] Article 22 of that Law establishes that:

> Employees in state-level bodies and appointed individuals shall be held accountable for their work materially and criminally.
>
> Criminal or minor offense accountability does not exclude disciplinary punishment for the same offense covered in criminal or minor offense proceedings

During the period when his detachment was resubordinated to the VRS, 10 July through 20 July 1995, Stupar maintained his position of command within the Detachment. The internal integrity of the command structure for subordinated special police units was assured under

[313] Official Gazette of SFRY, 44/76, 36/77, 56/77, 34/84, 74/87, 57/89, 3/90.
[314] Official Gazette of Republika Srpska, no. 32, 31 December 1994.
[315] Official Gazette of the Serb People in Bosnia and Herzegovina, no. 9, 13 June 1992.
[316] Official Gazette of Republika Srpska, no. 11/94.

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Article 14 of the Law on the Application of the Law on the Interior During an Imminent Threat of War or a State of War, which required that:

> Police units shall be under direct command of a commander who is a member of the MUP. During the time they are resubordinated to the Army of the Republika Srpska, they shall retain their organization and may not be split up or separated.[317]

Stupar was subject to the laws and rules of the VRS during the period of resubordination. Defense expert Dr. Mile Matijević explained that this means that:

> The military rules shall be valid for and applied to the engaged police unit for the reason of observing the principle of unity of command as long as that police unit is subordinated to the commander of the military unit in the zone of combat operations, as provided for also in the Law on VRS, Law on the Military Prosecutor's Office, Law on the Military Courts, and the Law on Application of the Law on Military Courts and of the Law on the Military Prosecutor's Office in Time of State of War.

Under Article 78 on the Law on the Army, to which Dr. Matijević referred, Stupar, as Detachment Commander, had the authority to take immediate action against the accused, including arrest and temporary confinement to quarters while disciplinary processes were undertaken.

Article 65 of the Law on Military Courts, to which the expert also referred, requires that:

> Every superior officer is obligated to take steps to prevent the person who has committed an act which is subject to criminal prosecution from hiding or fleeing, to preserve the traces of the crime and items which may serve as evidence, and to collect all information which might prove useful to the proceedings. The superior officer is obliged to inform the military prosecutor, directly or through a higher ranking officer, of the criminal offense.

The military rules to which the Accused was subject included the "Rules on the Application of the Rules of International Laws of War in the Armed Forces of the Socialist Federal Republic of Yugoslavia" and "Military Prosecutors Guidelines for Determining the Criteria for Criminal Prosecution, 6 October 1992".[318]

Rule 21 of the Rules on the Application of the Rules of International Laws of War, reciting the principle of command responsibility, provided that:

> The commanding officer who knows that the violations of the rules of the laws of war were committed but fails to initiate disciplinary or criminal proceedings against the perpetrator or, if he is not competent to initiate the proceedings, fails to report the perpetrator to the competent military commanding officer shall also be personally responsible.

[317] Official Gazette of Republika Srpska, no. 1/94.
[318] Military Prosecutors Guidelines for Determining the Criteria for Criminal Prosecution, 6 October 1992 (Exhibit O-282); Butler Brigade Report, 5.4, 5.6-5.8 (Exhibit O-226).

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The Guidelines issued by the military prosecutor echoed the Law on Military Courts, but set out procedures to be followed when an officer learned of acts committed by his subordinates that might have been committed in violation specifically of international humanitarian law. Grounded in Karadžić Order 01-53/92, "The Application of the Rules of the International Law of War on the Army", the Guidelines reiterate the principle of Command responsibility:

> If officers find out that units of the armed forces of the Army of Republika Srpska or their members have committed or are committing such acts [violations of international humanitarian law] and take no measures to prevent the consequences of the acts themselves and expose perpetrators to criminal prosecution, this in itself makes them answerable for these criminal offenses.

The Guidelines established a process requiring, "that officers in all units must accept the obligation to draft reports on all incidents which might be regarded as criminal offenses, regardless of whether they have been committed by members of the Army of Republika Srpska or by members of the enemy side, and to report to the command any information learnt about previous incidents." In addition, the Guidelines expected that the crime would be reported to the closest "military police, security and military judicial organs", that the area would be secured until the arrival of the proper investigating authorities or, if that was not practical, evidence in the form of witness statements and film of the crime scene would be gathered and delivered to the nearest military prosecutors' office.

Momir Nikolić confirmed in his testimony before the ICTY how, as a practical matter, such discipline was carried out. In terms of the discipline he would have expected to receive had his commander decided to punish Nikolić for his role in the genocide, the witness said:

> The commander, would the next day or in the forthcoming period, simply suspend me from the duty I held. He would have started an investigation. He would have taken measures and asked for criminal proceedings to be brought against me.[319]

Kovač confirmed in his testimony that MUP commanders likewise had the authority to take immediate disciplinary action in the field.

Dragan Obrenović in his testimony before the ICTY acknowledged that the disciplinary procedure was not simply a paper regulation, but was in force and used. Obrenović was specifically asked whether a system was in place "to punish soldiers that committed criminal offenses while on duty or related to their military activities," to which Obrenović answered affirmatively. He was then asked: "And were soldiers regularly investigated, tried, and punished for committing offenses?" His answer was: "For some, yes, graver crimes like killings, woundings." That the killings at Kravica fell into the category of "graver crimes" cannot be disputed.

As with the military, there was a process within the MUP by which superiors were required to meet their obligation to initiate disciplinary measures against subordinates who committed crimes or other breaches of police rules and practice. That process and obligation was established through the Law on Internal Affairs.[320] The defense military expert, Dr. Mile

[319] *Blagojević*, Testimony of 1 October 2003, pg. 2362 (Exhibit O-246).
[320] Official Gazette of Republika Srpska, no. 6/94; Law on Amendments to the Law on Internal Affairs, Official Gazette of Republika Srpska, no. 32/94.

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Matijević, reported that, in addition to that law, there were "also some sub-legal deeds based on the Law such as books of rules, instructions, guidelines, orders etc. that govern the mutual relations within the MoIA RS. All the Laws prescribe the disciplinary liability and the procedure for establishing the liability and disciplinary sanctions, starting from fines, assignment to other duties to the employment termination."

8. Knowledge of Superior

The *mens rea* element for command responsibility is that the accused knew or had reason to know that the crimes were about to be committed or had been committed by the subordinate. Criminal negligence is not sufficient to invoke liability, however, "a commander is not permitted to remain 'willfully blind' of the acts of his subordinates."[321]

a. Actual Knowledge

Actual knowledge has been defined by the ICTY as "the *awareness* that the relevant crimes were committed or were about to be committed."[322] Awareness of the crimes can be proven by direct evidence, such as statements made by the accused indicating that they were aware, or testimony of witnesses who observed them to be present when the crimes were committed. It can also be proven by circumstantial evidence.[323] Factors which establish actual knowledge circumstantially include: the types of criminal acts, the repetition of the crimes, and the similarity of the manner in which the crimes were committed, the geographic proximity of the superior, the reporting and monitoring structures in place, and the number of subordinates involved.[324] In order for circumstantial evidence to establish actual knowledge, it must be sufficient to conclude that the superior *must* have known.[325]

b. Reason to Know

The Appeals Chamber in *Čelebići* recited the definition of "reason to know" as it exists relevant to the *mens rea* requirement for command responsibility in customary international law. Subsequent judgments have determined that the definition is in fact settled.[326] In the absence of actual knowledge, "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offenses committed by subordinates."[327] That information does not have to be specific, and it is enough that the Accused have "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[328]

The information need not be in any particular form. It could be written or oral, or it could come to the superior through his own senses.[329] The information available to the superior

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[321] *Prosecutor v. Sefer Halilović*, IT-01-48-T, Judgment, 16 November 2005, para. 69.
[322] *Kordić* Trial Judgment, para. 427 (emphasis added).
[323] *Prosecutor v. Stanislav Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 174
[324] *See Prosecutor v. Fatmir Limaj, et. al*, IT-03-66-T, Judgment, 30 November 2005, para. 524; *Blagojević* Trial Judgment, para. 792
[325] *Kordić* Trial Judgment, para. 427.
[326] *See, e.g., Blaškić* Appeal Judgment, para. 62.
[327] *Čelebići* Appeal Judgment, para. 241 (emphasis added).
[328] *Bagilishema* Appeal Judgment, para. 28.
[329] *See Galić* Trial Judgment, para. 175.

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need not be sufficient to compel the conclusion that the crime has been, or is about to be, committed by the subordinate. It need only be sufficient to justify further inquiry.[330]

Evidentiary factors relevant to determining whether the superior has reason to know include: proximity of the superior to the place where the offenses were committed; observable physical evidence that crimes were being committed; reports from superiors and subordinates; enormity of the crime.[331]

c. Knowledge of the Accused

Although there is no evidence that the Accused Stupar knew in advance that members of the 2nd Detachment would commit the offenses for which they have been convicted, there is abundant evidence that he knew very soon afterwards that they had committed those offenses. During the time the killings were carried out, word of what was happening at the Kravica warehouse spread up and down the line of police officers from the Detachment stationed along the road. Those with Motorolas heard Čuturić say that Krsto had been killed and that he himself had been injured.[332] Those without Motorolas heard by word of mouth up and down the road about the casualties in the Detachment and the killing of the Bosniaks.[333] In addition, many observed the column that was led to the warehouse, and shortly thereafter heard the sound of machine gun and rifle fire and the explosion of hand grenades coming from the area of the warehouse.[334] Even civilians around Bratunac/Kravica were talking about the massacre.[335] Danilo Zoljić even heard about what happened at Kravica through radio communication on the night of 13 July while he was in Zvornik. Čuturić, as Stupar's deputy, under command and control would have been expected to report to Stupar what he knew of the events at Kravica at the earliest opportunity. From all of this evidence, it can be determined that Stupar "must have known" within a very short time of the incident what had occurred.

In addition, the Panel concludes that there is direct evidence that in fact he did have "actual knowledge" about the killings shortly after they occurred. Borovčanin testified before the Court of BiH that he had met Stupar in the Health Centre in Bratunac on the evening of 13 July after the Kravica killings. The health center was the place where the body of Dragičević was brought, and where Čuturić received treatment for his burns. In addition, defense witness for the Accused Trifunović, Mirko Trifunović, testified that "Mišo Stupar was the first one who came from the site, and told him that the whole Detachment should be gathered because they would come along bringing Krsto's body." Stupar also ordered Đorđo Vuković to take Krsto's body from the health center in Bratunac back to Skelani that evening, an order which was followed at about 20:00.

Thereafter, both Čuturić and Stupar attended Krsto's funeral in Skelani.[336] Miladin Stevanović testified that, after the funeral, all present were discussing the incident in which Krsto Dragičević was killed. S4 also testified that the event had been discussed at the

[330] *Halilović* Trial Judgment, para. 68.
[331] *See Prosecutor v. Milorad Krnojelac*, IT-95-25-A, Judgment, 17 September 2003, paras. 154, 171, 175-77. *See also Prosecutor v. Miroslav Kvočka, et al.*, IT-98-30/1-T, Judgment, 2 November 2001, para. 318.
[332] Marko Aleksić; Tomislav Dukić; Milenko Pepić; Nedeljko Sekula.
[333] Dragan Kurtuma.
[334] Marko Aleksić; Ljubiša Bečarević; Milenko Pepić; Slobodan Stjepanović.
[335] Blagoje Stanišić.
[336] Nebojša Janković; Mirko Sekulić.

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funeral. Nebojša Janković and Obradin Balčaković said that they heard the account of what happened at Kravica from members of the platoon after the funeral.[337]

On 15 July Stupar attended a meeting in Zvornik with Borovčanin, Vasić and Obrenović. Stupar's presence at the meeting was confirmed by the witnesses Dragomir Stupar, Danilo Zoljić and Dragomir Vasić, who testified that he had been there with Borovčanin. According to the 2 October 2003 testimony of witness Dragan Obrenović, commander of the Zvornik Brigade of the VRS, in the *Blagojević* trial, Stupar said that one of "his men" had been killed in front of Kravica. Stupar explained at the meeting that a captive grabbed a rifle from a person by the name of Oficir, who was in his unit, and killed him, while other police officers killed the other Bosniaks in the warehouse. Although Obrenović was confused as to the name of the person in the detachment who was killed, the rest of his understanding comports with the facts as they occurred and as obviously known to Stupar.[338]

9. Superior Failed to take Reasonable and Necessary Measures

The final element of command responsibility requires analysis of what constitute reasonable and necessary measures, and what the obligations of prevention and punishment are under customary international law. The failure to prevent the crime and the failure to punish are two separate duties, and not alternatives. A superior cannot allow a crime to be committed by the subordinate which he knew or had reason to know would be committed, and then "cure" his breach by punishing the subordinate, nor can he take reasonable and necessary preventive measures and, if they fail, not incur separate liability for failing to punish. The two may be evidentially related. For example, superiors who give orders prohibiting violations of international humanitarian law, but who do not then punish subordinates for violations of those orders, may be seen as in implicitly accepting "that such orders are not binding," which in turn may be evidence of failure to prevent subsequent violations.[339] Superiors, all other elements having been met, are charged with both the duty to prevent and the duty to punish, and failure to perform either or both will incur liability under the customary international law principle of command responsibility.

In determining what measures are necessary and reasonable, the Panel must be guided by those measures which are within the material control of the superior. A superior will not be held liable for failing to do what was outside his effective control. However, "the question of whether the superior had the *explicit legal capacity* to do so is irrelevant if it is proven that he had the material ability to act."[340] What is reasonable and necessary must be considered within the context of the actual events, but the measures taken by superior must, under international law, be "legal, feasible, proportionate and timely".[341]

[337] Nebojša Janković; Statement of Obradin Balčaković, 25 December 2005 (Exhibit O-55).
[338] Obrenović also confused Stupar's first name, however, given the corroboration of other witnesses, there is no doubt that it was the Accused Stupar who was in attendance and relating the Kravica incident.
[339] *Halilović* Trial Judgment, para. 96. *See also Orić* Trial Judgment, para. 326; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-T, Judgment, 15 March 2006, paras. 1778-1780.
[340] *Čelebići* Trial Judgment, para. 395 (emphasis added).
[341] Mettraux, *Command Responsibility* (and cases cited therein).

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a. To Prevent the Crime

At the point at which the superior knew or had reason to know that a crime was being "prepared or planned" by a subordinate, he had a duty to act to prevent it.[342] The Special Chamber for Sierra Leone has interpreted the duty to prevent to extend to prevention of subordinates from obeying illegal orders that could lead to the commission of crimes. The CDF Trial Chamber held: "As part of his duty to prevent subordinates from committing crimes, the Chamber is of the view that a Superior also has the obligation to prevent his subordinates from following unlawful orders given by other superiors."[343] The Chamber concluded: "Fofana's duty to prevent included both the obligation not to comply with the unlawful orders… and the obligation to ensure that his subordinates did not obey those orders."[344]

Although the Panel may speculate that Stupar knew in advance that men under his command would be involved in genocidal killings at Kravica warehouse, the Prosecutor did not provide sufficient evidence from which the Panel could conclude beyond doubt that Stupar knew or had reason to know that this specific crime would be committed by his subordinates. Therefore, the Panel does not find that Stupar is liable under the principle of command responsibility for failing to prevent the crime.

Although the evidence establishes beyond doubt that Stupar knew of the genocidal plan for the extermination of Bosniaks from the Srebrenica Safe Area by forcible transfer of the women, children and elderly, and the killing of the men, and that he knew that his unit was part of that mission, there is not sufficient evidence that he knew in advance of the occurrence that the particular task of some of the members of his detachment would be killing the men in the Kravica warehouse. There is no evidence that Stupar gave the order to Čuturić to form the column, escort the prisoners and ultimately kill the prisoners at the Kravica warehouse. There is no evidence that Stupar was informed that such an order was given to Čuturić prior to the execution of the order. There is no reliable evidence that Stupar was present either when the column was formed and escorted by the Accused to the warehouse or at any time during the shooting.

The only direct evidence offered to support the Prosecutor's assertion that Stupar was present during the killings at the warehouse was the statement Borovčanin gave to the OTP. In his 11 March 2002 statement, Borovčanin stated:

> When someone turned on his Motorola I was able to hear shooting and detonations… Stupar, the commander of the Šekovići unit, I heard him… He kept saying "Oh don't ask, don't ask, Something terrible is going on" and he wanted me to come back… I told him I'll be back straight away. We turned our vehicle and we went back….[345]

Borovčanin went on to say that upon arriving at the warehouse, he saw Stupar and had a conversation with him about what had happened, in which Stupar allegedly told him that no police officers had been involved in the killing of the large number of Bosniaks. Borovčanin

[342] *Kvočka* Trial Judgment, para. 317.
[343] CDF Trial Judgment, para. 248.
[344] *Id.*, para. 782.
[345] Borovčanin March 2002 Statement, pgs. L0066350, L0066351 (Exhibit O-337).

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admitted that he saw bodies lying dead. Stupar further allegedly told Borovčanin that Milan Lukić's forces had brought the Bosniaks to the warehouse and shot them.

The Panel finds that it was Borovčanin, not Stupar, who was present for a period of time while the killings were occurring and watched the killings proceed, and was also present on the meadow when Čuturić was forming the column, and was seen standing with Čuturić while Mladić was giving his speech.[346] Borovčanin's allegation that Stupar was present during the killings is not credible in light of other evidence. Neither Stevanović nor Mitrović list Stupar among those present during the shootings, and in fact Mitrović specifically denied seeing Stupar there. In addition, S4, who was in front of the warehouse during the entire time the Accused were involved in the massacre, testified that Stupar was not at the warehouse or anywhere around them either when they were escorting the column to the warehouse or during the shooting. S4's evidence on this point is credible because he did not give the impression that he was attempting to shield Stupar, and he acknowledged that he had seen Stupar on the road more than once earlier that day. In addition, the Motorola system over which Borovčanin says Stupar and he spoke was being monitored by platoon and squad leaders throughout the unit.[347] Marko Aleksić, who testified, said in his witness statement (Exhibit O-49) given to the Prosecutor on 6 July 2006 that as a temporary platoon leader, he was monitoring the Motorola and heard about the events at Kravica soon after Krsto Dragičević was killed, but that the person speaking was Čuturić, not Stupar. Milenko Pepić also testified to hearing this radio report.

As the credible evidence is insufficient to establish that Stupar was present at the scene of the killings or during the transfer of the men to the warehouse by the other Accused, the Panel is left only with indirect evidence based on Stupar's position within command and control. The Panel has found that Stupar was the commander of the Detachment, that Borovčanin was his immediate superior, that Čuturić was his deputy and the officer who was present with the Detachment overseeing the operation in the field, and that Trifunović was the platoon commander to whom all of the Accused were answerable except Džinić, who was in a different platoon within the same detachment. The evidence also establishes that the 2nd Detachment and other special police, all under the command of Borovčanin, were resubordinated to the VRS and that there were senior VRS Commanders from both the Main Staff and the Drina Corps who were present in and around Kravica and the Sandići meadow on 13 July.

The Panel, for the reasons explained in Section IV.C.1, *supra*, has rejected the defense assertion that the shootings were unplanned and occurred only because a prisoner disarmed and shot one of the members of the 3rd Skelani platoon, thus provoking limited fire from the Accused out of fear and in self-defense. The Panel has determined (see Section VI.C.8, *supra*) that the executions at Kravica were planned, and that they were carried out by the Accused according to that plan. However, without additional evidence, the Panel cannot conclude that Stupar ordered or knew that special police officers under his effective control would be ordered to commit the executions at the Kravica warehouse based solely on his position on the command structure.

[346] Testimony and Statements of S4.
[347] Statement of Radislav Božić (Exhibit O-58).

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The Prosecutor failed to produce any evidence that would support a finding that Stupar:

1) Learned of the execution task when he learned of the larger genocidal plan, and/or
2) Conceived of the task and conveyed it as an order to Čuturić or was ordered by a superior to relay the command to Čuturić; or
3) Was told by a superior or Čuturić that Čuturić was ordered to execute the men at Kravica prior to Čuturić carrying the order out.

As to point 1, there is no evidence that Stupar was either an engineer of the plan or that he was briefed on the part of the plan that required his men to act as executioners. As to point two, Dr. Matijević emphasized that tasks came from the brigade command level, not the detachment command level. There is no evidence that would contradict this assertion or lead the Panel to believe that any of the tasks Stupar's Detachment performed originated with him. Dr. Matijević also reported that the internal hierarchy within the MUP special police units strictly controlled the chain of command, and "they carried out the tasks assigned to them by their direct leader." However, there is reason to question the integrity of the MUP command structure during the Srebrenica mission. The witnesses to the occurrences on 13 July spoke of a variety of VRS officers, superior to Stupar, who were on site and speaking with Čuturić, including Borovčanin, any of whom could have given orders to Čuturić. This would have been an exception to command and control, but exceptions to command and control of this kind were occurring in other chains of command during these days. Borovčanin himself, who according to Order 64/95 was to report to General Krstić and whose unit was resubordinated to the Drina Corps area of operation, nonetheless took his orders from Mladić in the field on 11 and 12 July, according to his report covering the period 10 July thought 20 July 1995. Likewise, Momir Nikolić, in his Statement of Facts and on cross-examination in the *Blagojević* case before the ICTY, stated that although Vidoje Blagojević, commander of the Bratunac Brigade of the VRS, was his immediate superior, he was receiving orders from Main Staff superiors, including an oral order relayed through Lt. Colonel Vujadin Popović, Assistant Commander of Security for the Drina Corps, which he followed without consulting Blagojević, who he assumed already knew.[348]

On the third point, there is no evidence whether the order was given to Čuturić or as to whether it was communicated to Stupar. Stupar's presence near Sandići was noted throughout the day prior to the killings and certainly it is possible that the order was discussed with him. However absent any evidence on that point, the Panel cannot conjecture. It is also possible that he was informed by some other means of communication, but this is less likely, since this was not the kind of information, even in code, that would be advisably transmitted either by written document or by telephone or radio, given the constant awareness of the need for secrecy and cover-up. Borovčanin affirms that his communication with both his superiors in the VRS and the police chain of command was "verbal, not in writing."[349] Marko Aleksić also testified that all orders during the Srebrenica mission were oral. There is, in addition, no evidence whatsoever from any source that a message regarding the impending killings was communicated by or to Stupar.

In the absence of evidence which would directly or indirectly establish beyond doubt that Stupar had knowledge of the killings sufficiently in advance that he would have had the opportunity to attempt to prevent them, the Panel cannot find liability under the principle of

[348] Nikolić Statement of Facts, sections 4 and 5 (Exhibit O-246); *Blagojević*, Testimony of 30 September 2003, pgs. 2212-2213 (Exhibit O-246).
[349] Borovčanin March 2002 Statement, pg. L0066339 (Exhibit O-337).

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command responsibility for failing to prevent, therefore, with regard to the amended indictment, the Panel adjusted the operative part of the verdict to the state of facts.

However, there is both direct and indirect evidence that Stupar knew that his men committed the killings within hours of their having done so, and that knowledge required Stupar, consistent with the principles of responsible command, to initiate disciplinary proceedings against the Accused as soon as he was aware of the massacre.

b. To Punish Perpetrators

The duty to punish arises after the commission of the crime by a subordinate and at such time as the superior knows or has reason to know of its commission.[350] The superior is required to undertake all measures that are possible and he is not limited to those measures which are strictly within his legal competence if in reality he can exceed those measures.[351] If the measures open to him to punish are materially limited, he is still required to do everything within his capacity to see that the perpetrator is punished. As the Trial Chamber stated in *Kvočka*: "The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process."[352] That includes, as a minimum, the duty to further investigate, establishment of facts,[353] and "exercise his own powers of sanction, or if he lacks such powers, report the perpetrators to the competent authorities."[354]

As previously discussed, above, there were in place on 13 July clear disciplinary procedures for members of the special police who committed serious violations of domestic or international law, whether or not resubordinated to the VRS.

There is an interesting dispute among the witnesses as to how long the resubordination to the VRS lasted and whether the MUP or the VRS disciplinary process should have been invoked. This is in part the consequence of the inadequacies of Order 64/95 and the failure of those that drafted it to comply with the law and presidential orders on specificity as to time and tasks (see Section III.B.5, *supra*). The evidence is not contradicted that from 10 through 13 July, the resubordination was in place. Dragomir Vasić, Head of the Zvornik PSC, testified that he believed the resubordination ceased at the time when the 2nd Šekovići left the Bratunac road on 13 July. Tomislav Kovač, acting Minister of the Interior of the RS, testified that he thought it continued until 14 July when the MUP were given an "illegal order" to assist with the killing plan. However Kovač was also of the opinion that any disciplinary procedure that should have been brought for the events at Kravica still should have been brought through the VRS disciplinary system. Factually, however, it appears that the resubordination continued through 20 July, as Borovčanin continued to command the units involved in the Order 64/95 in Bjelovac and continued to take orders from the military in command in that area. This is further supported by the Borovčanin Resubordination Report, which covers the period between 10 and 20 July. Vasić admitted in his testimony that he had personally been given a copy of this report by Borovčanin.

It is undisputed that the killings at the Kravica warehouse by Stupar's subordinates occurred during the period of resubordination of his detachment to the VRS. As established above,

[350] *Limaj* Trial Judgment, para. 527.
[351] *Halilović* Trial Judgment, para. 100.
[352] *Kvočka* Trial Judgment, para. 316.
[353] *Halilović* Trial Judgment, para. 100.
[354] *Limaj* Trial Judgment, para. 529.

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Stupar learned of the killings of the same day. Stupar did nothing to comply with his obligations under the laws, rules and guidelines relevant to initiation of disciplinary process of the VRS, either on that day or any day during the time when the Detachment was resubordinated. In addition, he never ceased to be a commander within the structure of the MUP hierarchy, and if he was not directly resubordinated, he had an obligation to take disciplinary action under laws regulating the MUP and the more general law regulating state bodies, as well as the procedure set out by MUP rules and regulations for initiating disciplinary proceedings. The evidence is clear that he failed to take action under either procedure.

The Report on Security Situation in 2nd Detachment (Exhibit O-276), created by Nedeljko Sekula safety assistant commander, dated 3 August 1995 and covering the preceding month, reads in the relevant part:

> Security situation in the Detachment is good. There was no violation of working discipline by members of the police. Also, during the month, no report for criminal offense or misdemeanor was filed against any member, because members did no crime or misdemeanor.

The possibility that some discipline action was taken through military channels and was somehow unknown to the MUP is ruled out by the additional point that Sekula makes: "We had a good cooperation with members of other detachments, PJP-ies and ARS. We were all informing each other about all important security events."

Certainly the discipline of the police members of the detachment by the Army for killing the majority of prisoners in the Kravica warehouse would have been considered an "important security event". Stupar's failure to commence any disciplinary procedure, or even investigate the activities of his subordinates at the Kravica warehouse on 13 July was confirmed by Kovač, Vasić, and Borovčanin in their sworn testimony.

When Stupar learned that his subordinates had shot several hundred unarmed Bosniak men whom they had in custody after their surrender and Stupar further learned that the men were shot while they were detained by his subordinates in a closed warehouse where every possible exit was covered by armed guards, there could be no question that they were committing a "breach of the rules of the laws of war". Even if Stupar was unaware of the precise legal qualification of the activities of his subordinates, those activities were obviously sufficient to require immediate action and investigation as possible war crimes.

Failure of a superior, either in the military or the MUP, to initiate disciplinary proceedings against a subordinate who committed an ordinary crime or otherwise breached the rules of the organization subjected the superior to the possibility of punishment for a breach of duty. However, failure of a military superior to initiate disciplinary proceedings against a subordinate whom he knew or had reason to know committed a crime that was a violation of the laws of war, including war crimes and genocide, *additionally subjected the superior to liability for the underlying crime itself*; as provided according to International Customary law, under the principle of command responsibility, for any superior within a military, governmental, or quasi-governmental hierarchy who exercised effective control; and as expressly reflected in domestic law, Rule 21, when the superior was operating within the structure of the VRS.

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Stupar had two possible processes through which he could initiate disciplinary actions: the military process, during the period that his detachment was resubordinated to the VRS, and the process of the Ministry of the Interior, of which he never ceased to be a part. The obligation to take disciplinary action arose immediately upon learning of the activity of his subordinates at the Kravica warehouse. Under both VRS and MUP regulations he, as Detachment Commander, had the authority to take immediate action in the field.[355] Thereafter, he continued to have the obligation to initiate disciplinary action throughout the incriminating time period – from 13 July, the date of his discovery of his subordinates involvement in the killings, to July 19, the period covered by the Indictment. He did not then, nor has he since, taken any such disciplinary measures. It is irrelevant to the Panel which process might have been the most appropriate because no process was initiated by Stupar.

None of the subordinates involved in the genocidal acts at the Kravica warehouse were ever disciplined or, until this proceeding, investigated criminally. On the contrary, Trifunović, the commander of the 3rd Skelani Platoon and immediate subordinate to Stupar and his deputy – who remained with the Accused at the warehouse after Čuturić was taken to tend to his injuries and continued to participate with them in the killings – received an "extraordinary promotion" on 24 April 1996, nine months after he lead his men in the massacre.

Stupar, as a MUP commander resubordinated to the military, had the obligation to initiate disciplinary action against subordinates whom he knew had perpetrated any crime. However, when the crime perpetrated by subordinates was a violation of international humanitarian law, then, under the international legal principle of command responsibility, reflected in domestic law in Rule 21, failure to meet that obligation not only violated his affirmative duty to report and discipline his men for criminal activity, a crime of omission, but qualified as a mode of perpetration of the underlying crime, and made him personally liable for the crimes of the subordinates.

The Accused Stupar failed to report the crimes or take any step in the disciplinary process, and is therefore responsible for failing to punish the perpetrators of the crime of genocide as established above. That the disciplinary process may have failed for any reason at a later point is irrelevant, as the Accused Stupar failed to take the first critical step in that process. It is also irrelevant that the principal perpetrators may have committed those crimes pursuant to the orders of another person, as those illegal orders did not excuse the criminal liability of either the principal perpetrators for committing the crimes, or the commander for condoning those crimes after the fact by allowing the crimes to go unpunished. The five Accused were subordinates of Stupar over whom he had effective control, and he failed to exercise that control by punishing them under the processes available to him. Under the principle of Command Responsibility, Stupar is therefore criminally liable for the crime of genocide committed by the Accused.

10. Genocidal Intent and Command Responsibility

a. The Law

Under the principle of command responsibility, *mens rea* is established by proof that the superior knew or had reason to know that his subordinates were about to or did commit a

[355] Tomislav Kovač; Momir Nikolić.

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crime. However, it is axiomatic that genocide is a specific intent crime and may only be committed where the perpetrator possessed the necessary intent to destroy a protected group in whole or in part. The obvious question that arises, then, is whether a commander must also possess genocidal intent in order to be held liable for the crime of genocide under the theory of command responsibility.

The Trial Chamber in *Stakić* concluded, "It *follows* from Article 4 and the unique nature of genocide that the *dolus specialis* is required for responsibility under Article 7(3) as well."[356] Although the Trial Chamber did not further explain its conclusion, the thrust of its argument is clear: notwithstanding the elements of command responsibility with respect to other crimes, genocidal intent is so intrinsic to the definition of the crime of genocide that command responsibility must be interpreted relative to the elements of that crime. Similarly, it has been argued:

> [T]o be held responsible for genocide as a commander, the accused must therefore be shown to have possessed the required genocidal intent himself. There is indeed no precedent which would support a finding that a commander could be held responsible where he merely knows of his subordinates' intent and, prior to 1998, there was simply no state practice (and no *opinio juris*) that such a state of mind could ever suffice to enter a genocide conviction, regardless of the form of participation under consideration.[357]

Although the issue has never been properly presented, the Appeals Chamber of the ICTY has suggested that it does not consider proof of genocidal intent necessary to sustain a conviction for genocide on the basis of command responsibility. In reversing the Trial Chamber's conclusion in *Brdjanin* that the third category of joint criminal enterprise liability was incompatible with the specific intent requirement of genocide, the Appeals Chamber held, "The Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused."[358] It further expressly noted that extended joint criminal enterprise and command responsibility are both forms of liability "which do not require proof of intent to commit a crime on the part of an accused before criminal liability can attach."[359]

The Trial Chamber in *Brdjanin* specifically relied on these observations when concluding that "the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7(3) is that the superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent."[360] The Trial Chamber in *Blagojević* echoed this conclusion.[361]

The Panel considers that none of the various pronouncements by Trial Chambers of the ICTY and ICTR are particularly persuasive authority on this issue, as their conclusions were not

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[356] *Prosecutor v. Milomir Stakić*, IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002, para. 92 (emphasis in original).
[357] Mettraux, *International Crimes*, pg. 263.
[358] *Prosecutor v. Radoslav Brdjanin*, IT-99-36-A, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Motion for Acquittal Pursuant to Rule 98bis ("98 *bis* Appeal Decision"), 19 March 2004, para. 10. *Accord Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 291.
[359] *Brdjanin* 98 *bis* Appeal Decision, para. 7.
[360] *Brdjanin* Trial Judgment, para. 721.
[361] *Blagojević* Trial Judgment, para. 686.

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necessary to resolve the guilt of the accused. The Trial Chamber in *Brdjanin* concluded that the Prosecutor failed to prove beyond doubt "that the underlying offenses were committed with the specific intent required for the crime of genocide."[362] The Trial Chamber in *Blagojević* similarly concluded that the Prosecutor failed to prove that the accused had effective control over those who committed acts of genocide.[363] ICTR Trial Chambers entered convictions for genocide on the basis of command responsibility against Kambanda, Serushago, Kayishema, Musema, Kajelijeli, and Barayagwiza, but also concluded that those individuals were directly criminally liable for those same acts and that they possessed genocidal intent.[364]

Indeed, as of yet there has not been a final judgment from the international tribunals holding an accused guilty of genocide on the basis of command responsibility alone. The sole trial judgment directly on point is the first-instance conviction of Samuel Imanishimwe in the *Cyangugu* case. The Trial Chamber found that soldiers over whom Imanishimwe had effective control committed killings with genocidal intent, and that Imanishimwe knew or should have known of the participation of his soldiers in those killings.[365] The Trial Chamber made no finding regarding Imanishimwe's own intent when he failed to prevent or punish those under his command, implicitly concluding that such a finding was unnecessary to establish criminal liability. However, this conviction was overturned on other grounds on appeal, and the Appeals Chamber did not address the issue of genocidal intent and command responsibility.[366]

The Panel determines that it is not necessary in this case to decide whether specific genocidal intent is a necessary element of liability for genocide under command responsibility in every case. It is sufficient in this case that the Panel finds beyond reasonable doubt that Stupar in fact had the specific intent to destroy the Bosniaks from Srebrenica as such.

b. Stupar's Genocidal Intent

The evidence establishes that the Accused Stupar did posses the intent to destroy the Bosniaks from Srebrenica when, during the period between 13 and 19 July, he failed to punish the five Accused who committed genocide at the Kravica warehouse.

In coming to this conclusion the Panel looked at the *act* of the Accused, in this case an omission, and the *context* in which the omission took place. Although the Accused Stupar had the duty to punish from the point at which he learned of the crimes of his subordinates, the obligation was a continuing one. Thus the timeframe in which the Panel examined the "act" was from the point at which Stupar learned of his subordinates' involvement in the crime through the end of the period covered by the indictment, 19 July.

[362] *Brdjanin* Trial Judgment, para. 989.
[363] *Blagojević* Trial Judgment, para. 795.
[364] *See Prosecutor v. Jean Kambanda*, ICTR 97-23-S, Judgment and Sentence, 4 September 1998; *Prosecutor v. Serushago*, ICTR 98-39-S, Sentence, 5 February 1999; *Kayishema and Ruzindana* Trial Judgment; *Musema* Trial Judgment; *Kajelijeli* Trial Judgment; *Prosecutor v. Ferdinand Nahimana, et. al* ("Media Case"), ICTR-99-52-T, Judgment, 3 December 2003.
[365] *Cyangugu* Trial Judgment, para. 653-654.
[366] *Prosecutor v. Andre Ntagerura, et. al* ("*Cyangugu*"), ICTR-99-46-A, Judgment, 7 July 2006.

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"[T]he circumstances and facts surrounding the perpetrator's acts can, as a matter of law, establish genocidal intent beyond doubt".[367]

As reasoned above, Section V, *supra*, there did exist a genocidal plan to destroy the Bosniaks of Srebrenica. For the reasons also explained above, the implementation of that plan at its basic level was obvious to those present in the Srebrenica area on 12 and 13 July. Stupar, who was present in the Srebrenica area at least since 12 July, would have had the same opportunity as the other Accused to observe the implementation of the plan to eradicate the Bosniaks who lived in the UN Safe Area by forcible transfer and by killing. In addition, given his position in the command chain, directly below Borovčanin, he would have known much more about the plan than the other Accused. Stupar knew even before the issuance of Order 64/95 that his detachment would be involved. He told the Detachment's logistic officer, Dragomir Stupar, that Borovčanin would be contacting him about setting up logistical support, which in fact Borovčanin did. Stupar would have needed to know from Borovčanin sufficient detail of the mission to be able to carry out his role as Commander of the detachment and as Čuturić's superior. Stupar was with Borovčanin and other Commanders at a meeting in the morning of 12 July;[368] he was at the Sandići meadow on 13 July when Gen. Mladić spoke to the prisoners, as was Borovčanin; and he was seen by many in the Detachment driving up and down the Bratunac – Konjević Polje road on 13 July.[369]

Dr. Matijević reported that command and control was excellent within the MUP during this period. Given command and control as it existed in the MUP and the VRS, orders would have gone down the line of command from Borovčanin to Stupar to Čuturić and the platoon commanders, and reports after completion of tasks would have travelled in reverse order from the platoon commanders through Čuturić to Stupar who would relay them to Borovčanin.[370] It has been established that tasks for the MUP forces were being assigned in the morning of 12 July and 13 July at meetings with Mladić, as reported by Vasić, and these tasks would have travelled the command chain for implementation. The tasks on both days for the Detachment Stupar commanded was the killing of the 8000 Bosniak men, 1300 of whom were armed.[371] Stupar as commander of the Detachment would have known that this was happening by ambush, shelling, and induced surrender because he would have seen it, and his men and his artillery platoon were involved in it. He would have witnessed the controlled lawlessness whereby acts of violence and abuse and plundering were carried out with impunity by the soldiers on the surrendering Bosniaks. He would likewise have seen the buses full of women, children, and elderly, and the condition of the surrendering men, as he drove up and down the road. At the point at which he learned that members of his Detachment had finished their part of the killing of unarmed men in the Kravica warehouse, Stupar unquestionably knew at least as much as the other five Accused about the plan to

[367] *Kayishema and Ruzindana* Trial Judgment, para. 93. *See also Rutaganda* Appeal Judgment, para. 525 ("In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from the relevant facts and circumstances"); *Cyangugu* Trial Judgment, para. 663; *Semanza* Trial Judgment, para. 313; *Akayesu* Trial Judgment, para. 523; *Krstić* Appeal Judgment, para. 34 ("Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime"); *Jelisić* Appeal Judgment, para. 47 ("As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive discriminatory acts").
[368] Danilo Zoljić.
[369] Dragan Stupar; Miladin Stevanović; S4.
[370] Butler Brigade Report, 2.12 (Exhibit O-226).
[371] Vasić 12 July and 13 July Dispatches (Exhibits O-184 through O-186).

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eradicate the Bosniaks from Srebrenica, and his position as Commander would have necessitated that he know more.

As reasoned above, Section VII.E.9, *supra*, by the night of 13 July, Stupar knew that his subordinates, including his own deputy, participated in the mass killings. It was at this point that he became obligated to punish the perpetrators. It is also at this point that he incurred liability for his failure to punish, under the principle of command responsibility. In addition, it is the point from which the Panel analyzed his failure to exercise responsible command within the context of his knowledge, his actions and the events occurring during the incriminating period to determine whether Stupar's failure to act was done with genocidal intent. In so doing, the Panel adopted a similar analysis to that applied in determining the genocidal intent of the five direct perpetrators (see Section VI, *supra*) The Panel looked at the factors relevant to the underlying crime of genocide together with the criminal act of Stupar (the failure to punish) and the context in which his act occurred.

Although the factors relevant to the underlying act of genocide do not apply in the same way to Stupar as they did to the five principal perpetrators, they are still material to assessing the gravity of the offense that went unpunished, a factor relevant to assessing the reasonable and necessary response required of the commander. Therefore the number of victims; their identity as members of the protected group; the method, manner, and character of their execution; and the conformity of the killing with a preconceived plan are all relevant to the Panel's analysis. The huge number of unarmed Bosniak males methodically killed by his subordinates at close range are factors that would rule out any possibility that Stupar failed to punish because he believed the offenses trivial or insignificant. The factors would also lead Stupar, as they led this Panel, to the conclusion that the killings were perpetrated by the Accused with genocidal intent, that is, the intent to destroy the Bosniaks from Srebrenica as a group as such. These factors likewise are relevant to the consideration of what measures would be reasonable and necessary under the circumstances and the need for immediacy in effecting these measures. When assessing the "act" of failing to punish during the operative time, the Panel considered what Stupar did not do within the context of what he did do.

By the evening of the 13 July, Stupar learned that members of his Detachment, including his deputy[372], were involved in the commission of killings of unarmed Bosniaks on a massive scale (see Section VII.E.9, *supra*). Momir Nikolić described the expected response of a commander who learned that his subordinates had committed grave crimes:

> The commander, would the next day or in the forthcoming period, simply suspend me from the duty I held. He would have started an investigation. He would have taken measures and asked for criminal proceedings to be brought against me.[373]

In addition, it was well known throughout the Detachment, deployed up and down the road, that the Kravica killings had occurred. Motorola and word of mouth up and down the line spread the story, not only of the death of one of their comrades, but of the annihilation of all

[372] The Accused Stupar is not charged with and not found guilty of failing to punish his deputy Rade Čuturić. However Čuturić's involvement, as measured by his presence when the killings began, his control of the traffic through instructions to Milenko Pepić, his eventual return to the warehouse, and his duty to report to Stupar under Rules of command, provide part of the relevant context, as does Stupar's reaction to Čuturić in the days that followed.

[373] *Blagojević*, Testimony of 1 October 2003, pg. 2362 (Exhibit O-246).

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the Bosniaks in the warehouse.[374] Momir Nikolić was not the only one who knew what was supposed to happen to those engaged in grave crimes. Čuturić and the men in Stupar's detachment talked about the probable consequences.[375] Trifunović and the other perpetrators talked among themselves about the probable consequences, and later to other members of the Detachment.[376] They said that they expected that there would be consequences. On the night of 13 July, Stupar had the authority to discipline his men in the field pursuant to Article 78 on the Law on the Army. He had the power to temporarily arrest and detain.[377] He had the obligation to refer to judicial and prosecutorial branches pursuant to Article 65 of the Law on Military Courts.

Stupar was seen with the Accused and the other perpetrators of the genocide in the days that followed. He was seen with them in Skelani on 14 July and at the funeral, along with Čuturić.[378] Čuturić continued to be in his chain of command[379] and he and Stupar were seen together with the 1st and 2nd Platoons in the Zvornik area.[380] That the perpetrators were free, suffering no consequences, and enjoying the continued company of their commander was obvious.

Stupar took no action against any of the perpetrators on 14 July. He was seen as the commander on that day, in the company of Čuturić and the 1st and 2nd Platoons in Zvornik, where his troops were part of those assembled to "discover, block, disarm and capture any Muslim groups observed and prevent their crossing into Muslim territory."[381] He actively participated in carrying out that part of the killing plan designed to block and capture the fleeing Bosniaks in Zvornik at the same time that he failed to take any measure that would lead to the punishment of the Accused and other of his subordinates who had participated in that part of the killing plan that was carried out at the Kravica warehouse. Also in Zvornik that day were the buses full of Bosniaks transported from Bratunac, travelling to their Zvornik execution sites.

Stupar took no action against any of the perpetrators on 15 July. He was seen attending a meeting with Borovčanin and other commanders in Zvornik on that day where he talked about "his men" and the events at the Kravica warehouse.[382] Also present at the meeting was Obrenović. While Stupar talked about "his men" at Kravica, "Obrenović's men" were only a short distance away, in other parts of Zvornik, carrying out, preparing to carry out, or cleaning up from other mass executions, as they would continue to do for the next three days.

Stupar took no action against any of the perpetrators on 16 through 19 July. During that time, according to the Borovčanin Resubordination Report, he and Čuturić continued to command the 2nd Detachment. Also according to that report, the Detachment continued to carry out the killing plan: participating in the search for Bosniaks who had not found their way through the corridor on 16 July during the ceasefire; on 18 July in the area of Cerska and Udar; and on 19 July in the areas of Kamenica, Jovanica, Liplje, Safin Kamen, Crni Vrh and Snagovo. Duško Mekić testified that Stupar himself issued the order to search the terrain around Udar. The

[374] Dragan Kurtuma; Milenko Pepić.
[375] Statement of Milenko Pepić (Exhibit O-73).
[376] Statement of Obradin Balčaković (Exhibit O-55).
[377] Tomislav Kovač; Article 78 of the Law on the Army.
[378] Mirko Sekulić; Statement of Nebojša Janković (Exhibit O-64).
[379] Borovčanin Resubordination Report (Exhibit O-258).
[380] Statement of Marko Aleksić (Exhibit O-38).
[381] Drina Corps Report (Exhibit O-272).
[382] Ljubomir Borovčanin; Dragomir Vasić; Dragan Obrenović; Dragomir Stupar; Danilo Zoljić.

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Butler Report notes that Bosniak men found in the areas thus "combed" by MUP and VRS during this time were summarily executed.

When viewed in context over the period of days charged in the Indictment, the Panel concludes that Stupar's failure to punish was no oversight or negligent omission. Rather, the failure to punish was one of several acts of Stupar during that period that evidenced knowledge of and concurrence with the genocidal plan. Like the lawlessness tolerated on a smaller scale at Potočari and Sandići meadow, failure to intervene or punish acts of terror and abuse against the Bosniaks served a purpose in the genocidal plan. On the scale that Stupar tolerated it from "his men" that purpose was even more clear: it reinforced to all those who knew about the Kravica massacre – which was a considerable number of soldiers, police officers, and local people – that there was nothing they could do to the Bosniaks in violation of national or international law that would *not* be tolerated with impunity. Given the number of men needed to carry out the executions in Orahovac, Branjevo Farm, Petkovci Dam, Pilica Dom, and Kozluk during the days immediately following Kravica, this was an important message for the success of the genocidal plan. It also served the more subtle purpose of guaranteeing the silence of those who participated, that is, assuring that their mission in the liberation of Srebrenica "was not to be spoken of" outside the Detachment.

No disciplinary action was ever taken against the five Accused, the other perpetrators, or Čuturić, who assumed command of the Detachment a month after the Kravica massacre. Stupar left command of the 2nd Detachment in August and was reassigned as Head of the Zvornik Section, Anti-Terrorism Administration. Four months after the Kravica genocide, 17 November 1995, Stupar received from Karadžić "The Order of the Karadordje Star" (Exhibit O-109) for his services to the RS.

The Panel has considered evidence of Stupar's failure to punish the five Accused for their perpetration of genocide at the Kravica warehouse together with the general context, which is the genocidal plan and his knowledge of it; and the specific context, which is the events occurring between the evening of 13 July through 19 July. Based on that analysis, the Panel concludes beyond doubt that Stupar's failure to punish the five Accused during the operative time was done with the aim to destroy Bosniaks, a protected group, in whole or in part.

Finally, it also important to note that the Prosecutor in his Indictment charges Stupar with being:

> responsible pursuant to Article 180(1) in conjunction with Article 21 of the CC BiH, by being present at the site of the mass execution of prisoners and by failing to intervene with the purpose to protect the prisoners, for assisting and supporting the perpetrators of killings in the manner that his presence served as a tacit encouragement to the perpetrators.
>
> and, in his capacity of a superior officer, with being also responsible for the actions of his subordinates pursuant to Article 180(2) of the CC BiH.

The evidentiary proceedings established that the Accused Stupar is responsible based on command responsibility for failing to punish the perpetrators of killings of the captives at the Warehouse. Since the Panel was unable to find beyond doubt that the Accused Stupar was indeed present when the column was formed and escorted to the Warehouse, or that he was present at the crime scene at the time of the killings (see Section VII.E.9.a, *supra*), bearing

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that in mind, the Panel conformed the operative part of the Verdict so as to reflect the established facts of the case and the criminal responsibility of the Accused Stupar, leaving out parts of charges under Count 1a) of the Prosecutor's Office's Amended Indictment related to the Accused Stupar. The Panel finds that this does not violate the objective identity of the Indictment and does not represent an essential violation of the criminal procedure provisions.

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F. Parts of Charges Left Out from the Operative Part of the Verdict

Having considered all admitted documentary evidence and the testimony of all witnesses, both individually and as a whole, as well as the arguments of the Prosecutor and Defense Counsel, and having applied the principle of *in dubio pro reo*, the Panel concludes that certain facts and acts alleged in the Indictment were not proven beyond a reasonable doubt. The Panel conformed the Operative Part of the Verdict in that regard. The Panel will explain the reasons for its findings as reflected in the Operative Part of the Verdict.

The Panel left out sub-paragraph (a) of the Indictment as unproven. In particular, while, as detailed above in Section III.B, *supra*, the Panel concludes that the Prosecutor proved beyond doubt that the Accused participated in securing the Bratunac – Milići road on 12 and 13 July 1995, particularly in the area between Kravica and Sandići villages, the Prosecutor did not prove that the Accused were criminally liable thereby for the crime of forcible transfer. As discussed below in Section VII.G, *infra*, the Panel concludes that the Prosecutor did not establish that the Accused were members of a joint criminal enterprise whose common purpose was, in part, to forcibly transfer part of the Bosniak population of Srebrenica. The Panel further concludes that the Accused did not perpetrate or co-perpetrate the crime of forcible transfer, as through their acts they neither committed the crime of forcible transfer nor substantially contributed to the commission of that crime by others, as required by Articles 21 and 29 of the CC of BiH. Finally, the Panel concludes that the Accused were not accessories to the crime of forcible transfer, as the Accused's acts with respect to the forcible transfer of the Bosniak population of Srebrenica were negligible, trivial, and had no measurable affect on the commission of that crime by others. In addition, the evidence did not establish that the Accused "kept the Bratunac – Milići road closed or open for traffic." The Accused were only responsible for securing the road, while other members of the 2nd Šekovići Detachment, such as witness Milenko Pepić, were responsible for actually halting or allowing traffic on the road.

The Panel left out sub-paragraph (b) of the Indictment as unproven. While the Panel is satisfied that the acts alleged did occur, the Prosecutor did not introduce any evidence to establish that the Accused participated in those acts in any way or were otherwise responsible for those acts under any theory of criminal liability.

The Panel left out the final clause of sub-paragraph (c) of the Indictment as unproven. While the Panel is satisfied that personnel from the VRS or MUP, including some members of the 2nd Šekovići Detachment, participated in the acts alleged, the Prosecutor did not introduce any evidence to establish that the Accused participated in those acts. In addition, the Prosecutor did not introduce any evidence that the Accused contributed, by their acts, omissions, or presence, to the commission of those acts by other persons, nor any evidence that the Accused intended to aid and aided in fact the commission of those acts by other persons. Further, the Prosecutor did not plead, and did not establish in any event, that the Accused were members of a JCE whose common purpose was to perpetrate those acts or other acts the foreseeable consequence of which was the commission of the acts alleged in this clause. Finally, the Prosecutor did not introduce evidence to establish that any of the Accused were responsible on the theory of command responsibility for those acts.

The Panel also left out the allegation in sub-paragraph (c) that the Accused "set[] up ambushes", as the Prosecutor did not introduce any evidence to support this allegation. The

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Panel further conformed sub-paragraph (c) to reflect its factual findings, as detailed above in Sections III.B.3 and VII.A.

The Panel left out all other clauses in sub-paragraph (d) of the Indictment not stated in the Operative Part of the Verdict as unproven. The Panel further notes that two of these allegations were improperly pled, as the Indictment did not describe who committed the acts alleged. Nonetheless, the Panel concludes that the Prosecutor did not introduce any evidence to establish that the Accused committed the acts alleged or were responsible for those acts under any other form of criminal liability.

In addition, in the Amended Indictment, its section dealing with legal qualification, the Prosecutor's Office qualifies the acts of the Accused also as infliction of serious bodily injuries and mental pain on the population of Srebrenica, both men and women, *inter alia*, by separating able-bodied men from their families and forcibly transferring the population from their homes to the area outside Republika Srpska. However, the factual substratum of the Indictment itself does not mention the circumstances that could lead to a reliable conclusion that serious bodily injuries and mental pain were inflicted on the Bosniaks from Srebrenica, nor was a single piece of evidence presented in the course of the evidentiary proceedings that would support this position taken by the Prosecutor's Office, which is why this qualification of the Prosecutor's Office has not been accepted in the Verdict.

Mindful of all evidence presented in the course of the proceedings and the established state of facts, when rendering the first instance Verdict, the Panel entirely conformed the operative part of the Verdict to the established state of facts.

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G. Joint Criminal Enterprise

The Panel has concluded that the Accused are guilty as co-perpetrators of the acts stated in the Operative Part of the Verdict. The Panel considers that the Accused's criminal liability is fully and accurately described by that form of culpability. The Panel will, however, address the Prosecutor's additional allegation that the Accused are guilty as members of a Joint Criminal Enterprise.

1. Law on Joint Criminal Enterprise

This Panel has previously addressed the issue of the applicability of joint criminal enterprise theory as a mode of criminal liability in proceedings under the CC of BiH. In *Rašević and Todović*, this Panel concluded that the systemic form of joint criminal enterprise liability is incorporated in Article 180(1) of the CC of BiH and was part of customary international law at the time the offenses in that proceeding were committed.[383] The Panel further concluded that application of joint criminal enterprise liability in that proceeding did not violate the principle of legality.[384]

As the Panel concludes that the Accused are not liable as co-perpetrators of the alleged JCE, the Panel need not determine whether the basic form of JCE liability (JCE 1) identified in *Tadić* is applicable law. This Panel has only previously concluded that the systemic form of JCE liability is applicable law, which conclusion does not extend necessarily to other forms of JCE liability identified in *Tadić*. The Prosecutor assumes, without adequate argument, that this Panel will conclude that the basic form of JCE is a legally applicable mode of liability for crimes against international humanitarian law committed during this period. Regardless, the Panel concludes that, even if it were established that the basic form of JCE liability, as articulated in *Tadić*, was the law at the time and place of the committed crimes, the Prosecutor failed to prove the legal elements necessary to establish that these Accused were members of the basic JCE described in the Indictment.

The Panel emphasizes that its conclusions regarding the applicability and foreseeability of systemic joint criminal enterprise theory applied only to contexts such as concentration camps and prisons that meet the legal elements of that form of JCE theory and which were the subject of prior jurisprudence. While the Panel recognizes that suggestions have been made that systemic JCE theory applies in other contexts that share similar characteristics, the Panel did not consider and did not express any opinion regarding such an extended application.

2. Prosecutor's Submissions

In the Indictment, the Prosecutor alleged that all Accused were criminally responsible for the acts charged as members of a joint criminal enterprise.

The Prosecutor defined the common purpose of the alleged JCE as "to exterminate in part a group of Bosniak people by means of the forced transfer of women and children from the

[383] This Panel expressly did not consider whether the so-called "extended" form of joint criminal enterprise liability was incorporated in the CC of BiH and was part of customary international law. As that form of liability was not pled in these proceedings, the Panel again need not consider the issue.
[384] *Rašević and Todović* First Instance Verdict.

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Protected area and by organized and systematic capture and killing of Bosniak men by summary executions by firing squad."[385] More specifically, the Prosecutor alleged that the purpose of the JCE was "to forcibly transfer women and children from the Srebrenica enclave to Kladanj on 12 and 13 July 1995; to capture, to detain, to summarily execute by shooting, burying, and reburying thousands of men and young boys, Bosniaks from the Srebrenica Enclave, aged between 16 and 60, in the period between 12 July 1995 and around 19 July 1995."[386] The Prosecutor suggested that the initial purpose of the JCE was to forcibly transfer the Bosniak population, but that this common purpose "was later on expanded" so as to encompass mass executions of Bosniak men.

In addition to the Accused, the Prosecutor alleged that the members of this JCE included:[387]

> …General Ratko Mladić, VRS Commander, General Milenko Živanović, Commander of the Drina Corps until around 20:00 hours on 13 July 1995; General Radislav Krstić, Chief of Staff /Deputy Commander until around 20:00 hours on 13 July 1995, and from that point of time Commander of the Drina Corps; Colonel Vidoje Blagojević, Commander of the Bratunac Brigade; Colonel Vinko Pandurević, Commander of the Zvornik Brigade; Lieutenant Colonel Dragan Obrenović, Deputy Commander and Chief of Staff of the Zvornik Brigade; Momir Nikolić, Assistant Commander for Security and Intelligence of the Bratunac Brigade; Dragan Jokić, Chief of Engineering Unit of the Zvornik Brigade; Ljubomir Borovčanin, Commander of the Special Brigade of the MUP Police established by the Order under number 64/95, and many other individuals and military and police units who took part in the operations of the forced transferring and killing of Bosniak men….[388]

3. Analysis

At the very outset, the Panel highlights that there has never been a decision of any court or tribunal endorsing or even seriously considering a joint criminal enterprise theory that imputed criminal responsibility as broadly as proposed by the Prosecutor. The Prosecutor has effectively proposed that almost all VRS and MUP personnel that were deployed in the Srebrenica area between 12 and 19 July, from the highest echelon of the officer corps to the lowliest common soldier, together were members of a single joint criminal enterprise. Even more, these persons are alleged to be criminally responsible for all crimes committed

[385] Indictment, pg. 3.
[386] Indictment, pg. 5. The Panel recognizes that this definition of the common purpose of the JCE is identical to the common purpose identified by the ICTY Office of the Prosecutor in *Blagojević*. *See Blagojević*, Amended Joinder Indictment, 26 May 2003, para. 30. However, the Panel also notes that the OTP adopted a more narrowly-focused approach in its more recent Indictment in *Popović, et al*, distinguishing between separate JCEs to forcibly transfer the population and to murder able-bodied men. *See Prosecutor v. Vujadin Popović, et al.*, IT-05-88-T, Indictment, 4 August 2006.
[387] Again, the Panel recognizes that the Prosecutor's definition of the membership of the JCE is almost identical to the membership identified by the OTP in *Blagojević*. *See Blagojević* Amended Joinder Indictment, para. 33. And again, the Panel also notes that the OTP adopted a more narrow approach in its more recent Indictment in *Popović*. *See Popović* Indictment, paras. 96-98. In *Popović*, the OTP described the military and civilian leadership as members of the JCE, but only characterized the units who physically perpetrated the alleged crimes as having "participated in the implementation of the JCE." *Id.*, at 98.
[388] Indictment, pg. 6.

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following the fall of Srebrenica, that is, all acts of forcible transfer and certainly the vast majority of all killings perpetrated during that time.[389]

Neither the case law nor the literature support the proposition that a single basic JCE can stretch from the highest echelons of the military leadership to the lowliest foot soldier, including persons with such disparate roles and parts and assigning them all *the same level of criminal responsibility*.[390]

For the purposes of this analysis only, the Panel assumes, *arguendo*, that there was a JCE whose common purpose was "to capture, to detain, to summarily execute by shooting, bury and rebury thousands of men and young boys, Bosniaks from the Srebrenica Enclave, aged between 16 and 60, in the period between 12 July 1995 and around 19 July 1995" and to "forcibly transfer women and children from the Srebrenica enclave to Kladanj on 12 and 13 July 1995." The Panel further assumes, *arguendo*, that the members of this JCE included some of the military leadership specifically named by the Prosecutor in the Indictment.

Even under those assumptions, however, the Panel concludes that the Accused were not members of this joint criminal enterprise and are not responsible for the crimes committed pursuant to that joint criminal enterprise in which they did not participate.

In particular, the Panel concludes that such a broad extension of joint criminal enterprise liability to the Accused would be in complete violation of fundamental principles of criminal law, customary international law, and the law of war. In accordance with the fundamental principle of individual guilt, the Accused are criminally responsible for those crimes they committed. However, they cannot be considered criminally responsible for those crimes committed pursuant to the design of their ultimate superiors to which they did not contribute, simply on the grounds that those superiors also considered the Accused's acts as part of their design. The guilty intent and acts of others to which the Accused did not contribute simply cannot be the basis for the guilt of the Accused, and joint criminal enterprise theory does not modify this fundamental principle in any way.

Those who conceived and directed the criminal plan that was implemented following the fall of Srebrenica are criminally responsible for all crimes that ensued. The common soldiers of the VRS and the MUP, on the other hand, are responsible for the crimes they participated in, and no more. To conclude otherwise would be to assign collective responsibility to all soldiers for the crimes of their superiors, a notion absolutely repugnant to national law, international criminal law, and the law of war.

The Panel concludes that co-perpetratorship is the most appropriate form of criminal liability to describe the criminal culpability of the Accused. Punishment as co-perpetrators for their direct acts more than sufficiently addresses the Accused's guilt, and JCE liability would neither measurably contribute to identifying nor accurately describe the Accused's criminal responsibility. On the contrary, application of JCE theory would only blur understanding of the Accused's criminal responsibility.

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[389] *See Prosecutor v. Radoslav Brdjanin*, IT-99-36-A, Judgment, 3 April 2007, para. 445 ("A coherent application of such a notion could make each one of the [principal perpetrators], as members of the JCE, responsible for each one of the crimes that the Trial Chamber found were committed through the territory of the ARK during the Indictment period.").

[390] *See, e.g.,* Antonio Cassese, *International Criminal Law*, pgs. 209-210.

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Having considered the application of JCE theory more generally, the Panel also concludes more specifically that the Prosecutor did not establish the legal elements of the basic form of JCE liability. While the Panel is satisfied that the Accused's actions implemented in part the common purpose or plan of the JCE, the Panel concludes that the Accused only participated as tools in that plan without themselves being or becoming members of the JCE.

When analyzing an individual's alleged membership in a JCE, a careful distinction must be drawn between persons acting according to a common purpose and persons acting independently of one another with the same criminal intent. The Trial Chamber in *Krajišnik* clarified the distinction between persons acting in unison pursuant to a shared common purpose and persons acting individually with the same criminal intent. As the Trial Chamber noted, "It is evident …that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives."[391]

Accordingly, a comparative goals-focused analysis is insufficient to establish JCE liability. This point cannot be emphasized enough. Simply, it is not sufficient for the Prosecutor to demonstrate that a plurality of persons had identical criminal purposes. The relevant inquiry is whether the persons *shared* that criminal purpose in common, that they, in effect, had joined together to realize that criminal purpose. In the absence of proof of express agreement, this inquiry will almost exclusively involve consideration of the accused's specific acts.

The Panel further notes that, as a matter of law, knowing participation in the implementation of the common purpose or plan of a JCE does not establish membership in that JCE. As the Appeals Chamber specifically held in *Brdjanin*, a principal perpetrator of a crime implementing the common purpose of a JCE may know of the JCE and his role in implementing that common purpose without himself sharing the *mens rea* necessary to become a member of the JCE.[392] Simply, knowledge of the common purpose does not establish membership in the JCE, even where the individual implements the common purpose or plan.

The Trial Chamber in *Krajišnik* proposed that what must be considered is whether the persons alleged to be members of a single JCE *acted jointly*. Specifically:

> [I]t is the interaction or cooperation among persons – *their joint action* – in addition to their common objective, that makes those persons a group. The persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for the crimes committed through the JCE.[393]

The Trial Chamber further noted:

> On the other hand, links forged in pursuit of a common objective transform individuals into members of a criminal enterprise. These persons rely on each other's contributions, as well as on acts of persons who are not members of the

[391] *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Judgment, 27 September 2006, para. 884.
[392] *Brdjanin* Appeal Judgment, para. 410. *See also* Declaration of Judge Van Den Wyngaert, *Brdjanin* Appeal Judgment, para. 5 ("[Acquiescence as a standard of liability], in my view, would be an overly broad interpretation of the word 'agreement'. It would have an overly broad 'downward' effect.").
[393] *Krajišnik* Trial Judgment, para. 884 (emphasis added).

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> JCE but who have been procured to commit crimes, to achieve criminal objectives on a scale which they could not have attained alone.[394]

The Panel further emphasizes that JCE liability is identically applied with respect to the crime of genocide as with respect to all other crimes set forth in Articles 172 through 175 of the CC of BiH. In particular, the Panel stresses that proof that an individual possessed genocidal intent does not in any way lead *ipso facto* to the conclusion that that person was a member of a joint criminal enterprise whose purpose was to commit genocide. Similarly, proof of genocidal intent does not in any way depend on proof of membership in a JCE to commit genocide. JCE liability requires proof of intent distinct from and in addition to the specific genocidal intent – that is, proof of membership in a JCE to commit genocide requires proof in addition to individual genocidal intent.

The Panel recognizes that in practical terms, the crime of genocide will usually be perpetrated in the context of multiple perpetrations of that crime by a large number of persons.[395] The nature of the crime of genocide is such that it will often be committed in a context of the widespread, systematic, and organized commission of crimes against a particular population pursuant to a plan or policy directed by an organization or group of high officials. However, this context is not sufficient to imply that the perpetrators of genocide, particularly the principal perpetrators, are participants in a JCE.

The Prosecutor did not establish either legally or factually that any of the Accused acted "jointly" or "in concert" with the members of any JCE. Joint action requires some degree of reciprocity, mutuality, or bi-directionality, which is clearly absent here. The evidence establishes only that the Accused merely acted consistently with the design of those responsible for conceiving and directing the execution of a common political/military plan. Indeed, there is no evidence that the Accused and the designers of the plan mutually cooperated in any way, or even that the Accused were personally known to them as anything other than a fungible instrument.

In a similar respect, the Panel notes conceptually how tenuous were the links between the Accused, conscripts at the lowest rungs of the military structure, and the named members of the purported JCE, namely the senior commanding officers of the relevant VRS and MUP units. The path from the Accused to officers like General Mladić traversed numerous links in the chain of command, indeed, the whole length of the chain of command. The Panel also notes the wide disparity between the scope of the purported JCE and the scope in fact of the Accused's acts.

Moreover, even accepting that the common plan required the participation of persons such as the Accused in order to be realized, that relationship does not give rise to the mutuality that characterizes membership in a JCE. The Accused were simply "tools" used by the designers of the plan, who, in the language of the *Krajišnik* Trial Judgment, were "not members of the JCE but who [were] procured to commit crimes." The relationship between the Accused's acts and the acts of other tools is a character of the plan itself, rather than the individual acts of the Accused.

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[394] *Id.*, at para. 1082.
[395] Indeed, the Rome Statute introduces such a context as an element of the offense. *See* Elements of Crimes to the Rome Statute, Art. 6.

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Accordingly, the Panel concludes that in the instant case the Prosecutor failed to prove the elements of basic joint criminal enterprise liability.

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H. Accused Milovan Matić

Having considered all admitted documentary evidence and the testimony of all witnesses, both individually and as a whole, as well as the arguments of the Prosecutor and Defense Counsel, and having applied the principle of *in dubio pro reo*, the Panel concludes that the Prosecutor did not establish beyond doubt the criminal liability of the Accused Milovan Matić for any of the acts charged in the Indictment.

The Amended Indictment alleged that the Accused Milovan Matić seized wrist watches, money, and gold from those detained at the Kravica warehouse and participated in the killings at that location by filling ammunition clips. The Amended Indictment also alleges that the Accused was a member of a joint criminal enterprise, which issue the Panel previously addressed.

1. Seizure of Money and Valuables

The Prosecutor alleged that the Accused Matić seized wrist watches, money, and gold from those detained at the Kravica warehouse. The Panel concludes that the Prosecutor did not prove this allegation beyond doubt.

The Panel is satisfied that persons did enter the warehouse while the Bosniak civilians were detained there and seized valuables from the prisoners. In particular, S2, who was detained in the Kravica warehouse, testified that soldiers entered the warehouse, threatened the prisoners, and seized all valuables. He described in detail a man in civilian clothes who entered the warehouse and asked the detainees questions about the whereabouts of some people and demanded that the detainees give him their money, gold, and watches, threatening that any person who failed to do so would be executed. According to S-2, this person was escorted by soldiers. S-2 further testified that this person put the valuables and money he seized in a bag and his pockets, threw the detainees Marlboro cigarettes, left the warehouse and did not return. S-2 described this person as not tall, chubby, with a small belly, with shorter, thinning brown hair, and wearing Levi's jeans, shoes, and a short sleeve shirt.

There is, however, insufficient credible evidence proving that the Accused Matić seized wrist watches, money, and gold from the prisoners. S-2's description of the person he saw enter the warehouse does not match the Accused's physical appearance, as the Accused, at the relevant time, was not balding, but he did have a beard, which S-2 did not mention. In other circumstances, such an omission would perhaps not be probative, but the Panel notes that S-2's description was extremely detailed and complete. His failure to describe the civilian he saw as having a beard, then, may be considered not merely an understandable omission, but a positive indication that the person did not, in fact, have a beard. In any event, the Prosecution did not introduce evidence that the Accused Matić was, on that day, wearing Levi's jeans and a short sleeve shirt, which were the most specific aspects of S-2's identification.

Further, the testimony of witness Luka Marković, manager of the Kravica Farming Cooperative at the relevant time, does not establish the fact alleged by the Prosecutor. This witness testified that, around 11 o'clock on the morning of 13 July, a man offered to sell him one of five or six watches. The witness further stated that the man's name was Milovan Matić. The witness testified that he did not know where Matić had obtained the watches, and that he only assumed Matić had obtained them from the prisoners. The witness specifically noted that he did not see Matić take the watches from the prisoners, and that the only basis

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for his assumption that he had stolen them from the prisoners was that he had seen Matić, together with two other persons, Ilija Nikolić and Mile Obradović, enter the warehouse to look for certain persons among the prisoners who had participated in a prior ambush. No other witness and no documentary evidence corroborated this testimony.

Luka Marković's testimony is not particularly probative to the Prosecutor's allegation. First, the Panel notes that this testimony does not establish that the man he calls Matić seized the watches from the prisoners. The witness noted that he only assumed that the watches had been taken from the prisoners, but freely admitted that this was not necessarily true. Moreover, even if this assumption were accepted as true, the testimony still does not establish that this man himself seized the watches, as opposed to having received the watches from another person.

Nor can the Panel conclude that the person about whom Marković testified is the same person described by S-2. Not only did Matić fail to match the description offered by S-2, but S-2 stated that the person he described took many valuables, whereas Luka Marković stated that he did not see any money or gold, or any jewelry except for the five or six watches in the possession of the person he calls Matić. Also the timing is wrong. S-2 did not arrive at Kravica until after Mladić gave his speech at Sandići, an event which occurred between 12:00 and 13:00, whereas Marković remembers his encounter with the person he believes was Matić took place prior to that, at around 11:00.

Luka Marković's identification of the Accused Matić is dubious. The witness repeatedly stated in response to the Prosecutor's questions that he did not know who this man was at the time. Moreover, the witness specifically stated that he could not describe this man and what he looked like because the witness did not know the man at the time. When asked to do so, the witness could not identify the Accused Matić in the courtroom.

In addition, the witness stated that he only met the Accused Matić on one or two occasions. When asked how he learned the Accused Matić's identity, the witness provided inconsistent answers. On one occasion, the witness stated that the Accused Matić visited the coffee bar the witness managed in the early 1960's, although this was clearly impossible given that the Accused was only born in 1960. On another occasion, the witness stated that he learned the Accused's identity from the workers at the Farming Cooperative, although he also stated that the Accused first visited the Farming Cooperative in May 1995, before the relevant events.

The witness's identification was directly contradicted by numerous other Prosecution witnesses. Witness Ilija Nikolić stated that he was not with Matić at the Farming Cooperative on 13 July 1995. In addition, Zoran Erić, Miladin Nikolić, and Miloš Đukanović all confirmed that they did not see the Accused Matić with Ilija Nikolić and Mile Obradović at the Farming Cooperative on that date.

Witnesses Zoran Erić, Miladin Nikolić, and Miloš Đukanović, who worked at the Farming Cooperative and knew the Accused, all confidently and consistently testified that although Ilija Nikolić and Mile Obradović were present at the Farming Cooperative on 13 July, the Accused Matić was not together with them.[396] In particular, Zoran Erić specifically testified

[396] While Miladin Nikolić had previously stated in his prior statements to the CJB Bijeljina (Exhibit O-8) and the Prosecutor's Office (Exhibit O-9) that the Accused Matić and Ilija Nikolić were present at the Farming Cooperative on 13 July 1995 when the prisoners were being brought there, he retracted that portion of his statement at trial.

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that he knew the Accused Matić, and that Ilija Nikolić and Mile Obradović arrived at the Cooperative alone.

In addition, witness Ilija Nikolić directly rejected Luka Marković's identification of the Accused Matić. Ilija Nikolić testified that Luka Marković, whom he has known for decades, did not meet the Accused Matić until sometime before the commencement of these proceedings, but after 1995. Specifically, he testified that Luka Marković accompanied the Accused Matić and himself to Šabac, and that on that occasion, Luka Marković stated that he did not know the Accused Matić, and acted consistently with never having met him.

The Panel concludes that there is sufficient doubt regarding Luka Marković's identification of the Accused Matić as the person who first entered the warehouse and then later offered him a watch. By contrast, witnesses Ilija Nikolić, Zoran Erić, Miladin Nikolić, and Miloš Đukanović all confidently and consistently testified that they did not see the Accused Matić together with Ilija Nikolić and Mile Obradović at the Farming Cooperative.

The Panel thus has sufficient reason to doubt Luka Marković's identification of the Accused Matić as the person he saw with Ilija Nikolić and Mile Obradović who first entered the warehouse and then offered him a watch.

Accordingly, as neither the testimony of S-2 nor of Luka Marković establish that the person these witnesses described was the Accused Matić, and as there is no other evidence establishing that the Accused Matić seized wrist watches, money, and gold from those detained at the Kravica warehouse, as alleged by the Prosecutor, the Panel concludes that the Prosecutor did not prove this allegation beyond doubt.

Although the Panel need not reach this issue, the Panel also notes that, even if proven, the Accused's alleged acts do not as a matter of law constitute genocide or a crime against humanity, and it is doubtful whether they constitute a war crime against civilians, particularly standing alone.

2. Participation in Killings

With respect to the more serious allegation, namely that the Accused Matić participated in the killings at the Kravica warehouse by filling ammunition clips, the Panel recognizes that the Prosecutor, although aware of the fact that the Panel did not admit investigative statements of the Accused in which he admitted his participation in the killings by filling ammunition clips, relied substantially on this illegally obtained and therefore not admitted evidence. Such evidence cannot, obviously, be used by the Panel when reaching its conclusions.

S4 testified that a person wearing jeans and an olive drab shirt was bringing new ammunition clips to the soldiers firing upon the detainees in the Kravica warehouse. However, he could not remember any other identifying details and further testified that he would not be able to recognize this person. More specifically, S4 did not identify the Accused Matić's picture when giving his statements, or in the courtroom at the beginning of his testimony, or when testifying regarding this fact. Thus, the testimony of S4 is decisive only to the fact that there was a person who was filling ammunition clips. There is absolutely nothing in that testimony that could reasonably lead to the conclusion that the Accused was that person.

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The Prosecutor's case rested almost entirely on the testimony of Momir Nikolić. Momir Nikolić is the former Assistant Commander for Security and Intelligence for the VRS Bratunac Brigade and served in that post during July 1995. On 7 May 2003, in proceedings before the ICTY, Mr. Nikolić pled guilty to the crime of persecution as a crime against humanity in connection with his participation in events following the fall of Srebrenica. He is currently serving a sentence of 20 years imprisonment pursuant to that conviction. As part of his plea agreement, Mr. Nikolić agreed to provide evidence in other proceedings before the ICTY, and he accordingly testified for the Prosecution in the case against Vidoje Blagojević and Dragan Jokić, the transcript of which was admitted into evidence as Exhibit O-246. Mr. Nikolić testified before this Panel on 6 February 2008 via video link from the country in which he is currently serving his sentence.

During his testimony before the ICTY and this Panel, Mr. Nikolić testified that, as part of his duties as Assistant Commander for Security and Intelligence for the VRS Bratunac Brigade, he conducted an investigation into the events at the Kravica warehouse, particularly the possible participation of members of the Bratunac Brigade in those events. He further testified that during that investigation, he received information that the Accused Matić, whom he claimed to know personally, had participated in the killings at the Kravica warehouse. Mr. Nikolić stated that he had learned this information from a reliable informant. Crucially, however, he refused to name this informant, stating that he did not want to endanger this person.

When asked in cross-examination before this Panel to identify this informant, Mr. Nikolić again refused to do so. He did state, however, that this informant was not a direct witness of the events at the Kravica warehouse.

It is absolutely necessary to recognize the extremely limited probative value of such evidence and the inherent dangers in using it to establish the direct criminal liability of an accused for the crime charged. This is clearly hearsay evidence. That is, even if the Panel is satisfied that Mr. Nikolić interviewed an informant, and even if the Panel is satisfied that Mr. Nikolić accurately related the substance of that informant's information, the Panel is severely limited in its ability to verify the accuracy of that information. The Panel could not inquire from the informant how he himself came by that information, since Mr. Nikolić admitted that the informant did not witness the events personally. Moreover, Mr. Nikolić did not provide any information even as to the circumstances in which his informant learned the information; while this would be tenuous evidence, it would at least give the Panel some grounds on which to conduct an independent analysis of reliability.

These concerns are serious and challenging, but they are not the only impediments. Even more importantly, Mr. Nikolić's evidence is not simply hearsay evidence of an unknown provenance unsupported by any corroborating evidence. It is *anonymous* hearsay evidence that is not corroborated. Neither the Panel nor the Accused know the identity of Mr. Nikolić's informant, as he expressly refused to provide that information. Accordingly, the Accused are unable to challenge the credibility of this informant, even indirectly. It is obvious, therefore, that the Panel must treat this evidence as it would any other evidence from an anonymous witness. Namely, in order to ensure the Accused's right to a fair trial, including the right to challenge all evidence against him, under both the European Convention and the Constitution of BiH, the Panel can only use this evidence as

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corroborating evidence.[397] Accordingly, the Panel cannot rely on this evidence to a decisive extent, but only insofar as it corroborates other, legally-obtained evidence that the Accused had the opportunity to challenge; and even its corroborative value is severely limited for the reasons discussed above.

Finally, the Panel notes that the testimony of Mr. Nikolić is of limited factual value as well, as Mr. Nikolić only testified that he learned the Accused Matić *participated in* the killings at the Kravica warehouse. Such a vague characterization of the Accused Matić's role highlights the underlying reasons for rejecting hearsay, and particularly double hearsay, evidence: the inability of the parties and the Panel to question what the witness knows and how he knows it. Participation is a legal characterization which must be independently determined by the Panel based on evidence of the actual activities witnessed. Without the factual predicate, the Court cannot conclude that there exists "participation" as defined by law, sufficient to support criminal liability for a crime.

The Prosecutor failed to introduce any evidence on which the Court could legally base a decision that the charge that the Accused Matić was filling ammunition clips at the relevant time at the Kravica warehouse was proven. Moreover, even if the Accused's involvement in the filling of ammunition was proved, the question arises whether that action can represent an action of an accomplice or possibly an accessory in the perpetration of the criminal offense of Genocide, since it is necessary to prove special genocidal intent on the part of the Accused Matić in the perpetration of the act.

3. Conclusion

In the light of the foregoing the Panel concludes that the Prosecutor failed to bring about the evidence necessary to prove either that the Accused took watches, gold, and money from the prisoners or participated in the killings at Kravica warehouse by filling ammunition clips. Therefore, pursuant to Article 284 (1) (3) of the CPC of BiH, the Panel acquitted the accused Matić of the charges against him.

[397] *See e.g.*, *Lucà v Italy* (App. No. 33354/96), Judgment of 27 February 2001, para. 40; *Saidi v France* (App. No. 14647/89), Judgment of 20 September 1993, para. 44; *Kostovski v The Netherlands* (App. No. 11454/85), Judgment of 20 November 1989, para. 44.

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I. Accused Velibor Maksimović and Dragiša Živanović

Having considered all admitted documentary evidence and the testimony of all witnesses, both individually and as a whole, as well as the arguments of the Prosecutor and Defense Counsel, and having applied the principle of *in dubio pro reo*, the Panel concludes that the Prosecutor did not establish beyond doubt the criminal liability of the Accused Velibor Maksimović and Dragiša Živanović for any of the acts charged in the Indictment.

The documentary evidence established, and it was not contested, that Velibor Maksimović and Dragiša Živanović were members of the Skelani Platoon of the 2nd Šekovići Detachment in July 1995. However, numerous witnesses for both the Prosecution and the Defense testified that neither of these two Accused were present with the Platoon at the Sandići meadow and later the Kravica warehouse.[398]

The Accused Velibor Maksimović's witnesses, Goran Matić, Blagoje Gligić, Slobodan Maksimović, and Dragan Mijatović, stated that, in the days around 10 and 12 July 1995, they saw the Accused in Skelani and that he was not in the field mission with his platoon.

The Accused Živanović's Defense argued during the proceedings that the Accused was not on the field mission with the rest of the Detachment on the relevant days because he was preparing a going away party for his brother, who was about to start his military service. This was, *inter alia*, mentioned by witnesses Srbislav Davidović, Bogoljub Simić, Saša Simić, Gojko Perić, Nenad Mitrović, Obrenija Radovanović, Stanka Blagojević, Milomir Blagojević, Radiša Maksimović, and Željko Živanović.

The allegations of both Defense teams were also supported by the Prosecution witness S4. In particular, witness S4, who, as previously discussed, is a credible witness, specifically, explicitly, and confidently testified during cross-examination by counsel for Maksimović that Velibor Maksimović was not present at Sandići and Kravica, and moreover, was not even present at the prior field mission in Srednje. Similarly, S4 testified during cross-examination by counsel for Živanović that he was "positive" that Dragiša Živanović was not present at Sandići and Kravica, and that he did not think Dragiša Živanović was present in Srednje.

The Panel also notes that Miladin Stevanović, whose statement, as previously discussed, is credible, did not reference Velibor Maksimović and Dragiša Živanović as being present at either the Sandići meadow or the Kravica warehouse. Stevanović had, however, noted earlier in his statement that both Maksimović and Živanović were members of the Skelani Platoon, suggesting that the absence of any further reference was intentional.

The only direct evidence that the Accused were present is the 21 June 2005 statement of Petar Mitrović. In that statement, Petar Mitrović named the Accused among the members of the Skelani Platoon who were present at the Sandići meadow, in the escort for the column of men, and who fired at the prisoners at the Kravica warehouse. However, in the course of the crime scene reconstruction on 4 October 2005, Petar Mitrović, in response to the question of the Prosecutor, specifically recanted that portion of his statement incriminating the Accused, explaining the reasons why he mistakenly named the Accused as being present at the Sandići meadow and later the Kravica warehouse. The Panel notes that Petar Mitrović did not recant

[398] In light of the Panel's conclusion detailed below, the Panel need not address the credibility of the Accused's alibi witnesses. Similarly, the Panel need not address the credibility of other Prosecution witnesses who testified that the Accused were not present at the relevant time in the relevant location.

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his prior statement with respect to his identification of any other person he had previously named.

As for indirect evidence, the Prosecutor argued that the facts established that all members of the Skelani Platoon of the 2nd Šekovići Detachment were mobilized during the relevant time and that the entire Detachment was assigned as a unit to the field mission. The Prosecutor implied, accordingly, that Velibor Maksimović and Dragiša Živanović were mobilized as well.[399]

The Prosecutor suggested that the Panel should discount the 4 October 2005 reconstruction in favor of the 21 June 2005 statement. However, he did not explain on what grounds, other than by merely asserting that Petar Mitrović had no reason to name the Accused Maksimović and Živanović if they were not present. Moreover, the Prosecutor did not address at all the contrary evidence of S4 and Miladin Stevanović.

The Panel concludes that the Prosecutor did not establish beyond doubt that the Accused Velibor Maksimović and Dragiša Živanović were present at the Sandići meadow and the Kravica warehouse and participated in events at those locations. The Panel need not conclude that Velibor Maksimović and Dragiša Živanović were not present at the Sandići meadow and the Kravica warehouse. Rather, the Panel concludes only that it is unquestionable that this fact was not established beyond doubt.

In particular, the Panel notes that the Prosecutor did not offer, and the Panel could not itself identify, any credible or reasonable explanation why both S4 and Miladin Stevanović, credible witnesses, would fail to identify the Accused as being present and participants at the Sandići meadow and the Kravica warehouse if they in fact were present and participated. This is especially true as these witnesses fully and consistently identified other persons present. On the other hand, Petar Mitrović himself offered a credible explanation for the discrepancy between his statements and explained which statement was mistaken. Likewise, he did not otherwise modify his previous identification of the persons present.[400]

Furthermore, the indirect evidence the Prosecutor identified can bear little weight, particularly not the weight the Prosecutor suggests. Such a broad factual description has little, if any, independent probative value, and it does not in any way address the discrepant testimony of credible witnesses noted above. Moreover, even if the Panel viewed that evidence in the light most favorable to the Prosecutor, it would establish only that the Accused were somewhere in the area of Sandići and Kravica at the relevant time. It is clear from the evidence as a whole that the Skelani Platoon and the rest of the 2nd Detachment were deployed across a broad area at various distances from the Sandići meadow. It is further clear that not all members of the Skelani Platoon were assigned to escort the column of men to Kravica and participated in the events at Kravica. Accordingly, the "fact" that all members

[399] The Prosecutor's suggestion that the Panel should read the fact that Maksimović and Živanović's did not cross-examine Petar Mitrović as indicative of their guilt is curious. Considering that Petar Mitrović had clearly and conclusively retracted that portion of his prior statement, it is more likely that the Prosecutor needed to press the matter. The Panel, though, declines to consider the fact that he did not himself question Mitrović on this issue as evidence of anything.

[400] The Panel notes briefly that the discrepancies between Petar Mitrović's statements in this regard do not in any way cast doubt on his credibility, either in general or in relation to other facts he stated. The discrepancy was minor in the sense that he mentioned the names Velibor Maksimović and Dragiša Živanović only once in his prior statement, he did not retract his identification of any other participants, and he himself provided a credible explanation for the discrepancy.

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of the platoon were mobilized is not evidence as to what Velibor Maksimović and Dragiša Živanović did or did not do at Sandići or Kravica, nor is it evidence as to how they, through their presence or other acts, contributed to the commission of a criminal offense by another.

Therefore, the Panel concludes that the Prosecutor did not establish beyond doubt the facts alleged in the Indictment with respect to the Accused Velibor Maksimović and Dragiša Živanović, namely that they were present at the Sandići meadow and the Kravica warehouse and participated in events at those locations. The Panel further concludes that the Prosecutor did not establish beyond doubt any other form of liability for the acts charged in the Indictment; specifically, the Panel reiterates its conclusions regarding the Prosecutor's joint criminal enterprise theory. Accordingly, the Panel finds there is no evidence that the Accused Velibor Maksimović and Dragiša Živanović committed the acts charged in the Indictment, and therefore, pursuant to Article 284(1), (3) of the CPC of BiH, acquits them of the charges.

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VIII. APPLICABLE LAW

With regard to application of substantive law, defense teams for the Accused submitted that the principle of legality, that is, the *nullum crimen sine lege nulla poena sine lege* principle, constitutes an inviolable principle of legislation from the aspect of human rights protection and, as such, it is embodied in Article 11 of the Universal Declaration of Human Rights of 10 December 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the International Covenant on Civil and Political Rights of 6 December 1966 and, above all, Articles 3 and 4 of the CC of BiH.

The Defense referred to the fact that, in this particular case, there existed the criminal law, that is, the CC of the SFRY, according to which a criminal offense shall be the criminal offense with which the accused is charged by the Indictment. Under this law, the criminal offense of Genocide as referred to in Article 141 was punishable by a term of imprisonment of up to 5 years or the death penalty, whereas, the CC of BiH foresees imprisonment for a term not less than ten years or long-term imprisonment. By the enactment of the BiH Constitution, the death penalty as stipulated by the referenced law was abolished, and the maximum possible punishment for that criminal offense would be the term of imprisonment of 20 years, which is much more lenient than long-term imprisonment.

The Defense referred to the fact that the entity courts and the Brčko District Court apply the law which was in force at the time of the commission of the alleged criminal offense, that is, the CC of the SFRY and, therefore, such different jurisprudence of the Court of BiH and other courts is in opposition to the fundamental human right, that is, the right to equality of all citizens before the law.

Furthermore, the defense counsels for the Accused are of the view that Article 4(a) of CC of BiH may only be applied if the national legislation has failed to regulate certain acts or omissions as the criminal offenses. Therefore, since the criminal offense of Genocide has been regulated, as such, under international law and prior to the referenced event, the retroactive application of the provisions of the CC of BiH in this particular case is not warranted, considering that it cannot be subsumed under exceptions referred to in Article 15(1) of the International Covenant on Political Rights or Article 7(2) of the European Convention.

The Panel finds such arguments ill-founded and that, in this particular case, the provision of Article 171 of the Bosnia and Herzegovina Criminal Code should apply.

Article 3(2) of the CC of BiH, which pertains to the principle of legality, reads as follows: "No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law."

It is beyond dispute that the CC of the SFRY defined the criminal offense of Genocide as a separate criminal offense under Article 141 thereof. However, an issue arises as to which law should be applied when imposing a criminal sanction considering the fact that the CC of the SFRY prescribed a sentence of imprisonment of up to 20 years or the death penalty. The Defense argues that the CC of BiH is not a more lenient law because the criminal sanction under Article 141 of the CC of the SFRY appears to have been a more lenient sanction for the

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accused as compared to the criminal sanction prescribed by Article 171(1) of the BiH Criminal Code following abolition of the death penalty (the death penalty was initially foreseen as the strictest punishment in the CC of the SFRY and prescribed for this criminal offense).

Nonetheless, Article 4a) of the CC of BiH speaks of "general principles of international law". As neither international law nor the European Convention have an identical term, this term represents the combination of "principles of international law" on the one hand, as recognized by the UN General Assembly and International Law Commission, and "general principles of law recognized by the community of nations" contained in the Statute of the International Court of Justice and Article 7(2) of the European Convention. Principles of international law, as recognized in the Resolution of the General Assembly No. 95(1) (1946) and International Law Commission (1950) pertain to the "Charter of the Nuremberg Trial and the judgment of the Tribunal". "Principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal" were adopted in 1950 by the International Law Commission and submitted to the General Assembly. Principle I reads: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." Principle II provides: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law." Thus, regardless of whether we view it from the customary international law point of view or the "principles of international law" viewpoint, there is no doubt that genocide constituted a crime in the period relevant to the Indictment, that is, the principle of legality has been satisfied.

Legal grounds for trial and punishment for criminal offenses under the general principles of international law are provided for in Article 4a of the Law on Amendments to the BiH Criminal Code (*BiH Official Gazette* No. 61/04) which prescribes that Articles 3 and 4 of the Criminal Code of BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. This Article took over the provisions of Article 7(2) of the European Convention in their entirety and allows for exceptional derogations from the principles set forth in Article 4 of the Criminal Code of BiH, as well as derogations from the mandatory application of a more lenient law in the proceedings for a criminal offense under international law, such as the proceedings against the Accused, because these charges specifically include violation of the rules of international law. In fact, Article 4a of the Law on Amendments to the BiH Criminal Code is applied to all criminal offenses falling within crimes against humanity and values protected by international law, because those offenses (including the offense of Genocide) are contained in Chapter XVII of the BiH Criminal Code, titled as Crimes against Humanity and Values Protected by International Law. The provisions concerning the crime of Genocide have been accepted as part of the customary international law and they constitute a non-derogating provision of international law.

When this provision is correlated with Article 7(1) of the European Convention which has priority over all other law (Article II(2) of the BiH Constitution), a conclusion may be drawn that the principle of legality under Article 3 of the CC BiH is included in the first sentence of Article 7(1) of the European Convention, while the second sentence of Article 7(1) of the European Convention bans imposition of a heavier penalty than the one that was applicable at the time the criminal offense was committed. Therefore, this provision bans imposition of a heavier penalty but it does not stipulate a mandatory application of a more lenient law to the

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perpetrator as compared to the punishment that was applicable at the time of commission of the criminal offense.

However, Article 7(2) of the European Convention contains an exception to paragraph (1) allowing for the trial and punishment of any person for any act or omission which, at the time when it was committed or omitted, was criminal according the general principles of law recognized by civilized nations. The same principle is embodied in Article 15 of the International Covenant on Civil and Political Rights. This exception has been incorporated with a specific objective to allow for application of national and international war crimes legislation which came into effect during and after the World War II. The case law of the ECHR (*Naletilić vs. Croatia* No. 51891/99, *Kolk and Kislyiy vs. Estonia*, No. 23052/04 and 4018/04) has accordingly emphasized the applicability of paragraph (2) rather than paragraph (1) of Article 7 of the European Convention when dealing with these offenses, additionally warranting the application of Article 4a of the Law on Amendments to the Criminal Code of BiH in these cases.

The BiH Constitutional Court has considered this issue upon appeal by A. Maktouf (AP 1785/06) and adopted a decision on 30 March 2007, finding as follows: "Paragraph 68. In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for former Yugoslavia (the cases of *Krstić*, *Galić*, etc.). At the same time, the concept of the CC SFRY was such that it did not stipulate either long-term imprisonment or life sentence but the death penalty in case of a serious crime or a maximum 15 year sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law. Paragraph 69. In this context, the Constitutional Court holds that it is not possible to simply "eliminate" the more severe sanction and apply only other, more lenient sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."

In the view of the Panel, the principle of mandatory application of a more lenient law is excluded in prosecuting those criminal offenses which at the time of their commission were absolutely foreseeable and generally known to be in contravention of general rules of international law.

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IX. SENTENCING

A. Law on Sentencing

The purposes of sentencing are set out in both the general and special sections of the CC of BiH. Article 2 of the CC of BiH establishes as a general principle that the type and range of the sentence must be "necessary" and "proportionate" to the "nature" and "degree" of danger to the protected objects: personal liberties, human rights, and other basic values. In the case of genocide, the *nature* and *degree* of the danger will always be severe. The *type* of sentence the Court can legally impose in the case of genocide is limited to jail, and the *range* has been established as 10 to 20 years, or long-term imprisonment of between 20 and 45 years. The distinction between a 10 to 20 year sentence and a long-term sentence has consequences for the convicted person, including not only a longer period of incarceration, but also: more severe restrictions on the personal liberties of the convicted person within the prison system (Art. 152 LoE[401]); less privacy as to correspondence and telephone calls (Art. 155 LoE); and a longer mandatory sentence before consideration for parole or community privileges (Art. 44(4) CC of BiH). On the other hand, long-term sentencing also provides for more intensive and individualized treatment for rehabilitation (Article 152(3) LoE).

In addition to the general principle pronounced in Article 2, the CC of BiH prescribes further purposes and considerations the Court must address when determining and pronouncing a sentence. These are of two types: those that relate to the objective criminal act and its impact on the community, including the victims; and those that relate specifically to the convicted person.

In Part I below, the Panel will analyze the criminal act itself and determine the penalty that is necessary and proportionate for the crime committed by considering the relevant statutory purposes and applying the relevant statutory considerations. For the reasons explained in Part I, the Panel considers that a sentence of 40 years long-term imprisonment is a necessary and proportionate sentence that constitutes a fair and effective penalty for the crime itself.

In Part II below, the Panel will analyze each of the individual perpetrators and determine the penalty that is necessary and proportionate for each by considering the relevant aggravating and extenuating statutory considerations and adjusting the sentence of 40 years long-term imprisonment to reflect those considerations.

1. Necessary and Proportionate to the Gravity of the Crime

a. Danger and Threat to Protected Objects and Values

Pursuant to Articles 2 and 48 of the CC of BiH, the sentence must be necessary and proportionate to the danger and threat to the protected objects and values.

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural

[401] *The Law of Bosnia And Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures,* Official Gazette No. 13/05.

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and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."[402] Punishment of genocide is a principle "recognized by civilized nations as binding on States, even without any conventional [treaty] obligation."[403]

The value protected by the international criminalization of genocide was also given primacy by the former Yugoslavia, which played a significant role in the drafting and adoption of the 1948 Genocide Convention, which entered into force on 12 January 1951. Bosnia and Herzegovina, as a successor to Yugoslavia, ratified and incorporated the Genocide Convention into national law and implemented it by criminalizing genocide pursuant to Article 171 of the CC of BiH.

The crime of genocide likewise presents the gravest threat to *protected persons* because, by its very definition, the object of the crime is the annihilation of an entire group of persons, and the means of achieving that goal is through the destruction of the lives of members of the targeted national, racial, ethnical, or religious group. Article V of the Genocide Convention imposes on Bosnia and Herzegovina the obligation to "provide effective penalties for persons guilty of genocide…." The legislature of BiH has met that obligation *in abstracto*, by prescribing imprisonment as the penalty for genocide and by limiting imprisonment to a maximum sentence not to exceed 45 years. It is up to the courts of BiH to meet that obligation *in concreto*, by pronouncing a sentence within the statutory bounds which effectively accomplishes that goal.

The effectiveness of the sentence must take into account not only the fact that genocide was found to have been committed, but also the manner in which the specific act of genocide was committed in each particular case. "Genocide embodies a horrendous concept, indeed, but a close look at the myriad of situations that can come within its boundaries cautions against prescribing a monolithic punishment for one and all genocides or similarly for one and all crimes against humanity or war crimes."[404] In addition to the threat that was posed to the protected values and persons by the commission of genocide against them generally, the Panel examined the actual damage done to the protected persons in this particular case.

b. Suffering of the Direct and Indirect Victims

Pursuant to Article 48 of the CC of BiH, the sentence must be necessary and proportionate to the suffering of the direct and indirect victims of the crime.

The direct victims of the crime of genocide for which the Accused have been convicted are the hundreds of men who lost their lives during the first approximately one and one half hours of the massacre at the Kravica warehouse on 13 July 1995, as well as the women and children related to these men whose families and lives were irreparably destroyed by the loss of these men in this particular way. The indirect victim is the protected group of Bosniaks from Srebrenica whose existence was threatened by the genocidal act.

The suffering imposed physically and physiologically on the direct victims was extreme. The several hundred males of all ages who were killed in the Kravica warehouse were unarmed

[402] Opening paragraph of UN General Assembly Resolution 96(I), 11 December 1946.
[403] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 ICJ Reports 16, p. 23.
[404] *Krstić* Trial Judgment, para. 694.

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prisoners who had been captured or surrendered to the Bosnian Serbs in exchange for promises of safety. Their psychological and physical suffering during the first approximately one and one half hours of the massacre, the time the six Accused participated in the killings, is indescribable. Some insight is provided by witnesses S1 and S2, survivors of the massacre, who described the situation inside the warehouse as one of unimaginable horror. Further insight is provided by S4's description of the activities of the Special Police: shooting into the masses of dying men trapped in a confined space, throwing grenades at them, and preventing their escape from the slaughter. The direct victims of the Accused also included the women and children whose fathers, sons, and brothers the Accused killed that day, whose families were devastated, and whose psychological suffering will continue throughout their lives. The sentence must be proportionate to this degree of suffering.

c. Deterrence

Pursuant to Articles 6 and 39 of the CC of BiH, the sentence must be sufficient to deter others from committing similar crimes.

Prevention of genocide has always been linked with punishment. The very title of the Genocide Convention makes that point clear. In order to prevent genocide, the crime must be named and the perpetrators of the crime must be held accountable and not be permitted to profit from their participation in genocide. Deterrence is of particular importance in the present case. Six of the Accused were direct perpetrators of the killings. Without the willing involvement of direct perpetrators, those who plan genocide cannot carry it out. Each of these six Accused had the opportunity to disengage from the genocidal act, and in fact, Miladin Stevanović and S4 did disengage. As a consequence of his refusal to fire into the warehouse during the killings at Kravica, S4 was derided by members of the Detachment, ostracized by family and neighbors, and forced to relocate to another country when his children were subjected to ridicule. The penalty for choosing to engage in genocide, especially in the manner in which the Accused did, must be sufficient to outweigh the consequences of disengagement. Likewise the Accused Miloš Stupar, as Commander of the Detachment, had a choice to punish those under his command who engaged in the killings, and thereby vindicate those who did not. He chose instead to support the crime and the perpetrators by inaction, a choice that did nothing to detract from the approval of his superior officer or prevent the award of a presidential medal (Exhibit O-109). To be a deterrent to officers in similar positions in the future, the penalty must be sufficient to outweigh the advantages of complicity.

d. Express Community Condemnation

Pursuant to Article 39 of the CC of BiH, the sentence must express community condemnation of the accused's conduct.

The community in this case is the people of Bosnia and Herzegovina, and the entire world community, who have, by domestic and international law, mandated that genocide be unequivocally condemned, and that commission of genocide be subject to effective punishment. Condemnation of genocide has been given primacy within the international community by virtue of its recognition as *jus cogens*, that is, a norm from which no

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derogation is permitted;[405] as well as its recognition as a norm that is enforceable *erga omnes*, by which all States are recognized as having an obligation to enforce.[406] Genocide has been described as a crime "directed against the entire international Community rather than the individual."[407] This community has made it clear that these crimes, regardless of the side which committed them or the place in which they were committed, are equally reprehensible and cannot be condoned with impunity. The legislation of Bosnia and Herzegovina reflects this same resolve. The particular crime of genocide committed in this case was carried out in a manner that is particularly reprehensible and the sentence must reflect the nation's and the world's condemnation of this activity.

e. Educate as to Danger of Crime

Pursuant to Article 39 of the CC of BiH, the sentence must be necessary and proportionate to the need to increase the consciousness of citizens to the danger of crime.

The danger of genocide lies not only in the physical destruction of those in the targeted group, but also in the soul-destroying nature of the intent with which it is carried out, and the risk of its contagion. The imposition of a penalty for this crime must demonstrate that genocide will not be tolerated, but it must also show that the legal solution is the appropriate way to recognize that crime and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the act can contribute to reconciliation by providing a response consistent with the Rule of Law. It can also promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved.

f. Educate as to the Fairness of Punishment

Pursuant to Article 39 of the CC of BiH, the sentence must be necessary and proportionate to the need to increase the consciousness of citizens to the fairness of punishment.

Penalties for genocide, what has been labeled the "crime of crimes", have included the most serious punishment that can be imposed by national and international legal systems. National jurisdictions have imposed the death penalty for convictions of genocide, even in those states where the death penalty had been repealed or abandoned for all other crimes.[408]

Bosnia and Herzegovina has embraced the abolition of the death penalty for all crimes, a position that is entirely consistent with the respect for human life that makes the act of

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[405] *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Decision on Further Requests for the Indication of Provisional Measures, 13 September 1993, p. 440.; Vienna Convention on the Law of Treaties, *entry into force* 27 January 1980, Art. 53.

[406] *Barcelona Traction Light and Power Company* (Belgium v. Spain), Judgment of 5 February 1970, 1970 ICJ Reports 4, p. 32; *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Decision on Preliminary Objections, 11 July 1996, para. 31.

[407] William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000), pg. 6.

[408] Rwanda, considered a *de facto* abolitionist state, executed 22 offenders convicted of genocide by its domestic Court in 1997; Israel, which had abolished the death penalty for all other crimes, retained it for genocide and sentenced Adolph Eichmann to death. Schabas, *Genocide*, pgs. 396-397. The death penalty has been justified as a 'fair' sentence for the commission of genocide in recognition that those who commit a crime which has as its aim to deprive an entire group of people of their right to exist on earth have forfeited their own right to exist. *Id.*, pg. 397.

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genocide so abhorrent. A maximum sentence of long-term imprisonment for 45 years has replaced death as the most severe penalty. The murder of one person can fairly justify a sentence of long-term imprisonment. Participation in the murder of several hundred defenseless people in the manner evident in this case, even without genocidal intent, would fairly demand the severest of sentences available in domestic law. No penalty can adequately reflect the seriousness of depriving hundreds of persons of life, the psychological pain inflicted on their families, or the even graver crime that was committed when that deprivation of life was accompanied by the aim to deprive an entire group of human beings of their right to exist. The fairness of the sentence then depends not only on the correlation between the seriousness of the crime, the harm done by its commission, and the condemnation in which it is held, but also and more specifically, on the relationship of the available sentencing options to the sentence imposed for the particular crime. Whereas the maximum sentence available under law might be fair in this case, the Panel is mindful that as horrendous as this act of genocide was, there are those who committed multiple acts of genocide, as well as those whose crime was the commission of the larger genocidal plan, of which the genocide at the Kravica warehouse was but a part. Therefore the maximum sentence must, in fairness, be reserved for those crimes that, though qualitatively no more heinous, may quantitatively exceed even this crime.

All of these considerations relevant to the act itself lead the Court to consider that a necessary and proportionate sentence reflecting the gravity of the crime is 40 years long-term imprisonment.

2. Necessary and Proportionate to the Individual Offender

The statutory requirement of fairness also requires consideration of the individual circumstances of the criminal actor in addition to the criminal act. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again (Arts. 6 and 39 of the CC of BiH); and (2) rehabilitation (Art. 6 of the CC of BiH). Rehabilitation is not only a purpose that the CC of BiH imposes on the Court; it is the only purpose related to sentencing recognized and expressly required under international human rights law, to which the Court is constitutionally bound. Article 10(3) of the ICCPR provides: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

Rehabilitation for war criminals is inextricably bound to reconciliation. Most of the Accused convicted in this and the companion case were born in Šekovići, Srebrenica, Kladanj, or Skelani. The Defense repeatedly pointed out during the trial that several villages in these areas were attacked by Bosniak forces in January 1993. Homes in these villages were burned down, and some civilian members of the Bosnian Serb population living in those villages were killed. These facts in no way justify the commission of genocide against the Bosniaks of Srebrenica, nor are they extenuating circumstances justifying a reduction in penalty. It is however relevant to the sentencing goal of rehabilitation that it be acknowledged that the war that brought such suffering to the Bosniak victims of the Srebrenica genocide also brought suffering to Bosnian Serbs: to those civilians who lost homes and lives, and to the Accused, whose friends and family members were among them.

There are a number of statutory considerations relevant to the sentencing purposes of rehabilitation and specific deterrence that affect the sentencing of the individual convicted

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person (Art. 48 of the CC of BiH). These include: degree of liability; the conduct of the perpetrator prior to the offense, at or around the time of the offense and since the offense; motive; and the personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts warrant. The point of these considerations is to assist the Panel in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community, but to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

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B. Accused Milenko Trifunović

1. The Degree of Liability

The Accused Trifunović was Commander of the Skelani Platoon. During most of the approximately one hour and a half that the killings were carried out by the Accused and other members of the platoon, Trifunović had the material ability and the duty under national and international law to halt the killings and prevent further commission of the crime. He not only failed to issue any order to prevent further killings, but himself participated in the genocide. Because the evidence established that Trifunović is guilty of the same offense of genocide as a co-perpetrator, he cannot be convicted again for that offense under command responsibility liability. However, the fact that he failed in his duty of responsible command by failing to prevent further commission of the crime by the members of his platoon, over whom he had effective control, is established beyond doubt and is a factor which the Panel considers as seriously aggravating his degree of liability.

2. Conduct and Personal Circumstances

The conduct and personal circumstances of Trifunović prior to, during and after the commission of the offense present both aggravating and extenuating facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

Tomislav Kovač testified that before the offense, the Special Police and particularly the Second Detachment served with distinction in both their combat and non-combat roles. Trifunović, as a platoon commander within the 2nd Detachment, would have contributed to that reputation. Witnesses confirmed that, as a platoon commander, he was well respected and fair.

b. Circumstances Surrounding the Offense

The heinousness of the offense, the damage to the victims, and the extremely cruel manner in which the genocide was carried out have already been considered in calculating the gravity of the crime and will not be counted twice. The Panel notes that unlike Radovanović, Trifunović did not order S4 specifically to shoot the prisoners when S4 refrained from engaging in the killing, nor did he reprimand him for not shooting. Had Trifunović done either, these actions would have been factored as seriously aggravating. His failure to do so, however, cannot be considered as an extenuating circumstance. Refraining from inciting or ordering another person to commit a crime is required behavior, not exemplary. The circumstances surrounding the offense have already been calculated, and there is no evidence of any additional circumstance that is either aggravating or extenuating.

c. Circumstances Since the Offense

The Accused is married and the father of three children. A third child has been born since Trifunović entered custody. He has no prior convictions, and the Court has no information of any other proceedings pending against the Accused for some other criminal offense, which the Panel sees as an extenuating circumstance.

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d. Conduct During the Case

The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Panel. He chose only once to cross-examine a witness personally, and given the importance of that witness, Trifunović's manner of examination was appropriate. He, along with his co-accused, staged two hunger strikes during which time he refused to attend court proceedings. In the absence of any evidence that this activity was undertaken specifically to undermine these proceedings, the Panel refrains from drawing any inference that might be negative to the Accused. Trifunović's conduct during the trial was neither aggravating nor extenuating.

3. Motive

Although motive is not an element of genocide or a factor in genocidal intent, generally, the Panel concludes that the motive in this case was synonymous with the aim to destroy the Bosniaks of Srebrenica. Therefore, to consider motive as a separate aggravating factor would be to count it twice. Trifunović's motive has, accordingly, already been taken into account in considering the element of genocidal intent and in calculating the gravity of the offense, so it will not be considered as an aggravating circumstance.

4. Personality of Trifunović

The Panel has no evidence regarding the personality of the Accused other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore the Accused's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, and to make amends for his criminal actions. In this case, the length of the sentence also makes it unlikely that he will ever be in a position to commit another genocidal act outside of the control of prison authorities. The risk of repetition of similar crimes is therefore minimal.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, and to provide "education" to the prisoner by "modern educational methods" so that he will adopt socially acceptable values.[409] The nature of the crime of genocide perpetrated in the manner it was perpetrated by Trifunović raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.[410] Those sentenced to long-term imprisonment are entitled to greater rehabilitative services, including being placed in "special treatment groups" with more individualized treatment.[411] These statutory requirements for rehabilitation are consistent with BiH's international human rights obligations under ICCPR Article 10(3).

[409] LoE Art. 105.
[410] LoE Art. 106.
[411] LoE Art. 153(3).

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6. Sentence

Therefore in evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in CC of BiH Article 48(1), for the reasons explained above, the Panel concludes that both extenuating and aggravating circumstances exist. The Panel considers the Accused's lack of criminal record and his family life as extenuating circumstances. Conversely, the Panel considers the Accused's failure to exercise responsible command and order the men in his platoon to stop their participation in the genocide at the point when he had the material ability to do so as an aggravating circumstance. Instead, he misused his authority by encouraging further acts of brutality by his own participation. Trifunović's failure to exercise responsible command is an aggravating circumstance that should be reflected in the sentence, and it requires an upward adjustment of the sentence from that calculated solely on the basis of gravity of the crime itself. Having balanced all the relevant circumstances, the Panel concludes that the effective penalty for the commission of the crime of genocide by Trifunović is 42 years long-term imprisonment.

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C. Accused Aleksandar Radovanović

1. The Degree of Liability

The Accused Radovanović was a Special Police officer, and as such was trained for both police work and combat. He stated at trial that he was, in addition, trained and served as a regular police officer at the beginning of the conflict. As a Special Police officer at the time of the offense he had an obligation to obey the law and protect civilians in his custody. However, that dereliction of duty is subsumed in the greater crime of genocide, the gravity of which has already been calculated.

2. Conduct and Personal Circumstances

The conduct and personal circumstances of Radovanović prior to, during, and after the commission of the offense present both aggravating and extenuating facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

Tomislav Kovač testified that before the offense, the Special Police, and particularly the 2nd Detachment, served with distinction in both their combat and non-combat roles. Radovanović, as a member of the 2nd Detachment, would have contributed to that reputation. In addition, while serving as a regular police officer at the beginning of the war, Radovanović was credited with an act of bravery when he rescued a Bosniak child from a combat area. Radovanović's behavior before the commission of the criminal offense is an extenuating circumstance.

b. Circumstances Surrounding the Offense

The heinousness of the offense, the damage to the victims, and the extremely cruel manner in which the genocide was carried out have already been considered in calculating the gravity of the crime, and will not be counted twice. However, in addition to his role in this crime and the intent with which he undertook it, the Panel finds beyond doubt that Radovanović also engaged in incitement to commit genocide by taunting S4 when S4 declined to engage in the killing, and by swearing at him and calling him derisive names, in an attempt to goad S4 into firing at the wounded and dying prisoners held captive in the warehouse. This is a decidedly aggravating factor.

c. Circumstances Since the Offense

Radovanović continued as a police officer after the conflict. He is married and the father of one child. He has no prior convictions, and the Court has no information of any other proceedings pending against the accused for some other criminal offense, which the Panel sees as an extenuating circumstance.

d. Conduct During the Case

The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Panel. He, along with his co-accused, staged two hunger strikes during which he refused to attend court

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proceedings. In the absence of any evidence that this activity was undertaken specifically to undermine these proceedings, the Panel refrains from drawing any inference that might be negative to the Accused. Radovanović chose to exercise his right to make a statement during the trial and submitted to cross-examination. Radovanović's trial statement provided some truthful details that were of assistance to the Panel in ascertaining some of the surrounding events. However, his account of the events with which he was charged was contradicted beyond doubt by credible evidence in the case, and the Panel concluded that the portion of his statement regarding the crime itself was untrue and offered in the hope of exculpating himself and some of the other Accused. The Panel declined to consider the way in which he exercised his rights under Article 6 of the CC of BiH as an aggravating factor, and finds his conduct during the trial to be neither aggravating nor extenuating.

3. Motive

Although motive is not an element of genocide or a factor in genocidal intent, generally, the Panel concludes that the motive in this case was synonymous with the aim to destroy the Bosniaks of Srebrenica. Therefore to consider motive as a separate aggravating factor would be to count it twice. Radovanović's motive has, accordingly, already been taken into account in considering the element of genocidal intent and in calculating the gravity of the offense, so it will not be considered as an aggravating circumstance.

4. Personality of Radovanović

The Panel has no evidence regarding the personality of the Accused other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore the Accused's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, and to make amends for his criminal actions. In this case, the length of the sentence also makes it unlikely that he will ever be in a position to commit another genocidal act outside of the control of prison authorities. The risk of repetition of similar crimes is therefore minimal.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, and to provide "education" to the prisoner by "modern educational methods" so that he will adopt socially acceptable values.[412] The nature of the crime of genocide perpetrated in the manner it was perpetrated by Radovanović raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.[413] Those sentenced to long-term imprisonment are entitled to greater rehabilitative services, including being placed in "special treatment groups" with

[412] LoE Art. 105.
[413] LoE Art. 106.

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more individualized treatment.[414] These statutory requirements for rehabilitation are consistent with BiH's international human rights obligations under ICCPR Article 10(3).

6. Sentence

Therefore in evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in Article 48(1), for the reasons explained above, the Panel concludes that both extenuating and aggravating circumstances exist. The Panel considers the Accused's lack of criminal record and his family life, as well as his rescuing a Bosniak child, as extenuating circumstances. Conversely, the Panel considers the Accused's attempt to incite S4 to genocide, accompanied by his ridicule of S4 for refraining from committing the crime when Radovanović failed to intimidate him into participating in the killings, as aggravating circumstances. The Panel considers this action by Radovanović to be extremely serious, and concludes that the aggravating circumstance should be reflected in the sentence, requiring an upward adjustment of the sentence from that calculated solely on the basis of gravity of the crime itself. Having balanced all the relevant circumstances, the Panel concludes that the effective penalty for the commission of the crime of genocide by Radovanović is 42 years long-term imprisonment.

[414] LoE Art. 153(3).

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D. Accused Slobodan Jakovljević

1. The Degree of Liability

Jakovljević was a Special Police officer, trained in both combat and police work. He had no role in the command structure. As a Special Police officer at the time of the offense, he had an obligation to obey the law and protect civilians in his custody. However, that dereliction of duty is subsumed in the greater crime of genocide, the gravity of which has already been calculated.

2. Conduct and Personal Circumstances

The conduct and personal circumstances of Jakovljević prior to, during, and after the commission of the offense present facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

Tomislav Kovač testified that before the offense, the Special Police, and particularly the 2nd Detachment, served with distinction in both their combat and non-combat roles. Jakovljević, as a member of the 2nd Detachment, would have contributed to that reputation.

b. Circumstances Surrounding the Offense

The heinousness of the offense, the damage to the victims, and the extremely cruel manner in which the genocide was carried out have already been considered in calculating the gravity of the crime, and will not be counted twice. The circumstances surrounding the offense have already been calculated and there is no evidence of any additional circumstance relevant to Jakovljević that is either aggravating or extenuating.

c. Circumstances Since the Offense

The Accused is unemployed, married, and the father of three children. The Accused Jakovljević has no prior convictions, and the Court has no information of any other proceedings pending against the Accused for some other criminal offense, which the Panel sees as an extenuating circumstance.

d. Conduct During the Case

The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Panel. He, along with his co-accused, staged two hunger strikes during which time he refused to attend court proceedings. In the absence of any evidence that this activity was undertaken specifically to undermine these proceedings, the Panel refrains from drawing any inference that might be negative to the Accused. Jakovljević's conduct during the trial was neither aggravating nor extenuating.

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3. Motive

Although motive is not an element of genocide or a factor in genocidal intent, generally, the Panel concludes that the motive in this case was synonymous with the aim to destroy the Bosniaks of Srebrenica. Therefore, to consider motive as a separate aggravating factor would be to count it twice. Jakovljević's motive has, accordingly, already been taken into account in considering the element of genocidal intent and in calculating the gravity of the offense, so it will not be considered as an aggravating circumstance.

4. Personality of Jakovljević

Throughout the trial Jakovljević complained through his counsel of various physical discomforts. The Panel took evidence from Dr. Marija Kaučić-Komšić, an expert in neuropsychiatry, who examined Jakovljević along with a team of two other doctors. Their conclusion, expressed through the testimony of Dr. Kaučić-Komšić, was that he did not suffer from any physical disease or impairment, and that his pain, though real, was psychologically rather than physically induced. His pain was managed in the detention center through monitoring by medical staff and by the administration of pain medication. There is no evidence that Jakovljević manifested this difficulty at the time of the commission of the crime and it does not constitute grounds for any additional aggravating or extenuating consideration.

5. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, and to make amends for his criminal actions. In this case, the length of the sentence also makes it unlikely that he will ever be in a position to commit another genocidal act outside of the control of prison authorities. The risk of repetition of similar crimes is therefore minimal.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, and to provide "education" to the prisoner by "modern educational methods" so that he will adopt socially acceptable values.[415] The nature of the crime of genocide perpetrated in the manner it was perpetrated by Jakovljević raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.[416] Those sentenced to long-term imprisonment are entitled to greater rehabilitative services, including being placed in "special treatment groups" with more individualized treatment.[417] These statutory requirements for rehabilitation are consistent with BiH's international human rights obligations under ICCPR Article 10(3).

6. Sentence

Therefore, in evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in CC BiH Article 48(1), for the reasons explained above, the Panel finds that there exist extenuating circumstances with regard to the Accused, specifically his lack of

[415] LoE Art. 105.
[416] LoE Art. 106.
[417] LoE Art. 153(3).

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criminal record and his family life. The Panel finds that these extenuating circumstances are not of such a character when compared with the gravity of the crime committed so as to justify imposing a punishment of less than 40 years. The Panel concludes that the appropriate penalty for the commission of the crime of genocide by Jakovljević is 40 years long-term imprisonment.

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E. Accused Branislav Medan

1. The Degree of Liability

Medan was a Special Police officer, trained in both combat and police work. He had no role in the command structure. As a Special Police officer at the time of the offense, he had an obligation to obey the law and protect civilians in his custody. However, that dereliction of duty is subsumed in the greater crime of genocide, the gravity of which has already been calculated.

2. Conduct and Personal Circumstances

The conduct and personal circumstances of Medan prior to, during, and after the commission of the offense present facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

Tomislav Kovač testified that before the offense, the Special Police, and particularly the 2nd Detachment, served with distinction in both their combat and non-combat roles.

b. Circumstances Surrounding the Offense

The heinousness of the offense, the damage to the victims, and the extremely cruel manner in which the genocide was carried out have already been considered in calculating the gravity of the crime, and will not be counted twice. The circumstances surrounding the offense have already been calculated and there is no evidence of any additional circumstance relevant to Medan that is either aggravating or extenuating.

c. Circumstances Since the Offense

The Accused Medan left police work after the conflict. At the time these charges were brought, he was a laborer living in Mostar. He is indigent and single. He has no prior convictions, nor has there been, during the court proceedings, any information on any charges for any criminal activity since the conflict, which the Panel sees as an extenuating circumstance.

d. Conduct During the Case

The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Panel. He, along with his co-accused, staged two hunger strikes during which time he refused to attend court proceedings. In the absence of any evidence that this activity was undertaken specifically to undermine these proceedings, the Panel refrains from drawing any inference that might be negative to the Accused. Medan's conduct during the trial was neither aggravating nor extenuating.

3. Motive

Although motive is not an element of genocide or a factor in genocidal intent, generally, the Panel concludes that the motive in this case was synonymous with the aim to destroy the

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Bosniaks of Srebrenica. Therefore, to consider motive as a separate aggravating factor would be to count it twice. Medan's motive has, accordingly, already been taken into account in considering the element of genocidal intent and in calculating the gravity of the offense, so it will not be considered as an aggravating circumstance.

4. Personality of Medan

The Panel has no evidence regarding the personality of the Accused other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore the Accused's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, and to make amends for his criminal actions. In this case, the length of the sentence also makes it unlikely that he will ever be in a position to commit another genocidal act outside of the control of prison authorities. The risk of repetition of similar crimes is therefore minimal.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, and to provide "education" to the prisoner by "modern educational methods" so that he will adopt socially acceptable values.[418] The nature of the crime of genocide perpetrated in the manner it was perpetrated by Medan raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.[419] Those sentenced to long-term imprisonment are entitled to greater rehabilitative services, including being placed in "special treatment groups" with more individualized treatment.[420] These statutory requirements for rehabilitation are consistent with BiH's international human rights obligations under ICCPR Article 10(3).

6. Sentence

Therefore in evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in CC BiH Article 48(1), for the reasons explained above, the Panel finds that there exist extenuating circumstances with regard to the Accused, specifically his lack of criminal record. The Panel finds that this extenuating circumstance is not of such a character when compared with the gravity of the crime committed so as to justify imposing a punishment of less than 40 years. The Panel concludes that the appropriate penalty for the commission of the crime of genocide by Medan is 40 years long-term imprisonment.

[418] LoE Art. 105.
[419] LoE Art. 106.
[420] LoE Art. 153(3).

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F. Accused Brano Džinić

1. The Degree of Liability

Džinić was a Special Police officer, trained in both combat and police work. He had no role in the command structure. As a Special Police officer at the time of the offense, he had an obligation to obey the law and protect civilians in his custody. However, that dereliction of duty is subsumed in the greater crime of genocide, the gravity of which has already been calculated.

2. Conduct and Personal Circumstances

The conduct and personal circumstances of Džinić prior to, during, and after the commission of the offense present facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

Tomislav Kovač testified that before the offense, the Special Police, and particularly the 2nd Detachment, served with distinction in both their combat and non-combat roles. Džinić, as a member of the 2nd Detachment, would have contributed to that reputation. In addition, there was evidence that Džinić, who was 21 years old at the time of the crime, was recruited into the Detachment at least in part because of his abilities as a football player.

b. Circumstances Surrounding the Offense

The heinousness of the offense, the damage to the victims, and the extremely cruel manner in which the genocide was carried out have already been considered in calculating the gravity of the crime and will not be counted twice. However, Džinić's role in the killing does require consideration as a serious aggravation. The evidence establishes that Džinić, as well as a second person not charged in this case, deliberately and systematically threw a considerable number (two boxes) of hand grenades into the warehouse at the conclusion of the shooting, first in the room on the right and then, after the shooting in the second room, into the room on the left. The use of those weapons at that those particular times, against hundreds of wounded and dying people crammed into the warehouse with no hope of escape, demonstrates a level of cruelty and persistence that must be recognized and calculated.

c. Circumstances Since the Offense

The Accused Džinić remained a police officer after the conflict and was serving in Zvornik at the time of his arrest. The evidence produced by the defense shows him to have continued being active as an athlete. He is single and has no children. The Accused has no prior convictions, and there is no allegation of any conviction for any criminal activity since the conflict, which the Panel sees as an extenuating circumstance.

d. Conduct During the Case

The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Panel. He, along with his co-accused, staged two hunger strikes during which time he refused to attend court proceedings. In the absence of any evidence that this activity was undertaken specifically to

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undermine these proceedings, the Panel refrains from drawing any inference that might be negative to the Accused. Džinić's conduct during the trial was neither aggravating nor extenuating.

3. Motive

Although motive is not an element of genocide or a factor in genocidal intent, generally, the Panel concludes that the motive in this case was synonymous with the aim to destroy the Bosniaks of Srebrenica. Therefore, to consider motive as a separate aggravating factor would be to count it twice. Džinić's motive has, accordingly, already been taken into account in considering the element of genocidal intent and in calculating the gravity of the offense, so it will not be considered as an aggravating circumstance.

4. Personality of Džinić

The Panel has no evidence regarding the personality of the Accused other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore the Accused's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, and to make amends for his criminal actions. In this case, the length of the sentence also makes it unlikely that he will ever be in a position to commit another genocidal act outside of the control of prison authorities. The risk of repetition of similar crimes is therefore minimal.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, and to provide "education" to the prisoner by "modern educational methods" so that he will adopt socially acceptable values.[421] The nature of the crime of genocide perpetrated in the manner it was perpetrated by Džinić raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.[422] Those sentenced to long-term imprisonment are entitled to greater rehabilitative services, including being placed in "special treatment groups" with more individualized treatment.[423] These statutory requirements for rehabilitation are consistent with BiH's international human rights obligations under ICCPR Article 10(3).

6. Sentence

Therefore in evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in CC BiH Article 48(1), for the reasons explained above, the Panel found there exists an extenuating circumstance, specifically his lack of criminal record. Also, the Panel concludes that aggravating circumstances exist: specifically the role that Džinić played in the

[421] LoE Art. 105.
[422] LoE Art. 106.
[423] LoE Art. 153(3).

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genocide by throwing hand grenades into the open warehouse doors where they exploded on and around the already suffering and dying victims. The Panel considered this action on the part of Džinić as extremely serious and concludes that the aggravating circumstance should be reflected in the sentence, requiring an upward adjustment of the sentence from that calculated solely on the basis of gravity of the crime itself. On balancing all the relevant circumstances, the Panel concludes that the appropriate penalty for the commission of the crime of genocide by Džinić is 42 years long term imprisonment.

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G. Accused Miloš Stupar

1. The Degree of Liability

Stupar's liability accrues by virtue of his position as Commander. In his case, his position of command is not an aggravating factor, but the foundation for his guilt (see Section VII.E, *supra*).

2. Conduct and Personal Circumstances

The conduct and personal circumstances of Stupar prior to, during, and after the commission of the offense present facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

Tomislav Kovač testified that before the offense, the Special Police and particularly the 2nd Detachment, served with distinction in both their combat and non-combat roles. As Commander of the 2nd Detachment, Stupar would have been one of the people primarily responsible for that reputation.

b. Circumstances Surrounding the Offense

The heinousness of the offense, the damage to the victims, and the extremely cruel manner in which the genocide was carried out have already been considered in calculating the gravity of the underlying crime. Likewise the manner in which Stupar condoned the crime evidenced not only by his failure to punish those responsible, but by his positive treatment of the perpetrators, including his own deputy, the manner in which he referred to the crime and "his men" in his meeting in Zvornik on 15 July, and his continued involvement as commander of the Detachment in the killing plan during the period covered by the Indictment, leaves no doubt as to his own genocidal intent. All of these circumstances have already been calculated in determining Stupar's intent and his liability under command responsibility, and will not be calculated twice.

c. Circumstances Since the Offense

Stupar remained a police officer until the time of his arrest for this charge. The Accused is married and the father of four children. He has no prior convictions, , which the Panel sees as an extenuating circumstance, and according to the latest information the Court has, there is a criminal proceeding pending against him for causing a light bodily injury.

d. Conduct During the Case

The Accused behaved with decorum during the course of the trial and did nothing personally to aggravate witnesses, nor did he show disrespect to any witness or the Panel. He, along with his co-accused, staged two hunger strikes during which time he refused to attend court proceedings. In the absence of any evidence that this activity was undertaken specifically to undermine these proceedings, the Panel refrains from drawing any inference that might be negative to the Accused. Stupar's conduct during the trial was neither aggravating nor extenuating.

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3. Motive

Although motive is not an element of genocide or a factor in genocidal intent, generally, the Panel concludes that the motive in this case was synonymous with the aim to destroy the Bosniaks of Srebrenica. Therefore, to consider motive as a separate aggravating factor would be to count it twice. Stupar's motive has, accordingly, already been taken into account in considering the element of genocidal intent and in calculating the gravity of the offense, so it will not be considered as an aggravating circumstance.

4. Personality of Stupar

The Panel has no evidence regarding the personality of the Accused other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore the Accused's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes, and to make amends for his criminal actions. In this case, the length of the sentence also makes it unlikely that he will ever be in a position to commit another genocidal act outside of the control of prison authorities. The risk of repetition of similar crimes is therefore minimal.

In addition, all prisons in BiH have the statutory responsibility to design an appropriate rehabilitative treatment program for the prisoners entrusted to their care, and to provide "education" to the prisoner by "modern educational methods" so that he will adopt socially acceptable values.[424] The commission of the crime of Genocide, as perpetrated by Stupar, requires individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.[425] Those sentenced to long-term imprisonment are entitled to greater rehabilitative services, including being placed in "special treatment groups" with more individualized treatment.[426] These statutory requirements for rehabilitation are consistent with BiH's international human rights obligations under ICCPR Article 10(3).

6. Sentence

In evaluating the relevant "circumstances bearing on the magnitude of punishment" set out in CC BiH Article 48(1), for the reasons explained above, the Panel finds that the extenuating circumstances on the part of the Accused comprise his lack of criminal record and his family life.

The Panel is mindful that the role Stupar played is different from that of the principle perpetrators. Stupar is guilty of the underlying genocidal act because the elements of command responsibility have been met. Command responsibility is a principle of liability,

[424] LoE Art. 105.
[425] LoE Art. 106.
[426] LoE Art. 153(3).

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not a principle of sentencing. The Panel considered whether it was just and fair that the considerations on which the gravity of the crime were calculated for the direct offenders, and the penalty of 40 years concluded, should apply to Stupar as well. For the reasons set out below, the Panel concluded that to do otherwise would be grossly unfair.

According to the credible evidence, Stupar did not involve himself physically with the horror and mayhem that characterized the actual slaughter. However, the damage done by Stupar in failing to promptly punish those who did these horrendous acts was potentially far reaching. It is impossible to say whether prompt punitive action against the direct perpetrators at Kravica would have reduced the number of other soldiers willing to commit similar genocides in the days that followed. What is clear is that official inaction when confronted with genocide is and was at the time universally condemned. When the inaction is the failure to punish, and the official is a commander who knows that his subordinates have committed genocide, then national and international law at the time and now considers that it is both just and fair that the commander be found guilty of the identical underlying crime. When, in addition, the underlying genocide has been committed consistent with a plan about which the commander is both aware and a participant, and when his failure to punish is accompanied contemporaneously by a shared genocidal intent, then this Panel considers that it is both just and fair that the commander face an identical penalty based on the gravity of the underlying crime. Under the circumstances of this case, any calculation of a penalty that discounts the gravity of the offense when applied to Stupar cannot be justified. The Panel concludes that the appropriate penalty for the commission of the crime of genocide by Stupar is 40 years long-term imprisonment.

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Costs of the Proceedings

Pursuant to Article 189(1) of the CPC of BiH, the Accused Stupar, Trifunović, Džinić, Medan, Jakovljević, and Radovanović are relieved of the duty to cover the costs, and they shall be covered from the Court of BiH budget. In ruling on the costs of the proceedings, the Panel had in mind that the Accused are indigent, and that they have been sentenced to long-term imprisonment in a non-final Verdict, which led the Panel to conclude that the payment of costs would jeopardize the support of persons whom the Accused are required to support economically.

As regards the Accused Maksimović and Živanović, since they have been acquitted of the charges in this case, the Panel relieved them of the duty to pay the costs pursuant to Article 188(4) of the CPC of BiH.

Property Law Claims

Regarding the injured parties S1 and S2, as well as the Association of Mothers from Srebrenica and Žepa Enclave, who have filed property law claims in the course of the proceedings, the Panel found that the information obtained in the course of the criminal proceedings does not provide a reliable basis for either partial of complete ruling, and has therefore referred the injured parties to pursue their property law claims by taking civil action.

PRESIDING JUDGE
Hilmo Vučinić

MINUTES-TAKER:
Dženana Deljkić Blagojević

LEGAL REMEDY: This Verdict may be appealed within 15 days as of the receipt of the written copy thereof.

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ANNEX A: EVIDENCE

A. Witnesses for the Prosecutor's Office

During the main trial, the following witnesses for the Prosecutor's Office of BiH were heard:

1. Milomir Čodo
2. Bože Bagarić
3. Siniša Radić
4. Sabina Sarajlija
5. Miladin Nikolić
6. Jovan Nikolić
7. Kristina Nikolić
8. Dragan Nikolić
9. Zoran Erić
10. Luka Marković
11. Miladin Jovanović
12. Perica Vasović
13. Miloš Đukanović
14. Ilija Nikolić
15. Marko Alekšić
16. Siniša Bečarević
17. Obradin Balčaković
18. Ljubiša Bečarević
19. Tomislav Dukić
20. Radislav Božić
21. Predrag Čelić
22. Nebojša Janković
23. Dragan Kurtuma
24. Nenad Janjić
25. Duško Mekić
26. Milojko Milanović
27. Nikola Milaković
28. Živojin Milošević
29. Đorđo Vuković
30. Stanislav Vukajlović
31. Miloš Vuković
32. Milenko Pepić
33. Mirko Sekulić
34. Blagoje Stanišić
35. Slobodan Stjepanović
36. Nedjeljko Sekula
37. Dragomir Stupar
38. Danilo Zojić
39. Milomir Trifunović
40. S1
41. S2
42. Dragomir Vasić
43. E.H
44. S3
45. Marko Prelec
46. Hajra Ćatić
47. Ostoja Stanojević
48. Stevo Stanimirović
49. Slavoljub Gužvić
50. S4

During the main trial, a team of expert witnesses comprising Abdulah Kučukalić, Senadin Fadilpašić, and Alma Bravo-Mehmedbašić, expert witnesses for the Prosecutor's Office, provided an expert neuropsychiatric evaluation of the mental state and mental competence and capacity of Petar Mitrović.

Vedo Tuco, expert witness for the Prosecutor's Office, provided an expert evaluation of the connection between the mass graves and the killings at the Kravica Warehouse.

B. Witnesses for the Accused Miloš Stupar

During the main trial, the following witnesses for the Accused Miloš Stupar were heard:

1. Cvjetin Gvozdenović
2. Lazo Đurić
3. Radenko Mijatović
4. Tomislav Kovač
5. Dražen Erkić
6. Dostana Šulić
7. Milan Vukajlović
8. Mladen Borovčanin
9. Ljubiša Milutinović
10. Nenad Andrić
11. Vujadin Gagić
12. Tahir Ibrišimović
13. Luka Stupar
14. Mirko Stupar
15. Momčilo Vlačić
16. Goran Savić
17. Snježana Sokić
18. Zoro Lukić

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Handwriting expert, Dane Branković, expert witness for the Accused Miloš Stupar, provided an expert evaluation of the authenticity of the signatures of the accused Miloš Stupar on the relevant documents.

Professor Mile Matijević, PhD, expert witness for the Accused Miloš Stupar, provided an expert evaluation of the relationship between the army and the police in Republika Srpska at the time covered by the Indictment.

C. Witnesses for the Accused Milenko Trifunović

During the main trial, the following witnesses for the Accused Milenko Trifunović were heard:

1. Dragoslav Mirković
2. Miodrag Josipović
3. Boriša Janković
4. Mirko Trifunović
5. Witness C
6. Witness B
7. Đorđe Božić

D. Witnesses for the Accused Brano Džinić

During the main trial, the following witnesses for the Accused Brano Džinić were heard:

1. Zoro Lukić
2. Zoran Tomić
3. Miloš Lakić
4. Dejan Dabić
5. Radomir Stevanović
6. Đurđić Dalibor
7. Slađan Stanković
8. Muhamed Buševac
9. Bunijevac Uroša
10. Risto Ivanović

E. Witnesses for the Accused Aleksandar Radovanović

During the main trial, the following witnesses for the Accused Aleksandar Radovanović were heard:

1. Predrag Krsmanović
2. Stana Ostojić
3. Ivan Savić
4. Radmila Savić
5. Marko Katanić
6. Nada Savić
7. Tankosava Savić

The Accused Aleksandar Radovanović also testified on his own behalf.

F. Witnesses for the Accused Velibor Maksimović

During the main trial, the following witnesses for the Accused Velibor Maksimović were heard:

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1. Slobodan Mijatović
2. Goran Matić
3. Blagoje Gligić
4. Slobodan Maksimović
5. Dragan Mijatović
6. Vladan Bogdanović

G. Witnesses for the Accused Dragiša Živanović

During the main trial, the following witnesses for the Accused Dragiša Živanović were heard:

1. Srbislav Davidović
2. Bogoljub Simić
3. Saša Simić
4. Gojko Perić
5. Nenad Mitrović
6. Obrenija Radovanović
7. Stanka Blagojević
8. Milomir Blagojević
9. Radiša Maksimović
10. Željko Živanović

H. Witnesses for the Accused Branislav Medan

During the main trial, the following witnesses for the Accused Branislav Medan were heard:

1. Dražen Buhač
2. Mirsad Kusturica

During the main trial, Dragan Obradović, land surveying expert witness for the Accused Branislav Medan, provided an expert evaluation regarding the number of captives in Sandići on 13 July 1995 at 2 p.m.

I. Witnesses for the Accused Milovan Matić

During the main trial, the following witnesses for the Accused Milovan Matić were heard:

1. Pajo Milić
2. Sredoje Nikolić
3. Milka Vasić

During the main trial, Dr. Svetlana Radovanović, expert witness in demography for the Accused Milovan Matić, provided an expert evaluation of the number of the killed and missing persons in the Srebrenica Municipality area related to the July 1995 events.

J. Witnesses for the Court

During the main trial, the following witness for the Court was heard:

1. Momir Nikolić

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Pursuant to the LoTC and the decision of the Panel dated 12 April 2007[427], the following witnesses for the Prosecutor's Office were called for cross-examination regarding reports and statements given before the ICTY and admitted into evidence by the Panel:

1. Robert Aleksander Franken
2. Richard Butler
3. Jean-René Ruez
4. Dean Manning
5. Ljubomir Borovčanin

The following witnesses were called by Petar Mitrović prior to the severance of the cases, and the Panel admitted their testimonies in this proceeding:

1. Nada Josipović
2. Jovan Badžo
3. Mile Milesavljević
4. Dragan Srećković

Doctor Ratko Kovačević and professor doctor Spasenija Ćeranić provided an expert evaluation of the mental state and mental competence and capacity of Petar Mitrović.

The following witnesses were called by Miladin Stevanović prior to the severance of the cases, and the Panel admitted their testimonies in this proceeding:

1. Ljubisav Simić
2. Zdravko Živanović
3. Milunka Nikolić
4. Hajrija Đozić
5. Mujo Salihović
6. Radenka Petrović
7. Petko Petrović

During the main trial, Vlado Radović, a construction expert witness for the defense, provided an expert evaluation of the description and type of the Kravica Warehouse construction material.

[427] *See* Annex B.

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K. Documentary Evidence of the Prosecutor's Office

The Panel also reviewed the following documents submitted by the Prosecutor's Office of BiH:

O-01 Photograph of the "Interrogation Room"

O-02 Witness Examination Record of Čodo Milomir number: 14-04/2-446/05 of 6 December 2005

O-03 Photograph of the "Interrogation Room" marked with numbers 1, 2, 3, and 4

O-04 Witness Examination Record of Radić Siniša number: 14-04/2-445/05 of 6 December 2005

O-05 Photograph of the site Kravica-Hangar

O-06 Photograph of the ˝Back of the warehouse and remains of the maize field"

O-07 Photograph of ˝Panorama of the Kravica Warehouse˝

O-08 Record of Statement taken from Nikolić Miladin number: 12-02/6 of 18 June 2005

O-09 Witness Examination Record of Nikolić Miladin number: 14-04/2-280/05 of 15 September 2005

O-10 Witness Examination Record of Nikolić Miladin number: KT-RZ-10/05 of 12 July 2005

O-11 Aerial photographs of the Kravica Warehouse

O-12 Photograph of Bratunac

O-13 Aerial Photograph of Bratunac P-12.1, A3

O-14 Photo-uniform 2

O-15 Photo-uniform 3

O-16 Record of Statement taken from Nikolić Jovan number:12-1-7/02-230-483/03 of 26 August 2003

O-17 Witness Examination Record of Nikolić Jovana number: KT-10/05 of 10 October 2005

O-18 Record of Statement taken from Nikolić Jovana number: 12-02/2 of 15 June 2005

O-19 Photo of ˝Farming Cooperative (FC) Kravica taken from the hill-B2˝

O-20 Photo of ˝Hangar in FC Kravica, back B14˝

O-21 Photo of ˝FC Kravica, front and the asphalt road˝

O-22 Witness Examination Record of Nikolić Dragan number: KT-RZ-10/05 of 11 July 2005

O-23 Record of Statement taken from Nikolić Dragan number: 12-02/2 of 18 June 2005

O-24 Witness Examination Record of Marković Luka number: 14-04/23-290/05 of 20 September 2005

O-25 Record on the on-site investigation and reconstruction with Marković Luka number: KT-RZ-10/05 of 29 September 2005

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O-26 Photo of ˝FC Kravica" taken from the hill B1

O-27 Photo of FC Kravica, a more restricted part of the warehouse including the hangar, taken from the hill B4

O-28 Photograph - Hangar in Kravica from the back B14

O-29 Photograph - Hangar in Kravica, front on the right B 20

O-30 Record of Statement taken from Erić Zoran number: 12-02/4 of 19 June 2005

O-31 Witness Examination Record of Erić Zoran number: 14-04/2-326/05 of 13 October 2005

O-32 Photo uniform - example 1

O-33 Photo uniform - example 2

O-34 Photo uniform - example 3

O-35 Photograph – Kravica Warehouse P-10.1

O-36 Witness Examination Record of Jovanović Miladin number: 14-04/2-292/05 of 21 September 2005

O-37 Photograph - FC Kravica photographed from the hill, left part of Bratunac B3

O-38 Photograph of uniform 1, 2 and 3

O-39 Photograph - Kravica Warehouse P-10.1

O-40 Witness Examination Record of Đukanović Miloš number: 14-04/2-281/05 of 16 September 2005

O-41 Aerial photograph of the Kravica Warehouse P-10.1

O-42 Photo of FC Kravica taken from the hill B2

O-43 Photograph - Hangar taken from the hill B4

O-44 Witness Examination Record of Nikolić Ilija number: 14-04/2-308/05 of 27 September 2005

O-45 Record on the on-site investigation and reconstruction with Nikolić Ilija number: KT-RZ-10/05 of 4 October 2005

O-46 Video recording of the reconstruction and the Reconstruction Record with Nikolić Ilija

O-47 Decision on Immunity at the Main Trial for Aleksić Marko number: KT-RZ-10/05 of 6 July 2006

O-48 Notification - Immunity in investigation

O-49 Witness Examination Record of Aleksić Marko number: KT-RZ-10/05 of 27 June 2006

O-50 Main Trial Agreement on Immunity for Aleksić Marko number: KT-RZ-10/05 of 27 June 2006

O-51 Witness Examination Record of Aleksić Marko number: 14-04/2-327/05 of 12 October 2005

O-52 Witness Examination Record of Stupar Zvjezdan of 15 August 2005

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O-53 Photo C18-P2 from the Brochure-photos abstracted from a video recording P22

O-54 Photo C18-P3 from the Brochure-photos abstracted from a video recording P22

O-55 Witness Examination Record of Balčaković Obradin number: 14-04/2-387/05 of 25 October 2005

O-56 Witness Examination Record of Bečarević Siniša number: 14-04/2-343/05 of 20 October 2005

O-57 Witness Examination Record of Bečarević Ljubiša number: 14-04/2-329/05 of 12 October 2005

O-58 Witness Examination Record of Božić Radoslav number: 14-04/2-413/05 of 16 November 2005

O-59 Witness Examination Record of Dukić Tomislav number: 14-04/2-342/05 of 19 October 2005

O-60 Witness Examination Record of Čelić Predrag number: 14-04/2-391/05 of 27 October 2005

O-61 Photograph Džinić Brane taken from Exhibit 0127

O-62 Photograph Džinić Brane, March 1994

O-63 Photograph of Džinić Brano taken from Exhibit 0127

O-64 Witness Examination Record of Janković Nebojša number: 14-04/2-386/05 of 25 October 2005

O-65 Official Note on error made in the Witness Examination Record of Janković Nebojša number: 14-04/2-43/05 of 9 December 2005

O-66 Witness Examination Record of Milojko Milanović number: 14-04/2-410/05 of 16 November 2005

O-67 Witness Examination Record of Mekić Duško number: 14-04/2-345/05 of 20 October 2005

O-68 Witness Examination Record of Milaković Nikola number: 14-04/2-304/05 of 27 October 2005

O-69 Witness Examination Record of Milošević Živojin number: 14-04/2-398/05 of 1 November 2005

O-70 Witness Examination Record of Vuković Đorđe number: 14-04/2-332/05 of 13 October 2005

O-71 Witness Examination Record of Vuković Miloš number: 14-04/2-412/05 of 16 November 2005

O-72 Witness Examination Record of Vukajlović Stanislav number: 14-04/2-346/05 of 18 October 2005

O-73 Witness Examination Record of Pepić Milenko number: 14-04/2-388/05 of 26 October 2005

O-74 Witness Examination Record of Sekulić Mirko number: 14-04/2-396/05 of 31 October 2005

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O-75 Witness Examination Record of Stanišić Blagoje number: 14-04/2-401/05 of 1 November 2005

O-76 Map showing the direction of movement of Bosniak column P138

O-77 Witness Examination Record of Stjepanović Slobodan number: 14-04/2-393/05 of 27 October 2005

O-78 Witness Examination Record of Sekula Nedjeljko number: 14-04/2-330/05 of 12 October 2005

O-79 Record of Statement taken from Zoljić Danilo number: 12-02/4- of 19 June 2005

O-80 Witness Examination Record of Zoljić Danilo number: KT-RZ-10/05 of 13 October 2005

O-81 Order of the Staff Commander Toma Kovač of 10 July 1995

O-82 Map showing the area of Potočari, Kravica and Sandići and the key

O-83 Forensic psychiatric examination of Mitrović Petar, by the expert witness Prof. Dr. Abdulah Kučukalić of 29 August 2005

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O-I-30 Interim Combat Report of 11 July 1995

O-I-31 Supreme Command of the Republika Srpska AF – Basic characteristics of the international military-political situation of 8 March 1995

O-I-32 Military conscripts – police

O-I-33 Republika Srpska, MUP, PSC Bijeljina, Public Security Station Bratunac, criminal report of 11 December 2002

O-I-34 Crime Scene Record dated 7 November 2002

O-I-35 Republika Srpska, MUP, PSC Zvornik, Attn. President of the RS Government, Mr Koziću of 6 October 1995

O-I-36 Order to the Second Corps Command of 10 February 1993

O-I-37 Statement of Ramiz Bećirović of 11 August 1995

O-I-38 To the Second Corps Command, security situation analysis in the territory of the Srebrenica protected zone

O-I-39 Notification of the outcome of the negotiated demilitarisation of Srebrenica dated 20 April 1993

O-I-40 Srebrenica Demilitarisation Agreement reached by Lieutenant General Ratko Mladić and General Sefer Halilović on 8 May 1993

O-I-41 Report on the manning of war units, 28th Division, of 1 July 1995

O-I-42 Assembly of Bosnia and Herzegovina, introductory presentation of 30 July 1996

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O-I-43 Operations report of 30 June 1995

O-I-44 Information on combat results of the units and commands of the 28th Division of the 2nd Corps of the ARBiH

O-I-45 Preparation for offensive combat activities

O-I-46 Information upon the MMS (*GSS*) ARBiH act number: 1/825-564 of 28 June 1995

O-I-47 Successes and tasks of the ARBiH units, Information and the order of 2 July 1995

O-I-48 Sabotage combat activity carried out successfully – message of congratulations of 28 June 1995

O-I-49 Report on reception and condition of the units of the 28th Division of the land forces Srebrenica of 28 July 1995

O-I-50 Information from the Municipality of Srebrenica Presidency session held on 9 July 1995

O-I-51 Finding and opinion of the expert witness Dr. Mile Matijević

O-I-52 Finding of the expert witness Dane Branković of 1 January 2008 (O-I-52); Finding and Opinion of the expert witness Dane Branković of 28 January 2008 (O-I-52a); Check of *Razvojna banka* for Miloš Stupar (O-I-52b); Check for Miloš Stupar (O-I-52c); Entry of goods number : 17/2 of 30 May 2000 (O-I-52d); Delivery Note number 129/05 of 26 April 2005 (O-I-52g); Animal Recording Form and the Passport Application (O-I-52h); Statement number: 3-12-5 of 11 November 2004 (O-I-52k); Statement number: 03-12-76 of 11 November 2004 (O-I-52i); Severance Contract (O-I-52j); Order to Cash-desk of 25 June 1997 (O-I-52m); Sheet with signatures of Stupar Miloša (O-I-52n); Identity Card file for Stupar Miloš of 10 December 1997 (O-I-52o); Identity Card file for Stupar Miloš of 20 November 1997 (O-I-52p)

O-I-53 Transcript of the ICTY testimony of Zoran Petrović Piroćanac in the case of *Popović and others*

O-I-54 Transcript of the ICTY testimony of Nikola Gajić in the case *Blagojević and Jokić*

O-I-55 Combat activities around Srebrenica on 9 July 1995 (O-I-55); Transcript of the ICTY testimony of the witness Mile Simanić (O-I-55a); Transcript of the ICTY testimony of the witness Milomir Savčić -audio recording (O-I-55b)

M. Documentary Evidence of the Accused Milenko Trifunović

O-II-01 Map of the terrain

O-II-02 Rank insignia

O-II-03 Photograph of FC Kravica

O-II-04 Photograph of FC Kravica

O-II-05 Photograph of FC Kravica

O-II-06 Witness Examination Record for Vasić Slavorad number: 14-04/2-279/05 of 15 September 2005

O-II-07 Photograph of a house

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O-II-08 Photograph-Monument to Dragičević Krsto

O-II-11 Record of Statement taken from Božić Đorđe, number: 12-02/4 of 19 June 2005

O-II-12 Photograph of the Church house

O-II-13 Information on accomodation of the prisoners of war, number: 04-520-51/95 of 13 July 1995

N. Documentary Evidence of the Accused Brano Džinić

O-IV-01 Geographical map wherein the witness Lukić Zoro marked a place at which he was in the afternoon of 12 July 1995

O-IV-02 Geographical map wherein the witness Lukić Zoro marked a place at which he was in the evening between 12/13 July 1995

O-IV-03 Geographical map wherein the witness Lukić Zoro marked a place at which he was before the arrival of the column on 13 July 1995

O-IV-04 Geographical map wherein the witness Lukić Zoro marked a place at which he was in the afternoon upon the departure of the column on 13 July 1995

O-IV-05 Statement of the witness Lukić Zoro given to the lawyer, Suzana Tomanović, on 23 July 2005

O-IV-06 SIPA Record on examination of the witness Zoro Lukića number: 14-04/2-389/05 of 26 October 2005

O-IV-07 Decision of the MUP PSC Bijeljina number: 12-05/1-125-76 of 10 July 2007 to suspend the police officer Lukić Zoro

O-IV-08 Geographical map wherein the witness Tomić Zoran marked a place at which he had been in the afternoon of 12 July 1995

O-IV-09 Geographical map wherein the witness Tomić Zoran marked a place at which he was in the evening between 12/13 July 1995

O-IV-10 Geographical map wherein the witness Tomić Zoran marked a place at which he was before the arrival of the column on 13 July 1995

O-IV-11 Geographical map wherein the witness Tomić Zoran marked a place at which he was in the afternoon upon the departure of the column on 13 July 1995

O-IV-12 Statement of the witness Zoran Tomić given to the lawyer Suzana Tomanović on 23 July 2005

O-IV-13 SIPA Record on examination of the witness Zoran Tomić number: 14-04/2-390/05 of 26 October 2005

O-IV-14 Decision of MUP PSC Bijeljina number: 12-05/1-125-66 of 10 July 2007 to suspend the police officer Zoran Tomić

O-IV-15 Documents on the football activities of Brano Džinić

O-IV-16 DVD of a football game, indoor football tournament held in Holland in which he participated as a member of the BiH team

O-IV-17 Vuk Stefanović Karadžić, Srbian dictionary – explanation of the word “nickname” (O-IV-17/1); Yugoslav Academy, Dictionary of the Croatian and the Serbian

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language - explanation of the word “nickname” (O-IV-17/2); Wikipedia, a free encyclopedia - explanation of the word “nickname”(O-IV-17/3)

O. Documentary Evidence of the Accused Slobodan Jakovljević

O-VI-01 Witness Examination Record of Kurtuma Dragan, dated 18 October 2005

P. Documentary Evidence of the Accused Velibor Maksimović

O-VIII-01 Sketch of Skelani drawn by the witness Goran Matić

Q. Documentary Evidence of the Accused Dragiša Živanović

O-IX-01 Military Form (MF)-14, number: 01-228/95 of 13 July 1995 (O-IX-01/1); Military Form-14, number: 01-227/95 of 13 July 1995 (O-IX-01/2); Unit file for Perić (Petar) Gojko (O-IX-01/3); Unit file for Živanović (Desimir) Slaviša (O-IX-01/4); Unit file for Simić (Tomislav) Saša (O-IX-01/5)

O-IX-02 Frontline Situation Report number: 03/3-193 of 17 July 1995

R. Documentary Evidence of the Accused Branislav Medan

O-X-01 Photocopy of the voluntary blood donors files for Medan (Risto) Branislav

O-X-02 Finding and opinion of expert witness in geodesy Dragan Obradović

O-X-03 Transcript of the ICTY testimony in the case IT-05-88-T by PW 106

O-X-04 Transcript of the ICTY testimony in the case IT-05-88-T by PW 127

O-X-05 Transcript of the ICTY testimony in the case IT-05-88-T by PW 161

O-X-06 Report on the number of wounded persons dated 14 July 1995

O-X-07 Report on partial cleaning up of the terrain of Srebrenica, Kravica region, number: 193/97 of 29 May 1997

S. Documentary Evidence of the Accused Milovan Matić

O-XI-01 Photograph of two persons (O-XI-01a); Photograph of several persons (O-XI-01b)

O-XI-02 Unit file with signs 487 KO (O-XI-02a); Official file of Command Operations (CO) signs, sign of MF-08 (O-XI-02b)

O-XI-03 Cyrillic alphabet file, MF 4- official form in the Ministry of Defense

O-XI-04 Receipt of MP 7502 Sokolac, int. number : 05/4-1-792 of 11 October 2005

O-XI-05 Response to a request of MP 7502 Sokolac, number: 05/4-1-852 of 21 October 2005

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O-XI-06 Certificate number: 03-566-1-650/07 of 21 June 2007 certifying that Milovan Matić was not a member of VRS

O-XI-07 Order to expert witness in demography, Svetlana Radovanović, dated 5 December 2007 (O-XI-07a); Professional biography of the expert witness Svetlana Radovanović (O-XI-07b); Report on the number of missing and dead persons in Srebrenica of 28 May 2004 (O-XI-07c); Audio – recordings in the case IT-02-60 *Blagojević/Jokić* of 21 June and 22 June 2004 (O-XI-07d); Report on the number of casualties in the FC Kravica on 13 July 1995 (O-XI-07e); Comparative review of the Attestations of Death (O-XI-07f)

O-XI-08 Record of Statement taken from Luka Marković of 20 June 2005

T. Documentary Evidence of the Court

The Panel admitted into evidence the following documents *proprio motu*:

S-01 Statement of witness S4 given to the Prosecutor's Office of BiH on 18 April 2008 and a CD of the examination and the photographs on which S4 identified the persons in the course of examination

S-02 Statement of witness S4 of 22 May 2008 and a CD of the examination

Documentary Evidence of Petar Mitrović (presented prior to the separation of proceedings)

O-III-01 RS MUP Srebrenica PS call-up papers, No. 12-14-6/02-242/05, dated 20 June 2005 for Petar Mitrović

O-III-02 Receipt on Petar Mitrović's arrest Bijeljina PSC No. 12-1/3-124/05, dated 20 June 2005

O-III-03 Receipt on Handover of Arrested Person, No. 12-02/4-230-716/05, dated 21 June 2005

O-III-04 Bijeljina PS Letter No. 12-01/3-230-1267/07, dated 29 October 2007

O-III-05 Brežani Elementary School Diploma, student record number 193, dated 10 July 1983

O-III-06 Diploma on Mitrović's professional training, issued by the Obrenovac Adult Education Center, reference number 84/XVI 1996, record number 84/IV, dated 20 May 2006

O-III-07 Obrenovac Workers University Letter, dated 26 June 2007; form No.1- Belgrade Municipal Commercial Court registration entry 1-17850-00, dated 24 April 1991 (O-III-07a); form No. 2 – Belgrade Municipal Commercial Court registration entry 1-17850-00 dated 24 April 1991 (O-III-07b); form No.3, Belgrade Municipal Commercial Court registration entry 1-17850-00, dated 24 April 1991 (O-III-07c); form No. 5, Belgrade Municipal Commercial Court registration entry 1-17850-00, dated 24 April 1991 godine (O-III-07d); Belgrade Commercial Court Decision registration entry 1-17850-00, dated 18 June 1997 (O-III-07e); form No. 1 of the Belgrade Commercial Court – registration entry 1-17850-00, dated 18 June 1997 (No. O-III-07f); form No. 3, two pages Belgrade Commercial Court registration

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entry 1-17850-00, dated 18 June 1997 (O-III-7g); form No. 4 of the Belgrade Commercial Court registration entry 1-17850-00, dated 18 June1997 (O-III0-7h); Belgrade Commercial Court Decision, registration entry No. 1-88975-00, dated 23 December 2003 (O-III-07i); form No. 2 with the Decision, dated 23 December 2003 (No. O-III-7j); and certified signatures of the persons authorized for representation dated 26 August 2005 (O-III-7k)

O-III-08 Certificate of Driving School "AS" from Bajina Bašta No. 230/2007, dated 26 November 2007; Certificate of Driving School "AS" No. 230/2007, dated 26 November 2007 (O-III-08a)

O-III-09 Joint Stock Company "Rolo signal"from B. Bašta Letter No. 9/2007, dated 27 November 2007

O-III-10 Bijeljina PSC Srebrenica PS stating that Petar Mitrović has not passed a driver's license test, No. 12-1-5/05-222-161/07, dated 2 November 2007

O-III-11 Findings and Opinion by Ratko Kovačević, PhD (O-III-11a); Findings and Opinion by Spasenija Ćeranić, PhD (included in the Findings by expert witness Kovačević) (O-III-11b); Curriculum Vitae of Spasenija Ćeranić (O-III-11c)

O-III-12 Unit Record for Petar Mitrović, No. 1083116967

O-III-13 Copy of Medical Record Card at the MUP Employees Clinic, No. 06-01-82/97, dated 11 November 1997 detailing the medical check-up of Petar Mitrović

O-III-14 Decision of the Ministry of Internal Affairs of 24 July 1997 - decision on employment of Petar Mitrović

O-III-15 Bijeljina MUP, dated 26 December 2007, on termination of Petar Mitrović's employment

O-III-16 Record on Examination of Witness S-4 of 18 April 2008

Documentary Evidence of Miladin Stevanović (presented prior to the separation of proceedings)

O-VII-01 Transcript - testimony of witness "K" in the ICTY case number IT-98-33-T, dated 10 April 2000

O-VII-02 Zvornik PSC Dispatch - ICTY document No. 01776573

O-VII-04 Findings and Opinion of a Construction Expert Witness Vlado Radović

O-VII-05 Order No. 1/825-84, dated 17 June 1995

O-VII-06 Report on Recruitment into the 28th Division War Unit, strictly confidential No. 03-183-231, dated 1 July 1995

O-VII-07 Report on Intelligence, Tuzla 28 August 1995

O-VII-08 2nd Corps Command Paper, Security Situation Analysis No. 06-101-197-7/95, dated 11 September 1995

O-VII-09 Order - traffic regulation on the Konjević Polje - Bratunac road and in town, confidential No. 22/207, dated 12 July 1995

O-VII-10 Report, strictly confidential No. 17/897, dated 12 July 1995

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O-VII-12 Order – prevention of military intelligence leak in the combat zone, strictly confidential No.03/4-1638, dated 13 July 1995

O-VII-13 Regular Combat Report, strictly confidential No. 03/2-214, dated 13 July 1995

O-VII-14 Order on Active Combat Operations, strictly confidential No. 04/156, dated 2 July 1995

O-VII-15 Statement of Witness S-4, dated 18 April 2008 (O-VII-15a); Statement of Witness S-4, dated 22 May 2008 (O-VII-15b)

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ANNEX B: PROCEDURAL DECISIONS

In the course of the proceedings the following relevant issues were considered and the following decisions were rendered:

A. Decision on the Motion for Disqualification

On 8 May 2006, the Plenum of the Court of BiH adopted a decision upon a petition by all Accused and their defense counsels for the disqualification of the Presiding Judge in this case. The petition for disqualification was filed on the grounds of the alleged existence of reasons for disqualification referred to in Article 29(f) of the CPC BiH. The petition was refused as unfounded because the Plenum of the Court of BiH found that there were no reasons raising suspicion as to the impartiality of the Presiding Judge in this case.

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B. Protective Measures

In the course of the proceedings the Court rendered a decision on protective measures for witnesses S1, S2, S3, and S4.

With respect to S1 and S2, the protective measures were granted pursuant to Article 13 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, declaring the information concerning their identity confidential and ordering that they be heard from a separate room with the use of technical means for transferring image and sound. These measures were granted to witnesses S1 and S2 on 6 December 2005. The Court found that extraordinary circumstances warranting the ordering of protective measures existed since these witnesses are the sole survivors of the relevant event and they fear that possible consequences may take place as a result of their participation in the proceedings. The Panel also noted at the main trial hearing held on 4 October 2006 that the defense counsel for all the Accused waived the right to have the personal details of witnesses S1 and S2 disclosed to them.

With respect to S3 and S4, the Panel decided to grant protective measures to these witnesses pursuant to Article 4 of the Law on Protection of Witnesses and Article 235 of the CPC of BiH, and ordered that the personal details of witnesses S3 and S4 be regarded as confidential, and that they constitute an official secret. The publication or broadcasting of photographs or video recordings of the image of the witnesses in electronic, print and other media without the prior approval of the Court of BiH was prohibited under the same decision.

Moreover, the Panel, being seized of the motion by the Defense for Milenko Trifunović, rendered a decision on 19 September 2008, granting protective measures to Defense witnesses in the form of pseudonyms, A, B, and C respectively. The measures included the protection of the personal details of the witnesses, testifying from a separate room utilizing electronic distortion of the voice of the witness or the image of the witness (or both the image and the voice) by using technical means for transferring image and sound, and a prohibition on the publication or broadcasting of photographs or video recordings of the image of the witnesses in electronic, printing and other media or in any other way, without the prior approval of the Court of BiH. These measures were ordered in accordance with Articles 4 and 13(2) of the Law on Protection of Witnesses, in conjunction with Article 235 of the CPC, as a less restrictive alternative to closing the proceedings to the public.

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C. Exclusion of the Public

The Panel also excluded the public from portions of the main trial in accordance with Article 235 of the CPC of BiH on the following dates: on 7 March 2007, when discussing the manner of examination of witness E.H; on 21 March 2007, when discussing the motion to grant protective measures to witness S3; and on 22 August 2007, when discussing the manner of examination of witness N.J. On each of these occasions, the public was only briefly excluded from the courtroom so that the Panel, the parties, and Defense Counsel could freely discuss these issues.

In addition, the Panel excluded the public on 17 April 2008 to discuss a motion by the Prosecutor's Office to grant protective measures to witness S4, on 28 May to discuss the manner of examination of witness S4, and on 29 May and 11 June 2008 during the examination of witness S4 (direct and cross examination).

On 19 June 2008, the Panel excluded the public from a portion of the testimony of the Accused Aleksandar Radovanović when the Accused mentioned the names of protected witnesses.

In all the abovementioned instances of the public exclusion, the Panel, having considered its case-law indicating that it is not always possible to predict and fully control the dynamics of comments on legal and factual issues, decided to exclude the public from portions of the main trial when discussing the granting of certain protective measures to witnesses so warranted by the circumstances. The BiH public has received detailed information about the proceedings conducted before the Court of BiH through the media. The fact that the public receives detailed information about the particulars of the trial may pose an insurmountable obstacle for the witnesses to freely give their testimony. For this reason, the Panel, in striking a balance between the rights of the witnesses to the protection of their personal and intimate life and the interest of the public to receive correct information in a timely manner – at the same time noting that the exclusion of the public is an exception to the general rule stipulating that trial proceedings are open to the public – found that the exclusion of the public achieves an intended purpose in as much as the occurrence of irreparable damage to the witnesses can be precluded and the informing of the public made possible in other more acceptable ways. The Panel, for the purpose of protecting the personal and intimate life of the witnesses, as well as other important interests of the witness, including safety and ability to testify fully, found it logical and appropriate in the present case to protect the witnesses in this way.

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D. Constitutional Review: Law on Transfer of Cases

On 14 July 2006, the Decision was rendered refusing the Motion by the Defense Counsels to initiate the proceedings before the Constitutional Court of BiH regarding the evaluation of the constitutionality of the Law on Transfer of Cases by the ICTY to the Prosecutor's Office of BiH and use of the evidence obtained from the ICTY in the proceedings before the courts in BiH. The Defense for the Accused Milenko Trifunović states that the mentioned Law under Article 4, Article 5(3) and Article 6 is not in line with the European Convention on Human Rights and the Article II(3) which guarantee the right to a fair hearing in the civil and criminal matters and other rights related to the procedure and Article II(2) of the Constitution, given that the mentioned articles violate the rule of the direct presentation of evidence which guarantees to an accused the right to ensure the presence of a witness and his examination by the accused. During the trial the Court heard the parties and Defense Counsels. The Prosecutor's Office objected to the Motion and it proposes that the Court refuses the Motion because it considers that it has no grounds in the Constitution and in the law.

Analyzing the provisions of the Law on Transfer, the Court notes that this law as a separate law, provides for the acceptance as proven the facts which were proven in other proceedings, and it is, as such, a separate evidentiary action in the criminal proceedings. Considering the Motion by the Defense, the Court concludes that there are no indications that the given Law might be inconsistent with the Constitution and European Convention whose application supersedes the application of other laws in BiH.

More specifically, based on the settled and established jurisprudence of the European Court of Human Rights, the admissibility and evaluation of the evidence are mainly the issues on which the national courts should decide, and the general rule is that the national courts evaluate the evidence presented before them. Also, although it is duty of the national courts to evaluate the evidence including the manner in which the evidence was obtained, the entire proceedings have to be fair pursuant to Article 6(1) of the Convention, thus in this regard, the European Court of Human Rights established several principles (*See Barbera, Messegue and Jabardo*, Judgment of 6 December 1988, para. 78; *Kostovski v. Netherlands*, Judgment of 20 November 1989, paras. 41-45; *Asch v. Austria*, Judgment of 26 April 1991, paras. 26-31; *Unterpertinger v. Austria*, Judgment of 24 November 1991; *Ludi v. Switzerland*, Judgment of 15 June 1992, paras. 43-50; *Luca v. Italy*, Judgment of 22 January 2001, paras. 39-45):

- As a rule, all evidence has to be presented in the presence of the accused at the public hearing in order to present counter arguments; however, the use of the statements obtained in the pre trial phase itself is not in contravention of Article 6(1) and 3(d) of the Convention;
- nevertheless, the usage has to be in line with the rights of the defense, which implies that the accused has to be given a suitable opportunity to challenge and examine a witness testifying against him either during the testimony of that witness or in the later phase of the proceedings;
- in cases when the accused did not have an opportunity to challenge the evidence presented by witnesses, a national court may not base a convicting verdict on such evidence exclusively or to a decisive extent.

Accordingly, this leads to conclusion that all these principles were contained in the provisions of the Law on Transfer. The use of the evidence obtained in the proceedings before the ICTY and accepting as proven the facts established in those proceedings is not, in the opinion of the

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Panel, in violation of the European Convention, given that such use of the evidence does not call into question the fairness of the proceedings as a whole, which is the reason why the Panel did not grant this Motion by the Defense.

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E. Constitutional Review: Applicable Law

On 15 March 2007, by its Decision the Panel refused the Motion of the Defense Counsels to initiate the proceedings regarding the evaluation of constitutionality of the Criminal Code of Bosnia and Herzegovina before the Constitutional Court of BiH. The Defense Counsels for the Accused Milenko Trifunović and Miladin Stevanović filed with the Court of BiH Motions in writing to initiate the proceedings on the evaluation of constitutionality of the BiH CC before the Constitutional Court of BiH. The Defense Counsels state that one of the fundamental principles of the criminal procedure is that the law applicable at the time when a criminal offence was committed should be applied to a perpetrator and that, should the law be amended once or several times after the fact, the more lenient law will be applied, while Article 4a) permits the retroactive application of the BiH CC and imposition of more severe sanctions for the criminal offences committed while the SFRY Criminal Code was in effect. In the above mentioned the Defense Counsel finds the inconsistence between Article 4a) of the BiH CPC and the European Convention on Human Rights and Fundamental Freedoms, as well as the Universal Declaration on Human Rights, the International Pact on Civil and Political Rights which guarantee the right to a fair trial, and it is in contravention of Article 4 of the BiH CPC.

At the main trial hearing held on 14 March 2007 in response to the Motion, the Prosecutor's Office of BiH stated that the Motion by the Defense Counsels was not well-founded, and that it should be refused given that Article 4a) of the BiH CC allowing for the suspension of application of Article 3 and 4 of the BiH CC is identical to Article 7(2) of the European Convention, which is directly applied in BiH.

The Criminal Code of Bosnia and Herzegovina is a part of criminal legislation in Bosnia and Herzegovina. This Code provides for the basic and fundamental principles of the criminal legislation and its application, essential elements of criminal offences are defined as the legal sanctions to be applied to the perpetrators of such offences. Considering the Motion by the Defense, the Court finds that there are no indications that the given Code might be inconsistent with the Constitution and the European Convention. More specifically, Article II/2 of the Constitution of Bosnia and Herzegovina stipulates that the European Convention supersedes all other laws.

Firstly, Article 5(1) of the International Covenant on Civil and Political Rights stipulates the following:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

In other words it is undisputable that the principle of legality is one of the basic international standards in protection of the right to a fair trial and that it is stipulated by the international documents as stated in the submissions by the Defense.

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However, Article 15(2) of the same International Convenant stipulates the exemption from the paragraph 1 and states the following: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

The European Convention also follows the same principle, more specifically Article 7(1) of the Convention which stipulates that “...No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” However, identical Article 15(2) of the International Covenant, Article 7(2) of the European Convention stipulates as the cited paragraph 1 under Article 7 “...This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.”

Almost identical provisions are contained in the BiH CC, more specifically, Article 3 and 4 of the BiH CC establishing the principle of legality, that is, regulating the time when the Code is applicable, while Article 4a of the Code stipulates, “Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.”

Thus the Panel finds that the principles of legality and prohibition of the retroactive application of that legislation to the detriment of the accused, established by the mentioned International Covenant and the European Convention, are contained in the same form in the criminal legislation, that is, the BiH CC. This is why the Panel considers the request of the Defense Counsels unfounded, for it does not suggest that the mentioned provision under Article 4a could be inconsistent with the Constitution of BiH. The Panel will consider the issue of the application of the substantive law in a separate part of this Verdict.

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F. Established Facts

1. Prosecutor's Motion of 3 October 2006

On 3 October 2006, the Decision was rendered partially granting the Motion by the Prosecutor's Office of BiH of 10 March 2006. The facts established in the judgments of the ICTY IT-98-33-A of 19 April 2004 and No. IT-98-33-T of 2 August 2001, in the case *Prosecutor v. Radislav Krstić*, are accepted as proven in the following scope and order:

"It is not disputed that a state of armed conflict existed between BiH and its armed forces, on the one hand, and Republika Srpska and its armed forces, on the other." (T1)

"In March 1995, Radovan Karadžić, President of Republika Srpska ("RS"), issued a directive to the VRS concerning the long-term strategy of the VRS forces in the enclave. The directive, known as "Directive 7" specified that VRS was to: Complete the physical separation of Srebrenica from Žepa, preventing even communication between individuals in the two enclaves. By planned and well-thought out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica."(T2)

"On 31 March 1995, the VRS Main Staff issued Directive 7.1, signed by General Mladić. Directive 7.1 was issued "on the basis of Directive No. 7" and directed the Drina Corps to, inter alia, conduct "active combat operations…around the enclaves." (T5)

"On 31 May 1995, Bosnian Serb forces captured OP Echo, which lay in the Southeast corner of the enclaves"…"a raiding part of Bosniaks attacked the nearby Serb village of Visnjica, in the early morning of 26 June 1995." (T6)

"…Some houses were burned and several people were killed." (T7)

"Following this, the then-commander of the Drina Corps, General-Major Milenko Živanović, signed two orders, on 2 July 1995, laying out the plans for the attack on the enclave and ordering various units of the Drina Corps to ready themselves for the combat. The operation were code named "Krivaja 95." (T8)

"The VRS offensive on Srebrenica began in earnest on 6 July 1995." (T9)

"In the following days, the five UNPROFOR observation posts, in the southern part of the enclave, fell one by one in the face of the Bosnian Serb forces advance. (T10)

"Some of the Dutch soldiers retreated into the enclave after their posts were attacked, but the crews of the other posts surrendered into Bosnian Serb custody." (T11)

"Simultaneously, the defending A BiH forces came under heavy fire and were pushed back towards the town." (T12)

"Once the southern perimeter began to collapse, about 4.000 Muslim residents, who had been living in a Swedish housing complex for refuges nearby, fled north into Srebrenica town.…" (T13)

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“By the evening of 09 July 1995, the VRS Drina Corps had pressed four kilometers deep into enclave, halting just one kilometer short of Srebrenica town.” (T14)

“Late on 09 July 1995…, President Karadžić issued a new order authorizing the VRS Drina Corps to capture town of Srebrenica.” (T15)

“On the morning of 10 July 1995 the situation in Srebrenica town was tense. Residents, some armed, crowded the streets.” (T16)

“Colonel Karremans sent… requests for NATO air support…, but no assistance was forthcoming until around 14.30 hours on 11 July 1995, when NATO bombed VRS tanks advancing towards the town.” (T17)

“NATO planes also attempted to bomb VRS artillery positions overlooking the town, but had to abort the operation due to poor visibility.” (T18)

“NATO plans to continue the air strikes were abandoned following VRS threats to kill Dutch troops being held in custody of the VRS, as well as threats to shell the UN Potočari compound on the outside of the town and surrounding area, where 20,000 to 30,000 civilians had fled.” (T19)

“Late in the afternoon of 11 July 1995, General Mladić, accompanied by General Živanović (then Commander of the Drina Corps), General Krstić (then Deputy Commander and Chief of Staff of the Drina Corps) and other VRS officers, took a triumphant walk through the empty streets of Srebrenica town.” (T20)

“The moment was captured on film by Serbian journalist Zoran Petrović.” (T21)

“In July 1995, following the take-over of Srebrenica, Bosnian Serb forces executed several thousand Bosnian Muslim men. The total number of the victims is likely to be within the range of 7,000 - 8,000 men.” (T25)

“Faced with the reality that Srebrenica had fallen under Bosnian Serb forces control, thousand of Bosnian Muslim residents from Srebrenica fled to Potočari seeking protection within the UN compound.” (T31)

“Approximately 20,000 to 25,000 Bosnian Muslim refugees gathered by the evening on 11 July 1995 in Potočari.”(T32)

“Several thousand had pressed inside the UN compound itself, while the rest were spread throughout the neighboring factories and fields.” (T33)

“There was little food or water available and the July heat was stifling.” (T36)

“The refugees in the compound could see Serb soldiers setting houses and haystacks on fire.” (T39)

“On the 12 and 13 July 1995, the women, children and elderly were bussed out of Potočari, under the control of VRS forces, to Bosnian Muslim held territory near Kakanj.” (T43)

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"The removal of the Bosnian Muslim civilian population from Potočari was completed on the evening of 13 July 1995 by 20.00 hours." (T44)

"At the Hotel Fontana meetings on 11 and 12 July 1995, General Mladić has attempted to secure the surrender of the A BiH forces in the area of the former enclave. He was, however, unsuccessful…." (T62)

"As situation in Potočari escalated towards crisis on the evening of 11 July 1995, word spread through the Bosnian Muslim community that the able-bodied men should take to the woods, form a column together with members of the 28th Division of the A BiH and attempt a breakthrough towards Bosnian Muslim held territory in the north." (T71)

"At around 2200 hours on the evening of 11 July 1995, the 'division command', together with the Bosnian Muslim municipal authorities of Srebrenica, made the decision to form the column." (T72)

"The column gathered near the villages of Jaglići and Šušnjari and began trek north." (T74)

"Around one third of the men in the column were Bosnian Muslim soldiers from 28th Division, although not all of the soldiers were armed." (T75)

"The head of the column was comprised of the units of the 28th Division, then came civilians mixed with soldiers and the last section of the column was the Independent Battalion of the 28th Division." (T76)

"At around midnight on 11 July 1995, the column started moving along the axis between Konjević Polje and Bratunac." (T78)

"On 12 July 1995, Bosnian Serb forces launched an artillery attack against the column that was crossing an asphalt road between the area of Konjević Polje and Nova Kasaba en route to Tuzla." (T79)

"Only about one third of the men successfully made it across the asphalt road and the column was split in two parts." (T80)

"By the afternoon of 12 July 1995 or the early evening hours at the latest, the Bosnian Serb forces were capturing large number of these men in the rear." (T83)

"In some places, ambushes were set up and in the others, the Bosnian Serbs shouted into the forest…." (T85)

"The largest groups of Bosnian Muslim men from the column were captured on 13 July 1995…." (T88)

"After one unsuccessful attempt to move forward to the Bosnian Muslim front lines on 15 July 1995, the head of the column finally managed to break through to Bosnian Muslim held territory on 16 July 1995." (T93)

"In the attack from Tuzla the BiH Army forces supported the arriving column breaking through the front line for one and a half kilometers." (T94)

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"The personal documents and items were taken from both the Bosnian Muslim men in Potočari, and the men captured in the column, then plied up and burnt."(T115)

The remaining parts of the Motion of the Prosecutor's Office SHALL BE REFUSED as unfounded, as well as the Motion of the Prosecutor's Office of 4 May 2006 to accept as proven the facts established by the Judgments of the ICTY No.IT-02-60/1-A of 8 March, 2006 and No. IT-02-60/1-S of 2 December, 2003 in the case *Prosecutor v. Momir Nikolić*, and No. IT-02-60/2-S of 10 December 2003 in the case *Prosecutor v. Dragan Obrenović*.

Pursuant to Article 4 of the Law on Transfer, on 10 March and 4 May 2006 the Prosecutor's Office of BiH filed with the Court of BiH the Motion to accept as proven the facts established by final judgments of ICTY in *Prosecutor v. Radislav Krstić*, IT-98-33-A, Judgment, 19 April 2004, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Judgment, 2 August 2001, *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Judgment, 8 March 2006, *Prosecutor v. Momir Nikolić*, IT-02-60/1-S, Judgment, 2 December 2003, and *Prosecutor v. Dragan Obrenović*, IT-02-60/2-S, Judgment, 10 December 2003.

The motion reads that the Law on Transfer of Cases does not expressly deal with the stage of criminal proceedings during which a court should decide whether to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY. The Prosecutor submits that this is a matter best addressed during the evidentiary procedure at trial. The Court should balance the need for an expeditious trial against the rights of the accused. The proposed facts are relevant, do not directly incriminate the Accused for the criminal acts alleged in the indictment, and are not the subject of reasonable dispute. What is reasonably in dispute is the state of mind of all the Accused, their knowledge and intent, and their participation in the events alleged in the indictment. The proposed facts are those from which the Trial and Appeals Chamber in *Prosecutor vs. Krstić* concluded that there was genocide, and a widespread and systematic attack on the civilian population at the material time that the Accused are alleged to have committed the criminal acts contained in the Indictment. Accordingly, these facts are relevant for they establish elements of other possible legal qualifications of the criminal acts alleged to have been committed by all Accused. The proposed facts establish that there was a joint criminal enterprise, the common purpose of which was to forcibly transfer the Bosnian Muslim population from Srebrenica and its surrounding areas. Further, they support a finding that this initial plan escalated into a plan to capture, detain and then summarily execute all Bosnian Muslim males from the Srebrenica enclave. The participants in this enterprise included VRS and MUP personnel, known and unknown.

The Prosecutor alleges that all the Accused were participants in this joint criminal enterprise and submits that the issue in this case is whether the Accused were members of the enterprise, namely, whether they had the requisite intent and knowledge and whether they participated in it. Therefore, the facts relate to relevant issues but do not unduly prejudice the Accused's case concerning the final and critical elements of the criminal offences charged that remain to be decided by the Trial Panel. This includes the *mens rea* elements to satisfy a finding that the Accused possessed the *dolus specialis* required for the offence of genocide.

The defense opposes the motions of the Prosecutor's Office. It is unacceptable that the burden of proof and challenging the facts be transferred to the defense. The motions of the Prosecutor's Office concern the acceptance of facts from the cases pertaining to the Bratunac

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and Zvornik Brigade members, but not the accused. Observing the tradition of the continental law, all evidence and facts need to be focused on the particular event in the particular case. The defense points out that there is a difference between the Rule 94 of the ICTY Rules of Procedure and Evidence and the Law on Transfer of Cases. Rule 94 provides for a possibility of taking judicial notice of facts, whereas the Law on Transfer of Cases for the Court to accept facts as proven. Rule 94 is much more restrictive than the Law on Transfer as it foresees that the facts must not contain legal conclusions and explanations or be founded on agreement and voluntary admission of guilt. The motion contains numerous conclusions of the ICTY Chamber, which are based on previously established facts. It is also clear that the accused Nikolić and Obrenović concluded plea agreements with the ICTY Office of the Prosecutor, therefore, they cannot be considered as established, given that admission and agreement may only refer to a particular ICTY case, wherein it was in the interest of those persons to admit something in exchange for certain benefits. The motion to accept facts from the judgments based on a plea agreement does not meet the requirements set out in Article 4 of the Law on Transfer, since the said provision requires that the facts be established. That is not the case here, given that those cases lacked the entire trial and evidentiary proceedings, where evidence would be verified, but they only established punishments.

The Court heard the parties and their defense attorneys during the main trial in this case on 22 September 2006 and considered the motion of the Prosecutor's Office and the previous written submissions by the defense, and rendered the decision as stated in the operative provision on the following grounds:

The Law on Transfer of Cases under Article 4 provides that at the request of a party or *proprio motu* the Court, after hearing the parties, may decide to accept as proven those facts that are established by a legally binding decision in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY if it relates to matters at issue in the current proceedings.

Analyzing the quoted Article of the Law on Transfer, the Panel finds that the first formal pre-requisite under the said provision relating to the hearing of parties and their defense attorneys has been met. The Court heard parties and their defense attorneys during the main trial in this case on 22 September 2006, and the defense attorneys also had an opportunity to submit to the Court their response to the Prosecutor's motion in writing.

Further, it follows from the said provision that under Article 4 of the Law on Transfer it is at the discretion of the Court to accept the facts proposed by the prosecutor. However, neither the Law on Transfer, nor the CPC BiH, provide for the criteria based on which this issue could be considered, or prescribe legal requirements based on which it would be possible to accept such facts as proven. The Panel made an effort to exercise its discretionary right in a responsible and transparent manner by listing the criteria applied in accepting the facts thus established. These criteria provide a specific interpretation of Article 4 of the Law on Transfer and reflect the rights of the accused protected by the BiH regulations, and are at the same time in accordance with the ICTY jurisprudence. The Panel further emphasizes that it is not bound by the jurisprudence or interpretations of the ICTY, but when considering this issue, it took into account the interpretations the ICTY has applied to date in deliberations on these issues in the cases it tried pursuant to Rule 94 of the Rules of Evidence and Procedure. While interpreting the very text of Article 4 of Law on Transfer of Cases and deciding on the motions, the Court took into account the following criteria for accepting an established fact as proven:

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1. A fact must truly be a "fact" that is:

a) sufficiently distinct, concrete and identifiable;

b) not a conclusion, opinion or verbal testimony;

c) not a characterization that is of legal nature.

2. A fact must contain essential findings of the ICTY and must not be significantly changed.

3. The fact must not directly or indirectly confirm the criminal liability of the accused.

4.A fact that has gained such a level of acceptance as true that it is common knowledge and not subject to reasonable contradiction can be accepted as an adjudicated fact even if it relates to an element of criminal responsibility.

5. A fact must be "established by a legally binding decision" of the ICTY, which means that the fact was either affirmed or established on appeal or not contested on appeal, and that no further opportunity to appeal is possible.

6. A fact must be established in the proceedings before the ICTY in which the accused against whom the fact has been established and the accused before the Court of BiH have an identity of interest with reference to contesting a certain fact. For example, the facts stated in the documents which are a subject of a plea agreement or voluntary admission in the proceedings before the ICTY shall not be accepted, given that the interests of the accused in such cases are different, often contrary to the interests of those accused who utilized their right to a trial.

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

The legislative purpose for providing the Court with the discretion to accept "as proven" adjudicated facts include judicial economy, the promotion of the accused's right to a speedy trial, and consideration for witnesses in order to minimize the number of tribunals before which they must repeat testimony that is often traumatizing. Such purpose is in accordance with the right of the accused to a fair trial as prescribed by Article 13 CPC BiH and Article 6 paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms. This purpose, however, has to follow the principle of the presumption of innocence. Otherwise, one could not avoid the situation in which the evidentiary proceedings would *de facto* end to the detriment of the accused even before the imminent presentation of all pieces of evidence in the case. The acceptance of the adjudicated facts as "proven" does not violate respect for the presumption of innocence. The Panel holds only that the facts which are accepted here are sufficient for the Prosecutor to meet his burden of production on the particular point.

The ICTY has similar purposes for introducing and using Rule 94 of the Rules of the Procedure and Evidence of the ICTY. However, this Court must also keep in mind that,

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unlike the ICTY, it must assure the accused in this case their rights under the Law of BiH and under the European Convention. We therefore had in mind Article 6 of the European Convention and Articles 13 and 15 of the CPC when exercising our discretion under Article 4 in this case. The Panel is mindful that in balancing the purposes of the Law on Transfer it may not diminish the Accused's rights to the presumption of innocence and fair trial that those provisions of our law guarantee.

As for the objections by the Defense that accepting the established facts as proven violates the presumption of innocence, the right to a defense as well as Article 15 of the BiH CPC, the Panel states that the general principle of the criminal law indeed requires that a prosecutor should prove the criminal responsibility of the accused. However, this principle is not violated by accepting adjudicated facts, as these facts had already been established before the ICTY. In order to observe the fairness of the trial, the parties may challenge that fact at the trial, presenting to the Court evidence which puts in question the correctness of the established fact. The accepted facts are accepted as a possibility, and the criminal liability of the accused does not follow from them. In the proceedings they constitute a special evidentiary action and the Panel will treat them as a piece of evidence. The acceptance of facts established in the proceedings before the ICTY as proven is not in violation of Article 6 of the European Convention provided that it does not call into question the fairness of the proceedings as a whole.

In addition to that, the acceptance of facts established in the final judgments of the ICTY as proven represents a well-founded assumption that a specific fact is true and that the Prosecution need not prove it any further. The acceptance of any fact in no way whatsoever affects the rights of the accused to challenge any or all of the accepted facts in their case and arguments, as they would any other factual proposition on which the prosecutor has produced evidence. Likewise it does not bind the court to accept any fact admitted in this way in its final verdict. The adjudicated facts herein admitted will be considered along with all of the evidence produced in the trial from all sources, and the weight each piece of evidence is accorded, if any, will be determined in final deliberation and reflected in the final verdict of the Panel.

When it comes to the facts in the remainder of the Prosecutor's Office of BiH motion, the Panel notes that the facts do not meet the foregoing criteria, particularly because a certain number of facts constitute legal interpretations and conclusions of the ICTY chambers, or directly or indirectly incriminate the accused. With reference to the motion of 4 May 2006, the Panel concludes that all listed facts derive from the judgments that are the result of plea agreements, where the Accused before the ICTY had very different interests from the Accused in the case before the Panel, and had no incentive to challenge the facts or test them through other evidentiary means. The acceptance of such facts, in the opinion of the Panel is not allowed, given that there is no identity of the interest of the accused in the case before the ICTY and the accused in the case before the Court of BiH.

2. Prosecutor's Motion of 19 February 2008

The Panel also rendered the Decision refusing the Motion of the Prosecutor's Office of BiH of 19 February 2008 by which the Prosecutor's Office of BiH, pursuant to Article 4 of the Law on Transfer requested that in the course of rebuttal the facts established by final

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judgments of the ICTY be accepted as proven in *Prosecutor v. Radislav Krstić*, IT-98-33, and *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60.

The Motion states that the acceptance of the established facts in this phase of the proceedings the higher level of judicial economy is achieved, because the Prosecutor's Office will not have to present the evidence to prove the arguments of the rebuttal, and at the same time the principle of the fair trial would be preserved, because the Defense would be enabled to contest these facts within the presentation of the evidence in rejoinder. Also, the facts which would be accepted as established in this manner would contribute to the correct and complete establishment of the state of facts in the case and they would be in the interest of justice.

The defense for the accused objects to the Motion of the Prosecutor's Office stating that such motion my not be filed in this phase of the proceedings. The Prosecutor's Office already presents the evidence in rebuttal against the evidence for the defense and thereby the fairness of the trial is being jeopardized as well as the expedition of the proceedings, and it is not fair to move the burden of proof on the Defense in this phase. The Defense notes that some of the proposed facts have already been subject to consideration before this Panel in his case and some of these facts were not accepted at the time. In this manner the judicial economy of the proceedings is evidently undermined, because by moving to reconsider the same issue, after it was already decided on, surely undermines the judicial economy of the proceedings.

The Defense also believes that the proposed facts do not meet the already established criteria adopted by this Panel.

The Court heard the arguments of the parties at the trial in the case, and considered the motion of the Prosecution and the prior submissions in writing by the Defense, and rendered the decision stated in the operative part for the following reasons:

Article 4 of the Law on Transfer stipulates that after the hearing of the parties, the Court may on its own initiative or upon the motion of one of the parties decide to accept as proven the facts established by the final decision in other proceedings before the ICTY, or to accept the written evidentiary material from the proceedings before the ICTY relating to matters at issue in the current proceedings.

Analyzing the cited Law on Transfer, the Panel notes that the first formal requirement from the mentioned provision, which relates to the hearing of the parties and their defense counsels, was respected. The Court heard the parties and their defense counsels orally, and the defense counsel for the accused had an opportunity to file with the Court their opinions in writing regarding the Prosecution's Motion.

Furthermore, it follows from the mentioned provision that the acceptance of facts that the prosecutor proposes pursuant to Article 4 of the Law on Transfer is within the Court's discretion. However, neither the Law on Transfer nor the BiH CPC stipulated the legal requirements based on which such facts may be accepted as proven, and also in which phase of the proceedings these facts may be proposed and accepted.

The Panel considers that this motion by the Prosecutor's Office of BiH is not a new piece of evidence or the evidence in rebuttal to the evidence for the Defense. The Panel accepts the Defense's position that the motion to accept the established facts, pursuant to Article 4 of the

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Law on Transfer of Cases, may not be filed in the phase when the Prosecution's evidence in rebuttal is presented.

The facts proposed by this Motion of the Prosecution, in fact, in the opinion of the Panel, are the expansion of the initial phase of the presentation of the evidence for the Prosecution, and as the Defense pointed out, some of the proposed facts have already been considered and rejected by the Decision of the Panel of 3 October 2006.

The acceptance of facts in the final phase of the proceedings is surely in contravention of the judicial economy of the proceedings, because the Defense would have to be given the opportunity to present evidence by which the facts accepted as established would be contested. This could lead to an unjustifiable lengthening of proceedings which have already been pending for almost two years. Furthermore, evidence in rebuttal has to be restricted to evidence rebutting the specific evidence for the Defense and may not consist of a further attempt to meet the original evidentiary burden of the Prosecution.

3. The Accused Matić's Motion

The Panel has refused the Motion by the attorney Miloš Perić, Defense Counsel for the Accused Milovan Matić, for the acceptance as proven of the facts established by the ICTY Judgment in *Prosecutor vs. Vidoje Blagojević and Dragan Jokić*, No. IT-02-60-T dated 17 January 2005, filed with the Court on 25 June 2007. By the analysis of the proposed facts (Paragraph 365 and 366 of this Verdict) it can be easily concluded that the proposed facts pertain to the conclusions of the Trial Panel in that particular case before the ICTY, which is in contravention of this Panel's criteria (especially the criterion under Subparagraph 1.b) for the acceptance of established facts as proven.

4. The Accused Radovanović's Motion

By the Decision of 27 March 2008, the Panel also partially accepted the motion of attorney Dragan Gotovac, Defense Counsel for the Accused Aleksandar Radovanović of 11 February 2008 proposing the acceptance as proven the facts from the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) in *Prosecutor v. Radislav Krstić* and *Prosecuctor v. Vidoje Blagojević and Dragan Jokić*. The following facts have been accepted as proven:

"From the outset, both parties to the conflict violated the 'safe area' agreement." (*Krstić* Trial Judgment, para. 22)

"On more than one occasion, General Krstic was heard to emphasize that no harm must befall the Bosnian Muslim civilians who were being transported out of Potočari." (*Krstić* Trial Judgment, para. 358)

"It is not disputed that the Srebrenica enclave was never fully demilitarized and that elements of the ABiH continued to conduct raids of neighboring Bosnian Serb villages from within the enclave." (*Blagojević and Jokić* Trial Judgment, para.115)

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5. The Accused Trifunović's Motion

On 2 April 2008 the Panel also partially accepted the Motion by attorney Rade Golić, Defense Counsel for the Accused Milenko Trifunović of 26 March 2008 proposing the acceptance of the facts as proven from the final Judgment before the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Radislav Krstić*. The facts marked under the number 2 in the Motion are accepted as proven:

"The Drina Corps Command continued to exercise command competencies in relation to its subordinate Brigades and that this command role was not suspended as a result of the involvement of the VRS Main Staff, or the security organs, in the Srebrenica follow-up activity." (para. 276)

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G. Legality of Search and Seizure

By the Decision of 30 October 2006, the Panel accepted the oral Motion of the Prosecutor's Office of BiH to admit into evidence various items and documents collected or generated in connection with the search warrant of the Court of BiH, No. X-KRN/05/24, issued on 7 September 2005. The following evidence contained in the Indictment was admitted: 173, 174, 175, 193, 125, 130, 207, 62, 64, 126, 170, 171, 172, 194, 65, 64, 118, 165, 195, 127, 128, 63, 67, 158, 168, 66, 154, 156, 155, 68, 131, 132, 183, 184, 186, 187, 185, 189, 67, 133, 134, 136, 144, 145, 161, 162, 169, 137, 138, 139, 176, 177, 192, 124 and 197. The same decision **dismissed** the oral objections made by and on behalf of the Accused regarding the acceptance of the foregoing evidence, in which they argued that the search warrant and the manner in which it was carried out violated the rights of the accused.

The Defense objection claimed that the search warrant, on the basis of which the proposed evidence was collected or generated, violated the fundamental rights of the accused because it was not issued in accordance with the Article 58 of the CPC of BiH, nor executed in compliance with Article 60 of the CPC of BiH.

The Accused and their Defense Counsel state that the following provisions under Article 58 were violated:

> A search warrant must contain:
> c) the name, department or rank of the authorized official to whom it is addressed;
>
> e)... a description of the property- items that is the subject of the search;
>
> j) an instruction that the suspect is entitled to notify the defense attorney and that the search may be executed without the presence of the defense attorney if required by the extraordinary circumstances.

Specifically the Defense has argued that:

1. The warrant fails to state the name of the person to whom it was addressed, but rather it is addressed "to the authorized officials of the Public Security Center Bijeljina, SIPA, and the Prosecutor's Office of Bosnia and Herzegovina investigators."
2. The property was described in the warrant only as "items and traces relevant to the specific criminal proceedings, and all the items (photographs, war documents, notes, recognitions, diaries, medals, items seized from the captured, and similar)...." and that such a description was not sufficiently particular to allow the officials to search for and seize the articles that they did, including weapons, ammunition, and parts of police and military uniforms.
3. The provision in the warrant which states, "The suspects have the right to inform their Defense Counsel on the search, but the Order may be enforced outside the presence of the defense counsel of the suspects, being an urgent matter," is insufficient to protect the rights of the accused, both because of the manner in which it was written and in which the warrant was executed under Article 60. They argue that because the accused were in custody at the time of the search, and all had Counsel, they or the people present at the searched premises, were improperly denied the right to call counsel to be present for the search.

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Defense Counsel for Petar Mitrović objected additionally because there was no occupant present at the time of the search of the premises in which he had an interest.

The Panel analyzed the order of the Court, No. X-KRN/05/24, issued on 7 September 2005, and the file relevant to the warrant in accordance to the objections raised by the Defense Counsel and issued the decision as stated in the operative part for the following reasons:

Article 15 of the CPC of BiH assures that "the evaluation of facts shall not be limited to special formal evidentiary rules." Nothing in the provision on search warrants and seizures of property requires strict compliance with the CPC provisions to be necessary in order for a court to use evidence obtained as a basis for its decision. (*Cf.* Article 79). However, Article 10 provides that "the Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and the international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code."

The human right and freedom at issue when the government searches the dwellings of an individual is the right of respect for private life enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 provides, "Everyone has the right to privacy, both with respect to his own life and the life of his family, his home and his correspondence." However, that right is not absolute, and public authorities can interfere with this right provided that the interference is for one of the purposes stated in the convention ("legitimate aim"); it must be authorized by the law of the state ("according to law"), and it must be necessary in a democratic society ("proportionate").

Applying those requirements to the search here, the Panel concludes that all three requirements justifying government interference with the right to privacy existed. The first two were not contested:

1 The search was conducted for the "legitimate aim" of public safety and prevention of crime. A court had determined under Article 132(1) that there existed grounded suspicion that persons who had an interest in each of the premises searched had committed serious violations of the law constituting war crimes; and that evidence of these crimes was likely to be present on these premises.
2 Interference in the Article 8 rights of the accused by search and seizure under warrant has a basis in the law of BiH. Chapter VIII, Section 1, Articles 51 through 64 of the CPC set out with precision the law regarding search warrants, their execution and their review. The law is identifiable, accessible and foreseeable, and meets the standards the European Court established in its case law. (*See Funke v. France* (App. No. 10828/84), Judgment of 25 February 1993; and *Klass and Others v. Germany*, Judgment of 6 September 1978, Series A no. 28).

The nature of the objections raised by the accused and their respective Defense Attorneys is as to the third requirement, "proportionality". They argue that the search and seizure was carried out in contravention of the safeguards placed in the CPC to assure that the interference with Article 8 rights was no greater than necessary to achieve the legitimate aims.

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The Panel analyzed these objections, by considering whether there was in fact a violation of the CPC and whether these violations, if they existed, placed a disproportionate burden on the Defendant's rights protected under Article 8.

1. Was there a violation of Article 58(c)?

It is indisputable that the warrant does not give the personal name of any authorized official to whom it is addressed. However, it is unclear that the personal name is a prerequisite of the law as written. Article 58(c) uses the disjunctive word "or" when listing "name, department **or** rank...." The warrant does provide the names of the three departments authorized by the Court to serve and execute the warrant. If Article 58(c) is read in conjunction with Article 55 (Request for a search warrant) there is no requirement that the application for the warrant should provide the Court with the personal name of the authorized official to whom it is addressed, only the name of the applicant, who will undoubtedly not be the official executing the warrant. The purpose of Article 58(c) is to assure that the person whose property is being searched knows what officials have been given permission by the Court to conduct the search, so that they may object to entry of anyone not part of the identified agency. The identification of the agency or agencies authorized by the court meets this purpose. This reading is also consistent with Article 61 in which the authorized official "must give notice of his authority and purpose" and confirm it by the warrant, but is not required to give his name. In addition, the person whose property is ultimately seized needs to have notice as to the agencies responsible for the search and seizure sufficient to contest their actions and seek return of the property. That purpose is adequately protected when the name of the authorized agencies appear on the warrant, especially as Article 63 further requires that the signature of the authorized official be on the receipt given at the time of the seizure, and that requirement was met in this case.

The Panel concludes that the safeguards contained in Article 58(c) are sufficiently met if the warrant states the name of the agencies authorized to conduct the searches under the warrant; and that failures to include a personal name of an individual authorized to conduct the search neither unreasonably burden the accused nor constitutes an essential violation of the Code.

2. Was there a violation of Article 58(e)?

The need for description of the items for which the search is to be conducted is designed as a safeguard to ensure that the scope of the search and the items seized is controlled by the judicial authority, and not open to the arbitrary exercise by the agency carrying out the search. In this case the judge described in the warrant a category of items using the words of the law itself "items and traces relevant to the specific criminal proceedings" (See Article 51 paragraph 1). The "specific criminal proceedings" were set out in the warrant as "the criminal offense of Genocide in violation of Article 171 of the Criminal Code of Bosnia and Herzegovina". The Panel considers this to be sufficiently specific to limit the search to those items that would be evidence of genocide and instrumentalities used in the physical destruction of a group in whole or in part. These were in fact the objects that were searched out and seized. In addition, evidence that was less obviously within the description of "traces and items relevant to the commission of genocide", such as items evidencing military service, were described in the warrant by specific example. In the execution of the warrant these items were searched for and seized when found.

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The Panel concludes that the description of items that were to be the subject of the search and seizure was sufficiently particular to limit the scope of the search and the authorization of the seizure to those items that were relevant to the charge, and did in fact limit that scope. The description in the warrant neither unreasonably burdens the accused nor constitutes an essential violation of the Code.

3. Was there a violation of Articled 58(j)?

Defense Counsel for accused argues that Article 58(j) gives the accused the right to have his Defense Counsel present during the search. However, they misread the article. The Article requires that the warrant include an instruction thereof, which it did. That instruction, to the extent that it implies that the suspect has a right to have counsel present, is limited by the law itself in those situations where the judge specifically finds and states on the warrant that the search may proceed without the presence of the lawyer when the judge finds extraordinary circumstances. In this specific case, the judge stated on the warrant, after instructing of the right to inform his Defense Counsel of the search, that "the order may be enforced outside the presence of the Defense Counsel of the suspects, being an urgent matter." The safeguard of attorney presence is to witness the search and to ensure that the suspect has no unrepresented encounter with law enforcement. As the suspects were not at the premises, therefore there was no risk of unrepresented encounters. As the files reflect that there were witnesses to the searches during the execution of each warrant, and those witnesses are named and available to the defense, the Defendant's rights were adequately protected.

The Panel concludes that the instruction regarding notification of Defense Counsel and permission to execute the warrant without counsel being present neither unreasonably burdens the accused nor constitutes an essential violation of the Code. (This matter was considered as well by the preliminary hearing judge on the motion of the defense and similarly decided in decision of February 16, 2006, and the ruling is consistent with that of the Panel.)

Based on the file, the Panel finds Petar Mitrović's objection unfounded with respect that there was no occupant on the premises when they were searched. Although he is correct that no occupant was present during the search, the file indicates that the provision of Article 60 was met in that two neighbors were present throughout the search and signed as witnesses to that fact. Under Article 60(3) and (4), it is sufficient to protect the rights of those interested in a dwelling if, in the absence of an occupant, two neighbors are present as witnesses to the search.

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H. Admission of Reports and Testimony Pursuant to the LoTC

On 4 December 2006, the Panel rendered the Decision that it would use the following evidence obtained by the ICTY:

A. Reports of Richard Butler (Indictment Part 6, Numbers 1 and 2) and Dean Manning (Indictment Part 6, Numbers 11, 14 and 16) are accepted under Article 4 taken in conjunction with Article 8 of the LOTC.

B. Reports set out in Part 6 of the Indictment – Numbers 4, 5, 6, 7, 8, 12, 13 and 15 – are accepted under Article 6(1) of the LOTC.

C. Testimony of Dean Manning (Indictment Part 2, Number 2) and Jean Rene Ruez (Indictment Part 2, Number 1) are accepted under Article 5 of the LOTC.

D. Lists of missing persons in the territory of BiH referred to in Indictment Part 6, Numbers 9, 10 and 17 are accepted under Article 4 taken in conjunction with Article 8 of the LOTC.

E. Testimony of witness Ostoja Stanojević referred to in Indictment Part 6 (sic!), Number 26 is accepted under Article 5(1) of the LOTC.

The oral objections raised by the defense attorneys of the accused with regard to the acceptance of the aforementioned evidence ARE REFUSED as ill-founded.

During the main trial in this case, the Prosecutor's Office moved the Court to admit into evidence a series of documents collected by and transferred from the ICTY. The following evidence was proposed to be admitted as lawful:

1. Evidence of the Prosecutor's Office of BiH referred to in Indictment Part 2:

- Testimony of Jean Rene Ruez given to the ICTY on 15 June, 16 May, 19 May, 21 May and 22 May 2003 – Indictment Part 2, Number 1;
- Testimony of Dean Manning given to the ICTY on 5/6 February 2004 – Indictment Part 2, Number 2.

2. Evidence of the Prosecutor's Office referred to in Indictment Part 6:

- Report on military events in Srebrenica dated 1 November 2002, Richard Butler – Indictment Part 6, Number 1;
- Report on command responsibility of VRS Brigade, Richard Butler – Indictment Part 6, Number 2;
- Report of the United States Naval Criminal Investigative Service on the review and finding of evidence from the Kravica Warehouse – Indictment Part 6, Number 4;
- Report-Appendix to the number of the missing and the dead in Srebrenica by H. Brunborg – Indictment Part 6, Number 5;
- Report on the number of the missing and the dead in Srebrenica by H. Brunborg and M. Urdal – Indictment Part 6, Number 6;
- Report on the review and finding of evidence from the Kravica Warehouse – Indictment Part 6, Number 7;

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- Report on blood and tissue samples found in Grbavica School and the Kravica Warehouse – Indictment Part 6, Number 8;
- Report of the Office of the Prosecutor of the ICTY titled "Missing from Srebrenica – persons who were reported missing after the fall of Srebrenica – Indictment Part 6, Number 9;
- List of missing persons of the International Committee of the Red Cross – Indictment Part 6, Number 10;
- Summary of the expert-medical evidence (mass burial sites) – Indictment Part 6, Number 11;
- Report on digging out and exhumation of Glogova 1 mass grave – Indictment Part 6, Number 12;
- Report on digging out and exhumation of Glogova 2 mass grave – Indictment Part 6, Number 13;
- Summary of the expert-medical evidence (execution and mass burial sites) – Indictment Part 6, Number 14;
- Report by the Chief Pathologist (mass burial sites of Srebrenica) – Indictment Part 6, Number 15;
- Report on review and finding of evidence from the Kravica Warehouse, September/October 2000 – Indictment Part 6, Number 16;
- Publication of the International Committee of the Red Cross on the missing persons in the territory of BiH – Indictment Part 6, Number 17;
- Testimony of witness Ostoja Stanojević – Indictment Part 6, Number 26.

The Prosecution moved the Court to admit the said evidence under Article 6(1)(3) and Articles 3, 5 and 8 of the LOTC.

The defense has lodged objections. In the first place, they pointed out that the LOTC applied only to the ICTY cases transferred to the Court of BiH pursuant to Rule 11 *bis.* The defense further argued that the legal qualification of particular pieces of evidence is disputable, bearing in mind that the Prosecution submitted that the proposed evidence related to statements and reports of expert witnesses, which is questioned by the defense. Specifically, with respect to the evidence referred to in Indictment Part 6, Numbers 1 and 2, the defense opposed the presentation and admission of the said evidence for the reason that Mr. Richard Butler appeared as a military expert before the ICTY, believing that his statement before this court could be considered solely as the statement of an expert witness. However, the defense contended that this would not be in accordance with Article 6(3) of the LOTC because the subject under discussion was not statements that the expert witness gave before the ICTY. Furthermore, the defense emphasized that Butler prepared his report on the basis of documents of the Office of the Prosecutor of the ICTY; therefore, this was not an independent expert witness and this piece of evidence could not be subsumed under the provisions of Article 6 of the LOTC. The defense also requested that only the statement by Richard Butler given at the main trial before the ICTY be admitted into evidence and not the evidence proposed in the Indictment. Moreover, the defense stressed that Article 6(1) of the LOTC included statements of expert witnesses only and not their reports or any other written material, this being an additional reason for the defense to argue that the said evidence was not admissible according to valid regulations. In addition, the defense pointed out that, in any event, one could not admit into evidence any written material prepared by an expert witness without previously admitting into evidence the testimony of that witness given at the main trial, as required by Article 170 (sic!) of the BiH CPC.

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As regards the remaining evidence referred to in Indictment Part 6, the defense noted that it was not clear which provision of the LOTC for admission of evidence was invoked. Furthermore, the defense emphasized that it was not quite clear which type of evidence was at stake; in other words, the legal qualification of the proposed evidence was disputable. Specifically, as the Indictment moved for admission of *reports*, the defense contended that the present case did not concern findings of expert witnesses but rather interpretations of findings by persons who did not participate in the preparation of the findings. The defense underlined that neither the CPC of BiH nor the LOTC provided for a possibility of admitting *reports* into evidence and, therefore, they expressed opposition in this regard. In addition, the defense pointed out that the Prosecution altered the ground for admission of the proposed evidence.

Moreover, the defense attorney of the accused Milovan Matić argued that Exhibits 4, 5, 6, 7, 8, 11, 12, 13, 15 and 16 were, to all effects and purposes, findings and opinions of expert witnesses and they should be treated accordingly, this type of evidence not being addressed by the LOTC. However, the defense attorney was of the opinion that when interpreting the term *statement* in Article 6 of the LOTC, a conclusion that the provision in question did not, in effect, include written findings and opinions but solely oral evidence given before an ICTY Chamber can be drawn. The defense also argued that the said evidence could be admitted into evidence solely on the condition if it was supplied by competent expert witnesses. The defense therefore contended that the manner of tendering evidence proposed by the Prosecution was inadmissible, i.e. through the statement by Dean Manning. The defense does not regard this person as an expert witness because he was an employee of the Office of the Prosecutor of the ICTY.

The Panel has heard the arguments put forward by both parties and decided as worded in the enacting clause herein for the following reasons:

Legislative History and Purpose

Article 1 of the BiH CPC provides that:

> This Code shall set forth the rules of the criminal procedure *that are mandatory* for the proceedings of the Court of BiH, the Chief Prosecutor of Bosnia and Herzegovina and other participants in the criminal proceedings provided by this Code, when acting in criminal matters.

Article 3(1) of the LOTC provides that:

> Evidence collected in accordance with the ICTY Statute and Rules of Procedure and Evidence may be used in proceedings before the courts in BiH.

The LOTC was designed as *lex specialis* to avert the risk that the CPC might make ICTY evidence unusable. *Lex specialis* amounts to special rules which pre-empt the CPC as to subject matter (evidence collected by the ICTY) and scope (rules on admissibility and use). As *lex specialis*, as relevant to the proffered evidence under discussion, the LOTC either: derogates from and pre-empts the CPC where it is inconsistent; or reverts to the CPC to cover those issues not specifically addressed by the LOTC (Article 1(2)).

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Furthermore, Article 3(1) of the LOTC provides for the use of evidence collected by the ICTY in proceedings before the courts in BiH. Consequently, one can rule out the possibility of using this evidence solely before the Court of BiH in cases transferred from the ICTY. This law defines a procedure of transfer of cases to the Prosecutor's Office of BiH. Aside from that, the LOTC also defines a procedure and conditions of use of such evidence before other courts, which manifestly derives from its provisions.

Analysis as to all

The reports and testimony which the Prosecution seeks to admit under Part 6 of the Indictment and Part 2, Numbers 1 and 2, fall within the scope of the LOTC. They all meet the requirements of Article 8 because it was collected and certified as held by the ICTY by electronic stamp. It also meets the requirements of Article 3(1) because there is no claimed or apparent irregularity in the collection or use under the statute and rules of the ICTY. It meets the requirements of Article 4 because they were presented to this court in the form of documents admitted as either oral or written evidence in a proceeding before the ICTY.

Analysis as to particular type of evidence

Some of the evidence offered by the Prosecutor also meets the more particular description of Articles 5 and 6 of the LOTC. To the extent that particular provisions of the law apply, their use in analyzing the material is preferred over the general. Articles 5 and 6 relate to statements accepted at proceedings of the ICTY. In English, the word statement can mean either a written statement or an oral statement, depending on the context. In local language the word “iskaz” is used. It has been argued that “iskaz” can only mean an oral statement. However, when reading the local language in context, the word “iskaz” in three places is modified by the word oral (Article 3(2), Article 6(1) and Article 6(2)), which indicates that in the LOTC, “iskaz” unmodified has the same flexible meaning as statement in English and that a determination of whether it means written or verbal statement or either or both would depend on the context.

Article 6(1) and Article 6(3) both refer to “iskaz” in local language. When viewed in context, the word “iskaz” in Article 6(1) can be distinguished from Article 6(3). The statement in Article 6(1) is the written statement of an expert (the equivalent in the CPC to ’findings and opinion’) entered into evidence before the ICTY. The statement in Article 6(3) is the verbal testimony of an expert, given before an ICTY proceeding, reduced for our use to a transcript.

In Article 5 “iskaz” has the meaning of verbal testimony given under oath and subject to cross-examination in a proceeding of the ICTY. The context makes this clear because it appears in the same article and paragraph as deposition statements taken according to Rule 71 of the Rules of Procedure and Evidence. Depositions taken according to Rule 71 of the Rules of Procedure and Evidence are testimony given under oath and subject to cross-examination. This confirms a testamentary reading of Article 5(1).

Analysis as to the rights secured by the European Convention

The LOTC does not remove the obligation of the Court to assure fairness in the proceedings to the accused. The Articles of the European Convention on Human Rights relevant to the admission of this kind of evidence are Article 6(1) which guarantees the right to a fair trial and Article 6(3) that provides the right to confrontation and production of witnesses.

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Article 6(1) and (3)(d) of the European Convention, provide in relevant part:

> 1. In the determination of... any criminal charge against him, everyone is entitled to a fair… public hearing…
>
> 3. Everyone charged with a criminal offense has the following minimum rights:
>
> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The European Court of Human Rights has determined that general principles of fair trial include the right of the defendant to be confronted with witnesses and evidence against him at a public hearing, and a meaningful right to challenge the evidence and cross examine the witnesses.[428] These rights are not unlimited, however. The European Court will not lay down rules of evidence, but it will review whether the use of evidence accepted in violation of the rights of the accused deprived him of a fair trial. Specifically, if improper evidence was the basis of a verdict of guilty, either wholly or in substantial part, then there will be a finding that the rights of the defendant have been violated.

The LOTC emphasizes that the accused has the right to request cross-examination of the witness whose statements the Court decides to use under Article 5. If the opportunity for cross-examination is not afforded, the statement, if accepted, will be subject to Article 3(2) of the LOTC.

> The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.

Written or transcribed statements or testimony of lay and expert witnesses, absent cross-examination of the witness by the accused in our Court, at best, can only be used to corroborate other direct evidence of guilt. Given that caveat, the LOTC leaves it up to the Court to decide whether the witness should be produced for cross-examination. In many instances, witnesses will be either impossible to produce for cross-examination or their production will involve considerable time and expense, thereby lengthening the trial perhaps significantly. Therefore, in order for the Court to exercise its discretion regarding requests for cross-examination, the Court must know what is contested by the party seeking to cross examine.

The purpose of cross-examination is to challenge and test the reliability of the information about which the witness testifies. If there is no dispute over that testimony, then cross-examination is unnecessary. If the testimony is disputed, but previous cross-examination by accused with a similar interest in challenging the evidence has occurred, and is available to the parties and Court, then further cross-examination may not be necessary. Requests for cross-examination must be made in good faith, in order for the Court to rule fairly. The

[428] *Messegue and Jabardo*, Judgment of 6 December 1988, para. 78.; *Kostovski v. The Netherlands*, Judgment of 20 November 1989, paras. 41-45; *Asch v. Austria*, Judgment of 26 April 1991, paras. 26-31; *Unterpertinger v. Austria*, Judgment of 24 November 1991; *Ludi v. Switzerland*, Judgment of 15 June 1992, paras. 43-50; *Luca v. Italy*, Judgment of 22 January 2001, paras. 39-45.

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defense has heard the testimony offered in Indictment Part 6, Item 26 and it is in a more advantageous position than had the witness appeared live because it can at leisure evaluate the testimony and consider the areas where cross-examination is necessary to its case.

Therefore if any accused or defense attorney wishes to petition the Court for production of the witness for cross-examination, they are required, in writing, to file a "Request for production of witness for cross-examination" and highlight, either on the paper transcript or by reference to the relevant section of tape of the read transcript, the particular answers given by the witness that are in dispute and on which the defense intends to cross-examine. Cross-examination must be restricted to the scope of the direct (Article 1(2) of the LOTC and Article 262(1) of the CPC). The Court will consider these requests if filed and rule upon them promptly.

A. The reports set out in Part 6 of the Indictment, Numbers 4, 5, 6, 7, 8, 12, 13, and 15 are accepted under Article 6(1) of the LOTC

The interpretation of this Panel of the statement referred to in Article 6(1) of the LOTC is the equivalent of a written report, or "findings and opinion of an expert". The material in Part 6 of the Indictment, Numbers 4, 5, 6, 7, 8, 12, 13, and 15 are the findings and opinions of persons recognized before the ICTY as experts and were admitted as such in proceedings before the ICTY. They therefore meet the formal requirements of the LOTC, which pre-empts the requirement of Article 270(5) of the BiH CPC requiring that the author of the report appear in court in order for the report to be admitted. Their use is subject to the further provision of Article 6(2) that it be used in the same way as if the person who made the report were giving oral evidence in the Court of BiH. Each of these reports was given by persons who had special expertise in their fields and the reports and opinions of those experts assist in the evaluation of the relevant issues. The Court therefore accepts them as expert findings and opinion. The ultimate use of these reports will be determined by the Court after all the evidence and arguments have been heard, at which time this evidence will be assessed as to reliability, weight and probative value.

B. The reports of Richard Butler (Indictment Parts 6, Numbers 1 and 2) and Dean Manning (Indictment Part 6, Numbers 11, 14 and 16) are accepted under Article 4 taken in conjunction with Article 8 of the LOTC

These reports meet the formal requirements of Article 6(1) of the LOTC in that they were admitted as expert reports in proceedings before the ICTY. However, in applying Article 6(2), if these reports were presented before the Court as oral submissions, this Court would not accept them as the reports of experts. The reports contain three types of information: argument, first hand information and compilation of the list of other evidence. The first hand information and the lists of other evidence are accepted by the Court under Article 4 of the LOTC. However, the arguments, in the form of opinion, are not.

Argument, described as opinion, is the bulk of these reports, and the court determines that it is not the proper subject of opinion evidence. It is up to the Court to conclude what the evidence means. The Court is assisted by the closing arguments of counsel who assemble the evidence and suggest the use that should be made of it. However, the ultimate use to be made of the evidence is within the ultimate expertise of the Court and is not the proper subject of expert testimony. The opinions contained in the proffered reports of Mr. Butler and Mr. Manning will not be used by the Court as evidence. The Parties may, however, highlight

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specific sections of the report as part of their closing argument provided that: a) the facts on which these arguments are based have been admitted into evidence, and b) the sources of the facts on which arguments rely are referenced with particularity, that is, the party advancing the argument sets out in writing the particular part of the document or testimony that supports the particular conclusions found in the Butler or Manning reports on which the Party relies.

First hand information contained in the reports, will be accepted as evidence under Article 4 of the LOTC because it is contained in a document admitted before the ICTY proceedings. It will be subject to the same limitations and analysis as all LOTC evidence, including Article 3(2).

Lists of other evidence to which the reports refer, will be accepted as evidence that additional evidence exists. Consideration of the evidence which is listed in the reports will be subject to further submissions into evidence by the parties and its acceptance will be determined at the time it is offered.

C. The testimony of Dean Manning (Indictment Part 2, Number 2) and Jean Rene Ruez (Indictment Part 2, Number 1) are accepted under Article 5 of the LOTC

This testimony meets the formal requirements of Article 5 in that it is in the form of transcripts of testimony taken under oath and subject to cross-examination before the ICTY. To the extent that this evidence contains actual first hand knowledge, as opposed to so-called "summary evidence" and lists of additional evidence, it will be used by this Court, under Article 5.

For the same reasons discussed in some detail regarding the reports of Butler and Manning, the ultimate opinions offered by Mr. Manning and Mr. Ruez through their testimony will not be used as evidence. Specifically, their opinions regarding the way in which the evidence collected by or from others should be viewed by the Court, and the conclusions which they suggest that the Court should draw from that evidence may be appropriate for closing argument, and may be used by the parties for that purpose. However, these opinions will not be used by the Court as evidence, as Mr. Manning and Mr. Ruez had no more expertise than the Court in reaching conclusions based on evidence.

Lists of other evidence to which the testimony refers, will be accepted as evidence that additional evidence exists. Consideration of the evidence which is listed in the testimony will be subject to further submissions into evidence by the parties and its acceptance will be determined at the time it is offered.

The testimony is therefore not accepted under Article 6(3), but will, as limited herein, be accepted under Article 5, and the ultimate use to be made of it will be determined by the Court after all the evidence and arguments have been heard and the weight, reliability and probative value of the evidence have been decided by the Court in its verdict.

D. The lists of missing persons (Indictment Part 6, Numbers 9, 10 and 17) are accepted under Article 4 taken in conjunction with Article 8 of the LOTC

The lists of missing persons prepared by the International Committee of the Red Cross were admitted into evidence in proceedings before the ICTY. It does not meet the more particular requirements of Articles 5 and 6 and will be accepted under Article 4. The ultimate use to be

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made of it will be determined by the Court after all the evidence and arguments have been heard and the weight, reliability and probative value of the evidence have been decided by the Court in its verdict.

E. The testimony of witness Ostoja Stanojević referred to in Indictment Part 6 (sic!), Number 26 is accepted under Article 5(1) of the LOTC

The testimony offered under item 26 of Part 2 meets the formal criteria laid down in Article 5(1); it is accepted and it will be subject to the same limitations and analysis as all LOTC evidence, including Article 3(2). The ultimate use to be made of it will be determined by the Court after all the evidence and arguments have been heard and the weight, reliability and probative value of the evidence have been decided by the Court in its verdict.

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I. Hunger Strike Decision

On 11 January 2007, the Panel rendered the decision that the trial would be held in the absence of the Accused because they unjustifiably refused to appear at the scheduled hearings to which they were duly summoned. This decision did not deny the possibility to the accused to appear at the hearing at any time. By this Decision the Panel ordered that the hearings without presence of the accused would be attended by their defense counsels, and it is also stated that the Court would reconsider this decision throughout the proceedings and evaluate its further effect. The decision also ordered that a recording of the main trial be delivered to each Accused on the same day that the hearing was held.

The trial started on 9 May 2006. Each accused was summoned and present and was informed of the charges against him in his own language. The main trial has continued on a regular schedule since its beginning, and each accused has attended every session. Each accused selected two attorneys to represent him from a list of attorneys qualified by training and experience to appear in serious cases involving war crimes. The two attorneys chosen by each accused have represented each throughout the trial at court expense. No accused has indicated any dissatisfaction with their chosen attorneys and the Court considers that all defense counsel have behaved competently and professionally.

The accused were legally summoned to the continuation of the main trial on 10 January 2007 and transportation was provided for their appearance at this Court. They all consulted with their attorneys on 10 January. They each were requested by state police to accompany them to the courtroom on 10 and 11 January. They each refused to leave their detention unit. They have advised their counsel, who have reported to the Court, their reasons for declining to enter the courtroom. These reasons are: that they are either personally involved in a hunger strike, or they support other inmates that are involved in the hunger strike; and that the strike is designed to emphasize their demand that the Constitutional Court render speedy decisions on the appeal of certain issues of law decided by the Court of BiH in this and other cases, with which the accused disagree.

The Panel then postponed the resumption of the trial to be held on 11 January 2007 and summoned the accused to appear before the Court on the given date in order to verbally present the Panel with the reasons for such decision. However on 11 January 2007 all the accused again refused to appear at the hearing.

The Prosecutor's Office of BiH stated that such conduct of the accused was aimed at delaying the proceedings and that the Court should use its authority and order that they be forcibly brought in, and eventually continue the proceedings without their presence. The Defense Counsels objected to the continuation of the trial without the presence of the defendants, stating that the basic legal right of the accused was the right to a fair trial, and that right required that he be present in person during the proceedings against him.

The Panel heard the presented arguments and rendered the decision as stated in the operative part for the following reasons:

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1. The Continuation of the Trial without the Presence of the Accused does not Constitute a Violation of the CPC

Article 247 of the BiH CPC bans trial in case of absentia of the accused**.** However**,** the question is raised as to how to define the term "*in absentia*", that is, if it is the absence of the accused at the main trial when the accused are not available to the Court physically, or, it is the absence of the accused from a hearing to which he is summoned, or it is the absence when the accused are physically available but they unjustifiably refuse to appear in the courtroom.

Although the BiH CPC in its provisions does not anticipate in full all the situations that might occur, Article 242(2) of the BiH CPC provides that the presiding judge may order that the accused be removed from the courtroom. In other words, it is clear that when it comes to the presence of the accused in the proceedings, some exceptions can be established. Generally, the term trial in absentia may be interpreted as full unavailability of the accused in the proceedings, when he is on the run, or in hiding, but it mainly refers to the cases when it is impossible to provide his presence during the proceedings because his whereabouts are unknown or there are other difficulties to inform him about the proceedings or to ensure his presence.

In the case concerned all the accused were ordered into custody, as the ultimate measure to ensure the presence of the accused and the successful conduct of the criminal proceedings. In other words the accused are not "*in absentia*", so that the ban of trial in absentia under Article 247 of the BiH CPC is not put in question.

The forcible bringing in of the accused who was duly summoned pursuant to Article 246(1) of the BiH CPC refers to the situation when the accused was duly summoned but fails to appear at the hearing and does not justify his absence. If apprehension was not successful, the judge or the presiding judge may order that the accused be placed in custody for maximum 30 days. Evidently the purpose of this provision is that the accused is familiarized with the criminal proceedings ongoing against him, however this provision is not applicable to the accused who are already in custody and unjustifiably refuse to appear at the scheduled hearings to which they were timely and duly summoned.

In this case the accused are already in custody. They are available to attend the trial in the courtroom and every measure has been taken to assist them in exercising their right to attend. However, the use of force against a person to make him exercise his right, in the opinion of this Panel, is not contemplated by the CPC nor applicable in the case at hand either for the respect of the dignity of a person or for the final goal which one wishes to achieve by doing so, exactly for the reason that no one has denied the accused their right to attend the trial. The Panel deems that the coercive measures or the use of the physical force to make a person exercise his right to attend the trial, as the Decision of this Court in *Stanković* case no. X-KR-05/70, of 4 July 2006 "...are not the appropriate way to make the accused know that the trial will be continued in his absence."

Although there are no specific provisions in the CPC which would regulate the situation caused by the unjustified refusal of the accused to appear at the scheduled hearing, neither are there any provisions under the BiH CPC which would prevent the Court from continuing the proceedings even without the presence of the accused in such a situation. The Panel will therefore consider the situation in terms of the protection of the fundamental rights and the freedoms of the accused.

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2. The Continuation of the Trial under these Circumstances does not Constitute a Violation of the Fundamental Rights and Freedoms of the Accused

Article 14(3) of the UN Covenant on Civil and Political Rights sets forth the following:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

With respect to the absence of the accused from the trial, the United Nations Human Rights Committee has concluded: in case the Prosecution fails to support the denial of the mentioned violation of this right, for instance by submitting a copy of the main trial transcript, the Commission has concluded that this right is violated. Consequently, while such trials do not *ipso facto* constitute violations of Article 14 of the Charter, a trial *in absentia* is compatible with Article 14 "when the accused has been summoned 'in a timely manner and informed of the proceedings against him' and the State party can show that the principles of a fair trial were respected." (Letter No. 699/1996, *A. Maleki v. Italy* (Opinions adopted on 15 July 1999), in the document UN. GAOR**,** A/54/40 (vol. II), p. 183, paras. 9.2-9.3.).

Article 6 (3) of the European Convention prescribes:

> Everyone charged with a criminal offence has the following minimum rights:
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

More specifically, it follows from the mentioned provisions that the accused has the right to directly and actively participate in the proceedings ongoing against him, and the state, through the court must ensure the Accused the opportunity to exercise these rights.

The European Court has held that "Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Nonetheless, as with other rights secured by the Convention, this right may be waived, provided that the

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waiver is 'established in an unequivocal manner.'"[429] The European Court has stated specifically that "when the accused has waived his right to appear and to defend himself… such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance."[430]

In addition, Article 6(3)(c) and (d) the proceedings may not be conducted without giving the accused an opportunity to present his defense, but this Article does not place a duty on the accused to exercise that right personally by personal presence in the proceedings.[431] The European Court will look at the fairness of the trial as a whole in order to determine if these rights have been secured.[432] This Court has an obligation to protect the right of the accused to a defense, whether or not the accused decide to enter the courtroom. The European Court has held that when there is a decision by an accused not to attend his own proceeding, "it is of importance for the fairness of the criminal justice system that the accused be adequately defended."[433]

3. Conclusion

In conclusion, if the foregoing is analyzed in the context of conducting the proceedings in the absence of the accused, it is possible only if the proceedings are held while respecting the basic protective mechanisms required by the jurisprudence of the European Court of Human Rights:

a. Knowledge of the charges against them in the mother tongue;
b. Timely notification of the hearing;
c. Ability to attend and to follow the proceedings;
d. Representation through a defense counsel;
e. Right to consult the defense counsel;
f. The existence of a clear, voluntary and unequivocal waiver of the right to attend the trial.

It is undisputable that the accused have been informed of the charges against them given that the Indictment in the case was confirmed on 19 December 2005, and it was delivered to the accused, and that at the onset of the proceedings was read out in their presence at the open session of the Court. In addition, the *ex officio* defense counsel was appointed to the accused, and subsequently the additional *ex officio* defense counsel of their choice, so that each accused is represented by two *ex officio* defense counsel of their choice whom they were entitled to consult and to date they have exercised that right without obstacles. More specifically, the principal and basic guarantees have been respected. In the course of the proceedings the Panel was informed, as it was stated, on 10 January 2007 that the accused in the case had gone on hunger strike and that they refused to appear in the court room. It was also established that they had been duly and timely informed about the continuation of the trial, and in spite of that they refused to leave the detention units and to be escorted by the court police to the trial.

[429] *Colozza v. Italy* (App. 9024/80), Judgment of 12 February 1985, p. 27 and 28.
[430] *Poitrimol v. France* (App. 14032/88), Judgment of 23 November 1993.
[431] *See Enslin, Baader and Raspe vs. Germany*, Judgment of 8 July 1978, para. 21.
[432] *Barbera, Messeque and Jabardo vs. Spain*, Judgment of 6 December 1988, para. 68.
[433] *EuErik Ninn-Hansen vs. Denmark*, Application no. 28972/95.

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The Panel therefore considered the two remaining issues:

- Ability of the Accused to attend and follow the proceedings.

- The existence of a clear, voluntary and unequivocal waiver of the right to attend the trial.

The reasons given by the accused for refusal to enter the courtroom for their main trial do not justify delaying the trial in order to accommodate future attendance by the accused. There are two separate activities involved: the hunger strike is the first and the refusal to enter the courtroom is the second.

As to the relevance of the hunger strike, on the dates when the hearings were scheduled, the accused were capable of attending the trial and they were not incapacitated by their alleged failure to consume food. The Court had no information as of the day when the hearing was scheduled that would lead to the conclusion that any accused was physically incapacitated to a degree that would interfere with his ability to attend the hearing. More precisely, their physical and mental abilities were not questionable to attend the scheduled hearings. The fact that they went on the hunger strike is relevant should the effects of the strike to the mental and physical health of the detainees influence their ability to attend and to follow the proceedings. However, this would require ongoing medical assessment, and as of the dates when the accused failed to appear, there had been no negative effects on the health of the accused in this case.

The second activity, refusal to enter the courtroom, is disruptive of these proceedings and has no necessary connection with the hunger strike at this point. It is a separate independent act of protest. It does not justify delaying the proceedings either as a matter of law or as a practical matter. As a matter of law it can only be seen as a violation of this Court's summons, motivated by a desire to prolong what is already a lengthy trial, for no legal or legitimate reason. As a matter of practicality, disruption of the main trial in this Court cannot accomplish any of the stated goals of the accused because this Court has no control over the schedule of the Constitutional Court. The strikers' arguments which they have raised before the Constitutional Court will not be compromised in any way by the Panel's decision to go forward with their trial. To the contrary, the constitutional rights of the accused to a speedy trial are compromised by the disruption.

The Accused have made a clear and unequivocal waiver of their right to be present at the main trial. The Panel notes that the accused refused to appear in court not only on 10 January, when they were summoned for continuation of the main trial, but also on the following day, 11 January 2007, when they refused to attend a hearing scheduled especially to hear them regarding their reasons for the hunger strike and for their absence from the main trial. The Panel concludes that the accused, by failing to appear to the hearing for the second time (about which they knew was not the continuation of the main trial but an opportunity for them to present their positions to the Panel), and failing to notify the Court thereof in person, they indisputably and clearly expressed their lack of interest in the proceedings pending against them, and thereby indisputably and clearly waived their right to attend the main trial in the case.

Furthermore, pursuant to the European Convention and the CPC BiH the Court is mandated to conduct the proceedings against the accused without delay. In addition, the Panel, in respect to the accused, when they are in custody based on the decisions of this Court, and

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when the custody is ordered as the measure to secure their presence in the proceedings, has the higher level of responsibility in conduct of the proceedings when it comes to the expeditious conduct of the proceedings because it follows from Article 131(2) of the BiH CPC: "It is the duty of all bodies participating in criminal proceedings to proceed with particular urgency." Apart from that, as it follows from the above mentioned decisions that the right of the accused of the criminal offence to be personally present in person in the proceedings pending against him is one of the basic rights. It is the *obligation* of the court to enable him to exercise that right and to give him an *opportunity* to appear before the court and to be heard. The Panel fulfilled that obligation. The accused have the possibility to freely waive the right, and reject the opportunity. Having in mind that the Panel is bound to continue the trial and to complete it within the reasonable deadline, the actions of the accused have no legal or practical object other than obstruction in order to delay the proceedings and to exert improper pressure on the Court which the Panel will not allow.

Based on the mentioned jurisprudence of the European Court the following questions relevant to the conduct of the proceedings arise when the proceedings are conducted without the presence of the accused because of their decision not to attend the hearings:

a) The right of the accused to attend the proceedings against them *is not an absolute right* and the accused may waive that right.
b) The waiver of the right has to be clear and unequivocal.
c) The Court is bound to use all means available to assure that the accused is able to follow the proceedings.
d) The Court has to provide the accused with the right to defense in such manner that the proceedings may not be held in the absence of the defense counsel.

Having in mind these considerations, the Court did everything possible to protect the rights of the accused to a fair trial, given their refusal to appear at the properly scheduled and noticed hearings. The Court proceeded according to the original trial schedule. The accused continued to be summoned and it was the continuing expectation of the Court that they would appear, for those Accused who continued to refuse to enter the Courtroom, the Court put the following procedure in place in order to assure their continued right to a fair trial:

1. Each accused would be asked by an authorized officer of the police of the state level detention unit if each was willing to accompany the police to the courtroom.
2. Official notes would be made by the authorized police officer as to the refusal of any accused to the request to attend the proceedings. These notes were to be filed with the Court at the start of the main trial each day and available to all counsel.
3. Those accused who were refusing food would be monitored regularly, including each morning on which trial was scheduled, by competent medical personnel as to their general health and their specific ability to participate in the proceedings.
4. The medical practitioner appointed by the Court was to report personally to the Court at the beginning of the trial day in the presence of the parties and counsel.

Each absent accused was to be provided with an audio/video recording of each days full proceedings. Attorneys were encouraged to have frequent contact with their clients, including telephone contact during breaks in the trial proceedings. After reviewing the trial record and consulting with counsel, the accused were given permission to request that witnesses be recalled for additional non repetitive cross-examination.

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J. Decision on Cross-Examination of Witnesses from the ICTY

On 12 April 2007 the Panel rendered the decision allowing the cross-examination of the witnesses, whose statements and reports in writing had been admitted as evidence in the proceedings as follows:

A. Richard Butler: regarding his reports (Sections 6.1 and 6.2 of the Indictment), who testified in the case on 21 March 2008.

B. Dean Manning: regarding his reports (Sections 6.11, 6.14 and 6.16 of the Indictment) and his statement (Section 2.2 of the Indictment) who testified in the case via video link 12 March 2008.[434]

C. Jean Rene Ruez: regarding his statement (Section 2.1 of the Indictment) who testified in the case on 2 April 2008 via video link.[435]

D. Robert Aleksander Franken: regarding his statement (Section 2.11 of the Indictment) who testified in the case on 18 July 2007 via video link.[436]

During the trial the Prosecutor's Office proposed that series of the documents and statements, given before the ICTY and taken over from the ICTY, be admitted as evidence. The admission of the evidence below was proposed pursuant to Article 6(1) and (3), and Articles 3, 5 and 8 of the Law on Transfer:

1. Evidence for the Prosecution of BiH stated in Section 2 of the Indictment:
- Statement given by Jean Rene Ruez to the ICTY on 15 June, 16 May, 19 May, 21 and 22 May 2003 – Section 2.1. of the Indictment;
- Statement given by Dean Manning to the ICTY on 5/6 February 2004 – Section 2.2. of the Indictment;
- Statement given by Franken Robert Aleksander at the ICTY on 26 September 1995 – Section 2.11 of the Indictment.

2. Evidence for the Prosecutor's Office of BiH stated in Section 6 of the Indictment:

- Statement on the military developments in Srebrenica, given on 1 November 2002, Richard Butler – Section 6.1 of the Indictment;
- Report on the command responsibility in the VRS brigades, Richard Butler – Section 6.2 of the Indictment; and
- Summary of the forensic evidentiary material (mass graves), summary of the forensic evidentiary material (execution sites and mass graves); Report on examination and taking evidence from the warehouse in Kravica, September-October 2000, made by Dean Manning – Sections 6.11, 6.14 and 6.16 of the Indictment.

The Prosecutor read the relevant parts of the proposed evidence in order for the Panel to evaluate their admissibility. By the decision in writing of 4 December 2006 (regarding Dean Manning, Richard Butler and Jean Rene Ruez) the Panel admitted into the evidence the

[434] On 7 February 2008, the Panel obtained confirmation of the waiver of the immunity from the UN Secretary General, and after the obtaining of the confirmation it examined this witness.
[435] As under the footnote above, date of confirmation of the waiver of immunity was 7 February 2008.
[436] As under the footnote above, date of confirmation of the waiver of immunity was 17 July 2007.

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reports mentioned in the Sections 2.1, 2.2, 6.1, 6.2, 6.11, 6.14 and 6.16 of the Indictment pursuant to Article 4, 5 and 8 of the Law on Transfer. The Panel separately, by an oral decision rendered on 29 March 2007, admitted into evidence the statement of Robert Aleksander Franken, which is listed in the Section 2.11 of the Indictment.

The Defense filed in writing the motions to cross-examine the above mentioned witnesses. In addition, the oral Motions of the Defense Counsels were heard on 12 April 2007. The Defense considers that the cross-examination is a basic right guaranteed by Article 262 and 270 of the BiH CPC, Article 5(3) and Article 6(4) of the Law of Transfer, Article 6(3)(d) of the European Convention on Protection of Human Rights and Fundamental Freedoms and the Constitution of BiH. What's more, this right is not limited or conditioned in any way. The Defense Counsel for Milovan Matić further presented an argument that, regarding the severity of the criminal offence with which his client is charged, the interests of justice favor the cross-examination.

The Defense Counsels for Velibor Maksimović and Dragiša Živanović said that the mentioned persons were engaged in the proceedings before the ICTY for several years and in this regard they spent a lot of time in Bosnia and Herzegovina. Having that in mind it is unclear why they may not appear before the Court of BiH now. Furthermore, they presented the argument that in terms of the fact that the work taken over by the Court of BIH is the work started before the ICTY, those persons have both the moral and professional obligation to appear before this Court. In case that the Prosecution fails to ensure their presence, the Defense Counsel for Velibor Maksimović requested that the Court uses its authority to reject the evidence pursuant to Articles 5(1) and 6(1) of the Law on Transfer.

Responding to the order of the Court that the submission should indicate parts of statements related to which the cross-examination is requested, many defense counsel refused to do so, stating that it would be premature disclosure of their strategy. Furthermore, the Defense Counsel for Milovan Matić stated that the right to the cross-examination should not depend on such statement, because in practice the relevant questions are raised based on *ad hoc* principle. On the contrary, the Defense Counsel for Miladin Stevanović stated that the Law on Transfer defines the right to the cross-examination as a discretionary right and therefore he made detailed submission regarding his request for cross-examination.

The prosecution filed an objection to the submissions of the Defense whereby cross-examination is requested of all the mentioned witnesses. The prosecutor's argument regarding Dean Manning is that his entire report simply connected other evidence collected by other bodies, therefore there is no need for his cross-examination. Furthermore, the Defense did not point to any specific evidence by which the credibility of Robert Aleksander Franken would be put in question.

The Panel heard the submissions of all parties and decided as stated in the operative part for the following reasons:

Context

The Defense requests the cross-examination of the reports submitted to the ICTY which were admitted in these proceedings pursuant to Article 4 and 8 of the law on Transfer, and the statement given before the ICTY admitted pursuant to Article 5 (1) of the Law on Transfer.

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The right to cross-examine witnesses against the defense before the Court of BiH is secured by Article 6(1) and 6.3(d) of the European Convention as well as Article 262(1) of the CPC of BiH. However, as far as evidence collected and used by the ICTY is concerned, the CPC is subject to the LOTC. The LOTC was designed as *lex specialis*, to avert the risk that the CPC might make ICTY evidence unusable. As the *lex specialis*, regarding these evidence, the Law on Transfer departs, that is, supersedes the CPC in the cases when it is not in line with it.

Compatibility of the Law on Transfer with the European Convention on Human Rights, Article 6

Although the LOTC, Article 4 and 5(1), provides for the admission of ICTY evidence without the need to call the witnesses live, it does not preclude calling these witnesses by the defense for the purpose of cross-examination.

Article 5(3) of the Law on Transfer provides the following:

> Nothing in this provision shall prejudice the defendant's right to request the attendance of witnesses as referred to in Paragraph 1 of this Article for the purpose of cross-examination. The decision on the request shall be made by the court.

Accordingly, the Court has the discretion to grant or to reject such requests.

The Law on Transfer further limits the use of evidence which was not subject to cross-examination, under the general principle set out in Article 3(2):

> The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.

Consequently the question arises as to whether the LoTC, which leaves to the discretion of the Court the decision on providing cross-examination of ICTY witnesses, violates the right to a fair trial under Article 6 of the European Convention. The Court concludes that it is not the case, given the fact that the right to the cross-examination provided for under Article 6(3)(d) is not an absolute or unconditional right. Although the right of Defense is regularly ensured through cross-examination,[437] the reading out of the statements is not necessarily incompatible with Article 6 in cases when there was no opportunity for the cross-examination.[438] If evidence was not subject to cross-examination, the Court may not base the verdict in its entirety or to a decisive extent on such evidence. The European Court has held: "In itself, the reading out of statements in this way cannot be regarded as being inconsistent with Article 6 §§ 1 and 3 (d) (art. 6-1, art. 6-3-d) of the Convention, but the use made of them as evidence must nevertheless comply with the rights of the defense, which it is the object and purpose of Article 6 (art. 6) to protect."[439] Consequently, evidence not subject to cross-examination may be used by the court as corroboration of other evidence for which the Accused's right to cross-examine have been secured, provided that the use in that way would not lead to the situation that the court proceeding, in its entirety, is unfair. The considerations in this regard include the existing procedures as the compensation for any difficulty which the

[437] *Lucá v. Italy*, (2003) 36 ECHR 46, para. 39.
[438] *Doorson v. Netherlands*, (1996) 22 EHRR 330, paras. 79-80.
[439] *Unterpertinger*, para. 33; *Saidi*, paras. 43-44; *Lucá*, para 40.

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defense may have because of the usage of the statement which was not subject to the examination, the quality of evidence and the degree of caution in relying on it.

Therefore, the LOTC is consistent with the ECHR jurisprudence in that the effect of refusing cross-examination is that the use made of the evidence admitted under Article 5(1) and other provisions of the LOTC is severely limited. However it is left to the discretion of the court to require cross-examination or not, after considering the fairness of the proceeding in its entirety.[440]

Application of Discretion

In the application of its discretion, this Court can justifiably refuse the submissions of the Defense for the cross-examination if there was no substantial disagreement with the evidence, or when the cross-examination of the witness would "prolong the proceedings but not serve to clarify the matter." Article 239(2) of the BiH CPC. In that case the statements and reports admitted pursuant to the Law on Transfer would not be used as the only and decisive basis for the verdict.

The Court notes that, following the Court's instructions in its Decision of 4 December 2006, the Defense Counsels for Miladin Stevanović, Branislav Medan and Miloš Stupar in their submissions indicated particular parts in the material, which is accepted pursuant to the Law on Transfer, and which they consider to require cross-examination.

The Panel, in exercising its discretion regarding the need to call these witnesses, considered these disclosures by the defense and concluded that they supported the need to call these witnesses to allow for further inquiry and challenge by the defense. The Panel weighed this need against the time and expense of such a requirement and the possible delay in the proceedings and concluded that these defense attorneys presented compelling reasons for the need to cross-examine these witnesses whether in person or through video link. Lawyers for all other accused also requested cross-examination, but failed to present any reasoning on which the Court could exercise its discretion. However, given the decision to call these witnesses, the Panel will permit cross-examination by all accused and their lawyers, who will thereby benefit from their colleagues' diligence, since to restrict the cross-examination to only those accused who supported their motions would not serve the ends of justice.

[440] *See also Lucá*, para. 40; *Saidi v. France*, (1994) 17 ECHR 251, para. 43.

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K. Prior Testimony and Statements of Accused Stupar and Trifunović

On 27 March 2007 the Panel rendered the Decision REFUSING to admit and use as evidence the following:

- The statement of the Accused Miloš Stupar of 26 June 2002 as a suspect during the investigation by the ICTY, and the testimony of the Accused Stupar of 28 and 29 April 2004, as a witness during the trial before the ICTY in the case *Prosecution v. Vidoje Blagojević*.

- The statement of Milenko Trifunović of 29 October 2002 as a suspect during the investigation by the ICTY.

For the following reasons:

By the Motion of the Prosecutor's Office of BiH of 5 May 2006 it was proposed that the statements of the Accused Miloš Stupar and Milenko Trifunović obtained by the ICTY be admitted and used as evidence. The Prosecution proposed this evidence pursuant to Articles 5 and 7 of the Law on Transfer. The defense for the accused objects this motion and proposes that the Motion be refused.

Having considered the motion, as well as the arguments presented by both sides, the Panel decided as stated in the operative part for the following reasons:

Article 5(1) of the Law on Transfer stipulates:

> Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RoPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue.

Article 7 of the Law on Transfer stipulates:

> A transcript of the testimonies given during the investigation in terms of Article 273, paragraph 2 of the BiH CPC and the relevant provisions of the criminal procedure codes of the Republika Srpska, the Federation of BiH and the Brcko District can be read out. In addition, the relevant investigator of the ICTY may also be examined with regard to the circumstances of the conducted investigative activities and information obtained during those activities.

The Court notes that the Motion of the Prosecution indicates that the statement of the Accused Stupar of 26 June and the statement of the Accused Trifunović of 29 October 2002 were given by these persons as suspects during the investigation before the ICTY, and that the statement of the Accused Stupar of 28 and 29 April 2004 was given during the trial before the ICTY in *Prosecutor v. Vidoje Blagojević*.

First, concerning the statements of the Accused Stupar and Trifunović given to the ICTY investigators in the capacity of suspects, the Panel notes that admission as evidence in this case of statements given in the investigative phase conducted by the ICTY is covered by

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Article 7 of the LOTC. Article 7 permits the use of investigative statements as evidence by reading them out at the main trial pursuant to Article 273(2) of the CPC of BiH. Article 273 constitutes an exception to the direct presentation of evidence at the main trial.

Article 273(2) reads as follows:

> Notwithstanding Paragraph 1 of this Article, records on testimony given during the investigative phase, and if judge or the Panel of judges so decides, may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult due to important reasons.

Article 273 of the CPC of BiH, as applied through Article 7 of the LOTC refers to the use of statements given in the investigative phase of the case in which introduction is sought. It is not the case here, because the investigative statements were not taken as part of this criminal case. Article 7 of the LOTC provides for an exception then, permitting the application of Article 273(2) to the admission of statements given in the investigative phase conducted in an ICTY criminal case. However, if the reference to Article 273(2) is to mean anything, then the Court must apply its remaining terms to the proposed statements.

Article 273(2) allows statements of persons whose direct testimony at the trial is impossible to obtain for the specific reasons set out in the Article to be read out. This provision does not refer to persons who gave their statements in a previous investigation, and who subsequently appear as accused persons in their own case. If one of the listed obstacles is present (the person is dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult) the investigatory statements of the persons to whom the obstacles refer can be read out. Since none of these obstacles can apply to the accused in his own case, because the presence of the accused is a prerequisite to his prosecution, and death, insanity or absence would preclude going forward with the main trial, the investigative statement referred to in Article 7 can never be the ICTY investigative statement of the accused.

Therefore, the Panel concludes that the Motion of the Prosecutor's Office cannot be granted because Article 7 of the LOTC foresees reading the statements of persons who in the particular case do not have the status of the accused person, but rather the status of witnesses who, for the specific reasons set out in the provision, *are not* present in the courtroom. This reading of Article 273(2) is confirmed when read together with Article 273(1) which refers to previous statements given by persons who *are* present in the court room. The accused Stupar and Trifunović gave the proposed statements during the investigation before the ICTY and now stand accused in the proceedings before the Court of BiH, where they are present and for whom there are none of the impediments listed in Article 273(2) of the CPC BiH.

Furthermore, the sworn testimony the accused Stupar gave in the main trial in the ICTY case of *Prosecutor v. Vidoje Blagojević* must also be excluded. The accused Stupar gave his statements before the ICTY in the capacity of a witness, and in accordance with that status he was compelled to answer questions and disclose everything he knew about the events on which he was questioned. Rule 90 of the ICTY RoPE stipulates that the Chamber may compel the witness to answer any question, even if it tends to incriminate the witness. The protection given to the witness who then becomes the accused before the ICTY is that "the

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testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony."

Regardless of whether the Accused Stupar resisted responding to questions before the ICTY, given his obligation as a witness under oath before that Court, the usage of his incriminating statement against him in this case would compromise his rights against the self incrimination protected by the ECHR, Article 6(1) and Article 6(2). His testimony under those circumstances cannot be concluded by this Panel to constitute a knowing and voluntary waiver of those rights. Therefore the use of these statements against Stupar is not allowed in this case where he has the status of the accused.

The testimony of the Accused Stupar given as a witness under oath before the ICTY satisfies the formal qualifications under Article 5(1) of the Law on Transfer. However, use of that statement against him in these proceedings would violate the right to a fair trial provided for by the CPC and the European Convention.

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L. Use of the Accused's Pretrial Statements

On 18 April 2007 the following Decision was rendered:

I. To partially grant the Motion of the Prosecutor's Office of BiH No. KT-RZ-10/05 of 5 May 2006. The following records of statements of the accused are accepted as evidence, and allowed to be read into the record at the main trial**:**

a) Petar Mitrović – the statement given to the Prosecutor's Office of BiH on 21 June 2005;
b) Miladin Stevanović – the statements given to the Prosecutor's Office of BiH on 24 June and 1 July 2005;
c) Brano Džinić – the statement given to the Prosecutor's Office of BiH on 22 June 2005.

II. To grant the proposal of evidence from the Indictment exhibit number:

a) Exhibit No. 40 in the Indictment - Record of crime scene investigation and reconstruction with Petar Mitrović of 4 October 2005; and
b) Exhibit No. 122 in the Indictment – Kravica Crime Scene Sketch.

III. To refuse the Motion of the Prosecution proposing the admission of the following statements of the accused:

a) Miloš Stupar – the statement taken in the Public Security Centre ('PSC') Bijeljina of 15 August 2003;
b) Petar Mitrović – the statement taken in the PSC Bijeljina of 20 June 2005.

On 5 May 2006, the Prosecution moved that all records of interviews and questioning of the following accused be read into the record at the main trial and admitted into the court file, that is:

(a) Miloš Stupar – statement of the accused Miloš Stupar dated 26 June 2002, given in the capacity of a suspect in the course of the ICTY investigation, and statement of 15 August 2003 given in the PSC Bijeljina in the capacity of a witness, and statement of 22 and 23 June 2005 given at the Prosecutor's Office of BiH;
(b) Milenko Trifunović – statement of 29 October 2002 given in the capacity of a suspect in the course of the ICTY investigation and statement of 22 May 2005 given at the Prosecutor's Office of BiH;
(c) Petar Mitrović – statement of 20 June 2005 given in the PSC Bijeljina in the capacity of a witness and statement of 21 June 2005 given at the Prosecutor's Office of BiH;
(d) Brano Džinić – statement of 22 June 2005 given at the Prosecutor's Office of BiH;
(e) Miladin Stevanović – statements of 24 June 2005 and 1 July 2005 given at the Prosecutor's Office of BiH;
(f) Milovan Matić – statement of 21 August 2003 given in the PSC Bijeljina and statement of 19 June 2005 given at the Prosecutor's Office of BiH.

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Under the Indictment, as Exhibits No. 39, 40 and 122, the Prosecution also proposed the presenting and admission of the following evidence:

(a) Exhibit No. 39 - Record of crime scene reconstruction with Milovan Matić of 29 September 2005 with the video record;
(b) Exhibit No. 40 - Record of crime scene reconstruction with Petar Mitrović of 4 October 2005; and
(c) Exhibit No. 122 – Kravica Crime Scene Sketch.

The Prosecution filed its Motion pursuant to Article 273, in conjunction with Article 78 of the Criminal Procedure Code of BiH ("CPC BiH"), stating that some of the named accused gave statements regarding their own participation and that of the co-accused, on the relevant day at the relevant site, in commission of the criminal offence as charged with under the Indictment. Further, the Prosecution alleged that the requirements of Article 78 of the CPC BiH were met at the taking of the proposed statements of the accused in the Police Station and the Prosecutor's Office of BiH, adding that the statements were given voluntarily and with full understanding of the right to remain silent, as well as that attorneys were appointed for all the accused while giving statements at the Prosecutor's Office of BiH. The records are admissible as evidence even if and when the suspect gives a statement incriminating himself and others. According to the Prosecution, the Record was true and accurate, signed by the suspects and their defense counsels. The Prosecutor's Office pointed out that prosecution witnesses Sabina Sarajlija and Bože Bagarić gave evidence in connection to the statements of the Accused Mitrović and Stevanović, whereby they both verified the regularity of examination at the Prosecutor's Office of BiH. Both the-then suspects, including the suspect Matić, had sufficient time to consult with their appointed attorneys and decide whether they would give such a statement. Moreover, all records were signed by both the suspects and their attorneys, while the suspects clearly waived their right to silence with full knowledge of their rights.

The Defense for all the accused objected that these pieces of evidence be accepted and presented, primarily noting that the accused exercised the right to silence at the main trial, and that the use of their statements taken at the investigative stage constitutes a violation of the CPC BiH and Article 6 of the European Convention on Human Rights ("ECHR") as it is not foreseen that these statements be read at the main trial. Provisions of the CPC BiH do not include instruction to the examined suspect in terms of the possibility to use his statement against him in subsequent stages.

The Defense for Mitrović emphasizes that his client's statements were unlawfully obtained and cannot be used by the Court as a basis for a verdict, as provisions of Article 78 CPC BiH were not complied with, and given that the suspect was not informed of the grounds for suspicion, he did not retain an attorney of his choice nor sign the waiver of the right to remain silent prior to giving the statement. He was not informed of the grounds for his arrest, either at the actual arrest or upon arrival. His rights, including the right to have an attorney appointed at no cost, were not communicated to him. The police made the record stating on its face that he was examined in the capacity of witness. The examination itself was done in the manner where the inspector dictated to the record-keeper. Mitrović was told not to talk as they knew everything. The rights under Article 219 of the CPC BiH were not respected, and he was not advised on his rights within the meaning of Article 84 of the CPC BiH. The one thing he was informed of on those premises was the right to an attorney, who was to be brought only later on while at the Prosecutor's Office, without presenting the suspect with the

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defense attorneys' list. The accused was not presented with the charges or grounds for suspicion. The examination at the Prosecutor's Office was not audio and video recorded. Likewise, the Defense argues that it is not evident from the Record of crime scene investigation whether the warnings and instructions under Articles 78, 81 and 87 of the CPC BiH were given as if the person is a witness or suspect. In reference to the statement of the accused Mitrović given at the Prosecutor's Office of BiH on 21 June 2005, the Defense objected that this statement is the repetition of the one given before police authorities on the day before, and that in accordance with Article 10.3 of the CPC BiH, the Court may not base its decision on evidence derived from the unlawfully obtained evidence, that is, on the statement given to the police, as it is this very statement that was obtained contrary to Article 10(2) of the CPC BiH, given that the accused Mitrović did not have an attorney present at the time of the taking of the statement in the police (the so-called "fruit of the poisonous tree" principle).

Within the adversarial system of proceedings which mandates equality of arms, the Defense Counsel for Brano Džinić asserts that his client has the right to remain silent. If it was to admit the statement, the Panel would favor the Prosecution, thus violating the principle of fairness. Furthermore, the unauthorized addition of the name of the accused Brano Džinić was made in handwriting on the statement of Petar Mitrović, thus the Defense for the accused Džinić objects to the admission of the Mitrović statement for this reason as well.

The Defense attorney for the accused Stevanović emphasizes that the CPC BiH does not prescribe a warning that a statement can be used against the person who is giving one, and that the statement of the accused can be used only during the investigation, while the use of the prior statement of the suspect is not allowed at the main trial, for in accordance with Article 6 of the CPC BiH, the accused has the right, but not the duty, to state his position on all incriminating facts. Accordingly, he has the right to decide whether he would make a statement at the main trial, in which case such statement can be used at the main trial exclusively together with his explanation in accordance with Article 273(1) of the CPC BiH. Furthermore, in terms of the legal grounds to use the statements, prior statements of the suspects are inadmissible based on Article 273(1) of the CPC BiH. It would be possible only as an exception to the direct presentation of evidence but only after the person had testified at the main trial, while the right to present or not to present defense is a fundamental right of the accused. Article 273(2) of the CPC BiH sets forth the exceptional circumstances as to when a statement can be read out at the main trial. The provision refers solely to the statements of witnesses and other parties to the proceedings, but not to the accused.

During the trial, the Panel gave an opportunity to the accused whose statements were being proposed as evidence to explain the circumstances of the taking of their respective statements. The Accused Mitrović, Džinić, Stevanović and Matić stated their unwillingness to explain their statements and maintained that their statements could not be used at all, and exercised their right to remain silent.

Having reviewed the Motion of the Prosecution and the position of the accused, the Panel decided as stated in the operative part on the grounds as follows:

First, the Panel finds that the Prosecution withdrew the initial Motion to admit into evidence the statements of the accused Miloš Stupar of 22 and 23 June 2005, and of the accused Milenko Trifunović, dated 22 May 2005, given at the Prosecutor's Office of BiH.

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Second, the Panel reaffirms its Decision dated 27 March 2007 wherein it decided to refuse the Motion of the Prosecutor's Office of BiH proposing the admission of the statements of Miloš Stupar and Milenko Trifunović given during the investigation before the ICTY.

Furthermore, the issue of admission and use of the statements of the accused which incriminate them and other co-accused is a complex legal issue not specifically regulated by the national criminal legislation. The issue entails a whole range of other legal issues pertaining to the fundamental rights of the accused in the criminal proceedings. At this stage of the proceedings, the Panel only analyzed the legality of the obtained statements in terms of formality and modality of their use, and did not go into the review of the weight of evidence as will be done in later stages.

In order to analyze the statements as to formal perquisites and admissibility the Panel looked at the provisions of the CPC BiH, as well as the provisions of Article 2(2) of the Constitution of BiH, particularly the European Convention on Human Rights ("ECHR"). The ECHR is incorporated directly into the national legislation and it pronounces the basic rights of the individual. The CPC provides protections of these rights consistent with the ECHR, whilst the CPC BiH can provide greater protection of these rights, but cannot provide less protection, and the Court must insure that these rights are preserved.

In deliberating on the issue, the Panel was mindful of the jurisprudence of the European Court of Human Rights ("the European Court"). The Panel notes that the rights guaranteed to the accused in the criminal proceedings are embedded under Article 6 of the ECHR which in its relevant part prescribes:

Article 6

Right to a fair trial:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

a. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

b. Everyone charged with a criminal offence has the following minimum rights:

   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

   (b) to have adequate time and the facilities for the preparation of his defense;

   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

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(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Though not specifically stated in Article 6 itself, the European Court has concluded that the right to remain silent is also protected by Article 6.[441] The Court infers this right from the right to a fair trial read together with the right of the criminal accused to the presumption of innocence and the right not to incriminate oneself. That right, as defined by the European Court, requires that national courts refrain from basing findings of criminal liability on incriminating statements made by the accused, when those statements have been improperly compelled by state authorities (*Heaney and McGuinness v. Ireland*, (2001) 33 E.H.R.R. 12, at 40; *Allan v UK*, (2003) 36 E.H.R.R. 12, at 44).

The European Court will not interfere with evidentiary rules applied by national courts generally, unless the application of the rule renders the entire proceeding unfair:

> The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. (*Luca v Italy*, (2003) 36 E.H.R.R. 46, at 38).

The European Court has had occasion to decide on the sufficiency of the judicial scrutiny necessary to assure the fair use of prior statements of the accused. In the case of *Brennan v. UK*, (2002) 34 EHRR 18, the European Court approved the use of suspect statements against the accused who made them, for a determination of guilt, when the trial court:

(1) Heard testimony from the police officers and others present when the statements were taken;
(2) Heard testimony from a neuro-psychologist regarding the competence of an accused's whose mental state had been put at issue;
(3) Reviewed the statements themselves and the circumstances in which they were made;
(4) Heard arguments from the lawyers of the accused;
(5) Gave the accused the opportunity to be heard in order to explain the circumstances in which the statements were obtained.

The European Court concluded that because the court undertook the above described review of the facts, the use of the prior statements made by the accused when they were suspects, was permitted against the accused at trial, regardless of whether or not the accused appeared as witnesses in the main trial.

In this case, the Court followed the procedure approved by the European Court in *Brennan.*

1. On 10 and 11 May 2006, the Panel heard testimony from police officers Milomir Čodo and Siniša Radić who were present at the station in Bijeljina when Petar Mitrović was

[441] The right to remain silent is contained in the second part of Article 6(3) CPC BiH: "The suspect or accused shall not be bound to present his defense or to answer questions posed to him." This right is to be distinguished from the broader right to defend oneself by presenting no defense. *See also* Article 78(2)(a) CPC BiH.

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questioned as a witness. On 11 May and 27 July 2006, the Panel heard from Sabina Sarajlija who was present when the Prosecutor questioned suspects Mitrović and Stevanović. On 10 May and 22 September 2006, the Court heard from a witness of the Prosecutor's Office of BiH Bože Bagarić, who was also present at the Prosecutor's interview of Mitrović. These witnesses testified as to the manner and circumstances of the questioning the condition of the accused during questioning, and other relevant information that will be discussed in greater detail in the Panel's analysis of the admissibility of the individual statements below.

2. The mental state of accused Stupar, Džinić, and Stevanović was not put into question, and the Panel concludes that there is no issue that would suggest that they were not competent at the time of questioning to understand their rights if properly informed of them or to waive their rights at the time they were questioned. The competency of Petar Mitrović was put at issue and the Panel heard from a neuropsychiatrist who testified with regard to those circumstances on 22 September 2006 in the main trial.

3. The Court admitted each of the offered statements for the limited purpose of reviewing them in connection with this decision as to their admissibility for use by the Panel in determining the verdict. The Panel concluded that it was impossible to evaluate whether the rights secured by the CPC BiH and the ECHR were respected, and the procedure required by the CPC BiH enforced without seeing each statement in its entirety. This procedure proved to be justified because issues such as the point at which the accused changed from witness to suspect, the extent and manner in which the accused verified that they understood their rights and the actual waiver of those rights were inextricably intertwined with the statements themselves. Failure to review each statement in its entirety would have deprived the Panel of the information necessary to make a decision and would have been inconsistent with the process approved by the European Court in *Brennan.*

4. The Court heard arguments of the Defense Counsel throughout the presentation of evidence relevant to the statements, particularly on 11 May and 27 July 2006 (during testimony of Sabina Sarajlija) and on 11 May 2006 (during testimony of Siniša Radić). The Defense was able to cross-examine all the witnesses mentioned in 1. above. In addition, the Panel announced on 29 March 2007, that additional arguments on the admissibility of the statements would be heard on 5 April 2007, on which date all counsel were provided unlimited time to make their arguments not only as to statements made by the accused whom they represented, but as to their views on the admissibility of all statements made by all accused. These arguments were considered by the Panel in connection with the decisions herein.

5. The Court gave each accused the opportunity to comment on the testimony of the witnesses relevant to the statements as well as on the circumstances of the taking of the statements themselves. Accused Mitrović took advantage of this opportunity on 27 July and 22 September 2006 by personally examining the witnesses Sabina Sarajlija and Bože Bagarić. These comments were considered by the Panel in connection with the decisions herein. In addition, the Panel announced on 29 March 2007 that the additional opportunity to be heard on the statements would be provided to all accused on 5 April 2007. On that date, all accused waived the opportunity for further comment and proceeded on their right to remain silent. The Panel respected their decision and such decision was not in any way used against the accused in connection with this or any other decision of the Panel.

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The CPC BiH provisions relevant to the rights of the suspect who is questioned are designed to ensure that the ECHR Article 6 rights are protected, in particular the right to silence, the right to a defense counsel and the right to understand the nature of the accusation against him and the right to an interpreter. Like the ECHR, the CPC BiH provides that the right to silence may be waived, but only if that waiver is made knowingly and voluntarily. The CPC BiH protects this right further by requiring evidence of the waiver prior to questioning, and in the case of crimes for which a penalty of long term imprisonment can be imposed, the mandatory provision of a defense counsel to the suspect. The CPC BiH likewise makes clear that the choice to speak or remain silent cannot be influenced in anyway by "force, threat, fraud, narcotics, or other means that might affect the freedom of decision-making and expression of will while giving a statement or confession," (CPC BiH Article 77(2)) and further "it shall be forbidden to extort a confession or any other statement from the suspect" (CPC BiH Article 10(1)). If a statement of a suspect is taken contrary to the provisions of Article 77 or 78 of the CPC BiH, "the decision of the Court may not be based on the statement of the suspect." (CPC BiH 77(3) and 78(6)). If any evidence, including a statement of the suspect, is taken in violation of international human rights or as an essential violation of the CPC BiH, "the Court may not base its decision on [that] evidence." (CPC BiH Article 10(2)) Furthermore, the Court is likewise precluded from basing its decision on any evidence which is "derived" from evidence taken in violation of international human rights or through an essential violation of the Code.

Therefore the Panel must decide:

1. Whether each statement was obtained legally.

2. Whether legally obtained statements can be used as evidence against the accused if the accused who made the statement exercises his right to remain silent at the trial.

1. Was each Statement Legally Obtained?

1.1. Statements of Accused Stupar and Mitrović taken by the PSC Bijeljina were not Legally Obtained

As for the statements of the accused Miloš Stupar of 15 August 2003, and the accused Petar Mitrović of 20 June 2005, the Panel observes that these are the statements given at the PSC Bijeljina. In regard to circumstances of the taking of the statement from Petar Mitrović, the Prosecution examined the police officials Siniša Radić and Milomir Čodo, who gave evidence at the main trial on 10 and 11 May 2006. Both witnesses stated that Petar Mitrović was interviewed in the capacity of witness, as is evident from the Record of obtaining the statement from the person of 20 June 2005. Likewise, the status of the accused Miloš Stupar at the interview is also evident from the Record of examination of witness, dated 15 August 2003.

It is evident from the analysis of respective statements of the two accused that they were questioned by the police and made their statements in the capacity of witnesses (CPC BiH Article 86) and not as suspects (CPC BiH Article 78). The police are authorized under the CPC BiH to take statements from both witnesses and suspects, but they are also obligated to act in accordance with the correct provision of the CPC BiH in order for the record of those statements "to be used as evidence in the criminal proceedings" (CPC BiH Article 219(3)). In this sense, both accused were instructed on their rights and obligations as witnesses: that is,

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that they must tell the truth on everything known to them in relation to the events in Srebrenica in 1995. Mitrović was specifically instructed with regard to events in the facilities of the Farmer's Cooperative in Kravica in July 1995. Based on these witness statements, the two were subsequently arrested as suspects against whom the criminal proceedings were instituted.

The Record of obtaining the statement from Petar Mitrović conducted by the police in Bijeljina at the police station violates, in particular, Article 45 and 78 of the CPC BiH at the point at which it became clear that he was providing them with evidence that he committed a crime for which long term imprisonment was the penalty. At that point he became a suspect for commission of the gravest form of serious crime. The authorized officials were required to stop the questioning at this point and inform him of his rights under Article 78 and provide him with a lawyer under Article 45(1). The statement is inadmissible under Article 78(6) as it was taken "contrary to the provisions" of Article 78 because the police failed to stop the questioning and proceed according to the mentioned provisions of the CPC BiH. There is no evidence however that any force, threats or duress was applied to Petar Mitrović in connection with this statement, and therefore there is no violation of CPC BiH Article 77, or 10(1). This is confirmed by Mitrović subsequently in the statement given at the Prosecutor's Office on the following day, where it is recorded that he said, "As of the moment I was taken in the police in Bijeljina until now the actions were correct, I was not mistreated and I have no objections on behavior of official persons who worked with me.…I am stressing again that nobody influenced me or forced me to admit everything that I have said."

The Prosecution argues that the police would not necessarily know that Mitrović was incriminating himself in connection with a crime for which appointment of a defense lawyer was mandated under Article 45(1) of the CPC BiH.

This argument is not persuasive. The police knew that they were investigating the alleged killing of 1000 civilians in the Kravica warehouse, an event that was allegedly part of the military operation in Srebrenica in July 1995, which had already been determined by the ICTY to be genocide. Even if the police were not aware of the crime that might be actually charged by the Prosecutor, they did know that they were investigating a crime for which the most serious penalty could be imposed. The Prosecution further argues that the Record of the statement is verbatim and that according to that Record Mitrović was only asked a few questions and then volunteered the incriminating information. On scrutinizing the actual Record, as the Panel is required to do under *Brennan*, the Panel does not find this credible in light of the time when the questioning commenced (20:05) and the time when it concluded (22:30), and given the length of the statement (2 ¾ pages).

In the case of Miloš Stupar, it was clear from the outset of his interview that he may provide the police with evidence that he committed a crime for which long-term imprisonment was the penalty, given that he had already given an interview to ICTY investigators in the capacity of a suspect (26 June 2002). Even if the Bijeljina police were unaware of this fact, it is evident from their questioning that they had in their possession a statement made by the accused Obrenović which placed Miloš Stupar at the Kravica warehouse at the relevant time and that this statement can be incriminating for Miloš Stupar. By failing to inform him of his rights as a suspect under Article 78 of the CPC BiH and provide him with a lawyer under Article 45(1) of the CPC BiH at the beginning of his interview, the police violated these provisions of the CPC BiH.

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The defense counsel for all the accused were resolute in their objections to the admission of these statements, alleging that the statements were unlawfully obtained and that provisions on instructing the person on his rights were not followed.

Article 219(3) of the CPC BiH explicitly prescribes that in gathering information from persons, the authorized official shall also act in accordance with Article 78 of the CPC BiH. Thereby, it is clearly noted as to which procedural requirements should have been met, from the point when the examiner had clear understanding that the person being interviewed is giving a statement by which he incriminates himself. In the specific case, the police officials did not instruct the persons examined on their rights under Article 78 of the CPC BiH nor was the questioning stopped to clarify the issue, as authorized officials are obliged to in these specific circumstances.

The right to defense is a fundamental right of the accused guaranteed by Article 7 of the CPC BiH, and Article 6(3)(c) of the ECHR. In cases like Stupar and Mitrović, where long-term imprisonment could be imposed, the CPC BiH goes further to protect the rights of the suspect in Article 45(1) of the CPC BiH prescribing the mandatory defense for the suspect at the first examination if he is suspected of a criminal offense for which a penalty of long-term imprisonment may be pronounced. The examination before a law enforcement agency was the very first examination before national authorities in both cases, for both suspects.

The right to the appointment of defense counsel early in the investigation was discussed by the European Court in cases *John Murray v. the United Kingdom* ((1996) 22 E.H.R.R. 29) and *Imbrioscia v. Switzerland* ((1994) 17 E.H.R.R. 441), where it was noted how the later proceedings are subsequently affected by the failure to appoint an attorney in early stages of the procedure.

Notably, it was concluded in *John Murray v. the United Kingdom*, (1996) 22 E.H.R.R. 29, para. 62, that Article 6 of the ECHR "applies even at the stage of the preliminary investigation into an offence by the police." It is noted in *Imbrioscia v. Switzerland*, (1994) 17 E.H.R.R. 441, para. 36, that Article 6, and paragraph 3 in particular "may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions [Art. 6(3)]." Furthermore:

> National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defense in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation." (*John Murray*, para. 63).

In conclusion, the rights and obligations of suspects questioned by authorized officials are different from the rights and obligations of witnesses. The rights of suspects during questioning, relevant to Miloš Stupar and Petar Mitrović, are protected by Article 6 of the ECHR, and Articles 6, 7, 45, 77, 78, and 79 of the CPC BiH. These rights were violated by the police when they failed to stop the questioning at the point at which it became clear that Stupar and Mitrović were not witnesses but in fact suspects in a crime for which long term imprisonment could be imposed. At that point the police were required to treat them as suspects and inform them of their rights under CPC BiH Article 78 and provide them with a defense counsel according to Article 45(1) of the CPC BiH. Failure to do so represents

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violations of the rights secured by Article 6 of the ECHR and of the CPC BiH Articles 219, 78, and 10, all of which require that the Panel does not accept the statements and refrain from basing any decisions on them.

1.2 The Statements of Mitrović, Stevanović, and Džinić taken in the Prosecutor's Office of BiH Were Legally Obtained

The three accused were questioned separately by the Prosecutor of BiH in the Prosecutor's Office as suspects for commission of the offence of genocide. The legality of the statements taken as a result of that questioning depends on whether the Article 6 rights of the accused and the processes set out in the CPC BiH to protect those rights, were all respected. The relevant CPC BiH provisions were Articles 6, 7, 8, 10, 45.1, 77, 78 and 79.

1.2.1. Arguments Relevant to the Statements of all Three Suspects

There is no allegation by any of the accused that their rights protected under Article 77 and Article 10(1) of the CPC BiH were violated, and the Panel has no reason to believe that the statements were extorted or taken in any manner that disrespected their personal integrity. The accused were advised of the right to use their own language and none has alleged that their rights under Article 8 have been violated. As to rights to counsel secured by Articles 7 and 45 of the CPC of BiH, all accused were provided with defense counsel prior to the beginning of questioning and each had the opportunity to meet with counsel before the questioning began. Only Mitrović asserts that there was a violation of the provisions of Article 45 of the CPC of BiH, and those objections will be taken up when the facts of his particular statement are analyzed below.

a. Article 79 of the CPC BiH: Audio/Video Recording

All three alleged that Article 79 of the CPC BiH was violated because none of the statements were recorded either by audio tape or through audio video processes. Article 79, which prescribes that a record be taken "on every questioning of the suspect," further states that "As a rule, a questioning of a suspect shall be audio or video recorded." (CPC BiH Article 79.2). None of these statements was recorded either in audio or video format. According to the witnesses who testified at the main trial, the record for all three was taken by a record keeper who typed the questions and the answers verbatim into a computer. The record as it was being typed could be seen simultaneously by the accused and his defense counsel, on computer monitors provided to them, as well as by others present for the interrogation. The record was printed and provided to each accused and his attorney for review and correction or objection, at the conclusion of the interrogation of each. Each accused signed his own record on every page, in addition to his attorney signing the final page of the record. Also at this time when the computer record was printed for review, each accused signed the "attestation of understanding and waiver of rights" on a line provided in the statement which preceded the record of the actual questioning. The testimony of these witnesses is confirmed in the Panel's review of the actual records themselves.

The Defense contends that failure to create an audio/video record violated Article 79 of the CPC BiH. The Prosecution asserts that they did not have the technical resources to create such a record at the time the interrogations were conducted.

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The Panel concludes that the law provides that audio/video recordings of statements is to be done as a rule, and according to Article 155 of the CPC BiH. However, in this specific case where witnesses present during the questioning have been examined on the circumstances of the taking of the statements of Mitrović and Stevanović, and where the defense counsels for Brano Džinić and Miladin Stevanović and Petar Mitrović were attending at the taking of the statement, the Panel finds that although a failure, such failure is not of such nature that it could qualitatively affect the formal validity of the statement. It would certainly be better practice to obtain the necessary equipment and record the interrogations as contemplated 'as a rule' in Article 79 of the CPC BiH. However, in this case, the Panel is satisfied that the records that exist of the interrogation accurately reflect each of the three statements, and notes that failure to create an audio/video record under Article 79 does not require exclusion of the statements from evidence under any provision of the CPC BiH. This conclusion is in accord with the European Court's decision in the case *Brennan v. the United Kingdom*, para. 53 that:

> The Court agrees that the recording of interviews provides a safeguard against police misconduct, as does the attendance of the suspect's lawyer. However, it is not persuaded that these are an indispensable precondition of fairness within the meaning of Article 6 § 1 of the Convention.

b. Consequences of Waiver

A second objection of the defense to the admissibility of the statements shared by all three accused is that the accused were not warned that if they waived their right to silence and answered the questions proposed by the Prosecutor, the record of the statement that they made could be used as evidence against them in subsequent criminal proceedings. The Defense acknowledges that this warning is not part of the warnings required under Article 78 of the CPC BiH, but nonetheless argues that it flows naturally from the right to silence protected by Article 6 of the CPC and Article 6 of the ECHR.

The Panel notes that CPC BiH Article 6 does indeed provide a right to silence: "The suspect or accused shall not be bound to present his defense or to answer questions posed to him." However, there is nothing in that Article or in any other Article of the CPC BiH that would require that the suspect be advised that if he voluntarily waived that right, and answered questions, the record of the statement could be used against him in criminal proceedings. This approach is consistent with that of other European jurisdictions, for example, in France and Germany, suspects are only warned that they have a right to remain silent, with nothing further said regarding how evidence might be used against them. *See* French *Code De Procedure Penale*, Article 116 ("The investigating judge then informs the person of his choice to remain silent, to make a statement, or to be interrogated."); German *Strafprozess Ordnung*, Article 136. Such provisions have not been challenged as unlawful before the European Court.

Furthermore, the Panel emphasizes that because such a requirement is not prescribed by the CPC BiH, the Prosecutor's Office could not have been expected to have instructed the suspects on it. The Panel also notes that all suspects had the opportunity to consult with their attorneys prior to giving the statement. The objection of the Defense that the persons should have been informed that everything they state can be used against them cannot be accepted as grounded, for the very purpose of appointing an attorney as early as the first examination of the suspect is to safeguard the suspect from procedural and meritorious failures that could

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bring about harmful consequences upon him in the later stages of the proceedings. The fact is that all persons whose statements are tendered as evidence had an attorney before and during the examination, hence this grievance of the Defense cannot be accepted as grounded.

c. Article 78 of the CPC BiH: The Formal Requirements

Particular formal objections raised by the accused as to individual statements are based on CPC BiH Article 78, and Article 6 of the ECHR.

Article 78 of the CPC BiH prescribes the basic instructions which the person interviewed as suspect needs be advised on by the one conducting the examination (Prosecutor).

Relevant to this case, the suspects should have been informed of the following:

1 The charge against the suspect and the grounds for the charge;

2 The right not to present evidence or answer questions;

3. The right to retain a defense attorney of his choice who may be present at questioning and the right to a defense attorney at no cost in such cases as provided by the Code. When the charge carries a sentence of long-term imprisonment, the mandatory right to assigned defense counsel.

4. The right to comment on the charges against him, and to present all facts and evidence in his favor;

5. The right to study files during the investigation, and view the collected items in his favor unless the files and items concerned are such that their disclosure would endanger the aim of investigation;

6. The right to an interpreter service at no cost if the suspect does not understand the language used for questioning.

7. That the suspect may voluntarily waive any of these rights, except the right to a defense lawyer if the charge is one that requires a mandatory defense.

8. The continuing right to present views on all facts and evidence that speak in his favor, even if the suspect has voluntarily waived the right not to answer the questions asked.

According to Article 78(6), "If any actions have been taken contrary to the provisions of this Article, the Court's decision may not be based on the statement of the suspect."

1.2.2. Analysis of the Formal Validity of Specific Statements

a. Mitrović

Insofar as to the formal validity of the statement of the accused Petar Mitrović, the Defense noted that the suspect Mitrović at the time of examination before the Prosecutor's Office of BiH was not informed of the ground for suspicion against him, as well that pursuant to Article 78(3) of the CPC BiH the suspect did not sign the record at the time when he waived his right to remain silent. Further, the Defense for Mitrović pointed out that the statement of June 21, 2005, was derived from the statement which Mitrović gave in the Police Station without the presence of an attorney, and he repeated the same statement at the Prosecutor's Office, thus the admission of the statement taken at the Prosecutor's Office would be contrary to Article 10(3) of the CPC BiH. The Defense also avers that the process for appointing an

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attorney to Mitrović under Article 45 of the CPC BiH was violated because he did not select the attorney himself from a provided list, as required by Article 45(6) of the CPC BiH. Finally, the Defense states that the waiver of the right to silence was not voluntarily made because the circumstances of the questioning and the mental state of the suspect at the time made it impossible for him to understand and voluntarily waive his rights as required under Article 78(3) of the CPC BiH and that use of the statement as evidence against him under these circumstances is prohibited under Article 78(6) of the CPC BiH and its use would violate his right to a fair trial under Article 6 of the ECHR.

1. Mitrović was Informed of the Grounds for Suspicion in Compliance with Article 78(2) of the CPC BiH

In connection with the objection that the suspect was not informed of the grounds for suspicion prior to the taking of the statement, the Panel inspected the Record of examination of the suspect Petar Mitrović of June 21, 2005, and found that the record reflects that the suspect Mitrović was told prior to the beginning of the questioning that he was charged with the commission of the crime of Genocide in violation of Article 171 of the CC BiH, but the record does not on its face recite the grounds for suspicion. However, the record does provide other indications that he was so advised and these indications corroborate testimony of witnesses who were present at the questioning and testified at the main trial. In this regard, the Panel observes the following:

The witness Sabina Sarajlija testified that the Prosecutor advised the suspect of the charge and the grounds for suspicion before the appointment of the mandatory defense attorney and before the suspect waived his right to silence. The Panel further notes that on the record reviewed by the defense attorney, it states that Mitrović was informed of the grounds for suspicion and charges, before initially deciding to waive his right to silence. In the record Mitrović states, “I have understood the charges against me and I will present my defense by answering the questions.” Sarajlija also testified that upon arrival of the defense attorney, the Prosecutor advised the defense attorney of the charge and the grounds for suspicion in front of the suspect, also before the suspect finally decided whether to waive his right to silence. Thus, before any questioning commenced, Mitrović was twice informed of the grounds for the charges against him and had the benefit of advice from his defense attorney with regard to whether to confirm his waiver. This is reflected in the record: “After the conducted conversation with his Defense attorney, the Suspect states that he will present his defense in the presence of his Defense Attorney by answering the questions.” The defense attorney and the suspect had the opportunity at any time during the questioning to stop answering questions for any reason, including the reason that the questions were inconsistent with the information given them regarding the grounds for suspicion and the charge. Neither the defense attorney nor the suspect exercised the right to stop the interview on these or any other grounds. The witness Sabina Sarajlija stated that the defense attorney for the suspect reread the entire statement and noted objections where she believed appropriate and that those were minor corrections. She did not object to the statement included in the official record that prior to the decision to waive the right to silence the suspect had been advised of the grounds for suspicion and the charge. Article 78 of the CPC BiH and Article 6 of the ECHR require that the suspect be advised of the charge and the grounds for the charge. The Panel concludes, based on the testimony of Sabina Sarajlija and the face of the record, that the suspect was advised of the charge against him and the grounds for the charge prior to his decision to waive his right to silence, and that there is therefore no violation of CPC BiH Article 78.2 CPC or Article 6 of the ECHR in this regard.

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2. Mitrović was not Denied a Mandatory Defense Counsel

The purpose of Article 45 of the CPC BiH is to assure that the suspect accused of a very serious crime has the services of a competent defense attorney assigned to him by the Court from the very first questioning, and that the suspect consents to representation by the particular attorney. This provision is consistent with Article 6 of the ECHR. The Defense raises two objections: first that the suspect was never presented a list or asked to choose the lawyer, but the lawyer was selected for him; and second that the lawyer that was assigned was not competent to handle serious criminal cases.

Both the Court record and the evidence is silent as to how the particular lawyer was selected. However, the record confirms that the lawyer was appointed by the Court consistently with the requirements of Article 45. The Court's file shows that at 18.00 on 21 June 2005 the Prosecutor filed a motion to appoint ex officio defense attorney alleging Mitrović's right to a mandatory defense and the Court ordered the appointment of attorney Slavica Čvoro. According to the testimony of the witness Sabina Sarajlija and the face of the investigation record, the defense attorney met in private with the suspect prior to the examination, and was present throughout the interview. The testimony further supports that the defense attorney carefully read the record of examination and made appropriate objections. The testimony also shows that the defense attorney zealously attempted to persuade the Prosecutor not to seek a pre-trial custody order against her client, although she was unsuccessful in that regard.

The Court record shows that she represented her client competently at the custody hearing, where Mitrović declared his satisfaction with her services. When asked by the judge whether he agreed with the defense counsel appointed, Mitrović stated he did. She continued to represent Mitrović, with his consent until November, 2005, when he asked for and was provided a different attorney. The record further shows that Mitrović expressed no dissatisfaction with the work of his defense attorney or representation of him during all those months and it is notable that she zealously and appropriately intervened on his behalf, including filing the appeal against the initial decision to order custody, and also the decision to extend custody, essentially contesting the motions of the Prosecution, and actively representing him at the crime scene reconstruction. The pleadings that she filed on Mitrović's behalf show that she was entirely aware of the facts and circumstances of the case, familiar with the intricacies of criminal law and defense, and competent in her arguments.

The Panel cannot conclude affirmatively that Mitrović selected Slavica Čvoro from a list presented to him. However the Panel notes that Mitrović expressed consent and satisfaction with her at 22:19 at the custody hearing on 21 June 2005, a few hours after her appointment, and his continued consent to her representation throughout the following months. Mrs. Čvoro remained the suspect's lawyer for several months. The purposes of Article 45 of the CPC BiH, and Article 6 of the ECHR have been accomplished because Mitrović was provided a competent defense attorney to whom he consented and who represented his interests in a professional manner throughout her representation of him, including throughout the questioning which produced the statement at issue. The Panel further notes that even if the accused did not select the lawyer from a provided list, that technical oversight in this case is neither an essential violation of the CPC BiH or of any fundamental human rights protected under national or international standards (Article 10(2)). In *Croissant v. Germany,* (1993) 16 EHRR 135, para. 7, the European Court stated that a "court should, as a rule, endeavor to choose a lawyer in whom the defendant places confidence." However, it found no violation

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of Article 6(3)(c) of the ECHR when the national court refused to replace an assigned defense counsel to whom the accused objected.

3. The Statement taken on 21 June 2005 by the Prosecutor was not Derived from Prior Statements (CPC Art 10(3))

Article 10(3) prohibits the Court from basing a decision on evidence derived from evidence that was obtained through violation of fundamental human rights or taken through an essential violation of the Code. The Defense claims that the statement given at the Prosecutor's Office is derived from the statement illegally taken at the police station, and therefore it must be excluded under the terms of Article 10(3) of the CPC BiH.

The Panel believes that the statement made during the interview with the Prosecutor was not derived from the statement which Mitrović gave to the Police. The police statement was illegally obtained because the police failed to provide Mitrović information required by law to be given to suspects of very serious crimes in order that he might understand his rights and consult with an attorney before deciding whether to waive his rights and answer questions, thereby incriminating himself. However, there was no threat or force used against Petar Mitrović by the police, and there could be no residual fear generated by the conduct of the police that would continue to influence Petar Mitrović during the interview by the Prosecutor. Furthermore, intervening events broke the connection between the first and second statement: a day had elapsed; the persons questioning the suspect were different; the location was different. But most importantly, prior to making the statement at the Prosecutor's Office, he was advised of his rights as a suspect under Article 78 of the CPC BiH and provided a defense counsel with whom he had the opportunity to consult. Therefore, in the presence of and with the advice of his lawyer, he made an independent and informed decision to waive his rights and answer the Prosecutor's questions. In scrutinizing the statement given to the police and that given to the Prosecutor, consistently with the process approved in *Brennan*, the Panel further notes that the statements themselves are sufficiently different to verify that at the point when he was questioned by the Prosecutor, Mitrović understood that he was suspected of a very serious crime and made the independent decision to defend himself by explaining the events that were the subject of the suspicion that the crime of genocide had been committed by him. The Panel sees no residual consequences from the illegality of the circumstances under which the police statement was taken that would either improperly influence the accused to waive his rights involuntarily or taint the content of the statement he made in response to questioning by the Prosecutor. The statement made in the Prosecutor's office is not derived from the police statement, nor is it a "fruit of the poisonous tree".

4. Mitrović *Voluntarily* Waived his Right to Silence in Compliance with Article 78(3) of the CPC BiH

The right to silence can be waived, provided that waiver is voluntary, pursuant to Article 78(3) of the CPC. Article 45(1) of the CPC BiH, the right to mandatory defense, is incorporated into the provisions of Article 78(2)(b) of the CPC BiH. The provision is designed to ensure that any waiver that is made is in fact voluntary. The Defense for Petar Mitrović argues that even if the requirements of Article 78 of the CPC BiH are fulfilled, the statement that he made in response to the interrogation by the Prosecutor was not voluntary. He avers that his client's physical and mental condition, combined with the stress over his loss of liberty during the preceding 24 hours, made it impossible for him to make a knowing and voluntary decision to waive his rights.

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The Panel accepts that Mitrović was in police custody during the 24 hours before his interrogation by the Prosecutor. However, there is no evidence that he was treated improperly in any way and the record in fact confirms that he was treated properly. *See supra*, Section 1.1. Strictly within the context of the interrogation on 21 June 2005, the Panel examined the evidence to determine whether, given the mental and physical condition of the accused, he was able to appreciate his rights and voluntarily waive them prior to answering the Prosecutor's questions.

The Panel concludes that accused Mitrović was not suffering from any mental or physical disability sufficient to interfere with his judgment or render him incapable of making a knowing and voluntary decision to waive his rights and speak to the Prosecutor. He had a defense counsel present who could intervene on her client's behalf if she believed he was incapable or incompetent. Furthermore, the Panel considered the testimony of witnesses Sabina Sarajlija and Bože Bagarić, who were present at the Prosecutor's Office at the examination of the accused Mitrović and described his demeanor and affect in some detail, based on which the Panel concludes that he was lucid, sufficiently rested and capable of responding appropriately.

The Panel is mindful that the European Court approved the use of expert testimony in connection with review of the voluntariness of the waiver of silence when the accused puts into issue mental impediments (*Brennan*, para. 53). With that in mind, the Panel considered the report and testimony of the neuropsychiatrist. The report of the Dr Abdulah Kučukalić, a neuropsychiatrist who made the findings and opinion on the mental responsibility of the accused Mitrović, and elaborated on his findings at the main trial on 22 September 2006, reads that Mitrović does not suffer from any mental disease of psychotic nature, has no addictions and slight depression has been observed. He is of average intellectual abilities. Although found to be emotionally immature, the tests did not find any pathological changes on the brain or damages to the cognitive functions. The expert found that there is a conscious simulation and attempt to present himself as an ill person with pseudodementia features, incapable of accepting and understanding a real situation, but concluded that he had the capacity to understand the importance of the offence, and that he is deemed to be mentally sound. Taking this evidence only in connection with the decision as to the admissibility of the statement, and deferring any decision as to the weight and sufficiency of the expert testimony for any other purpose until final deliberation on the verdict, the Panel finds no grounds for concluding that Mitrović was either incapable of understanding his right to silence or that his waiver of that right was anything but voluntary.

5. Mitrović Unequivocally Waived his Right to Silence Concerning the Charges in Compliance with Article 78(3) of the CPC BiH

In relation to the objection of the Defense that the accused Mitrović, suspect at the time, did not sign the waiver of his right to remain silent prior to the commencement of the questioning by the Prosecutor, as is referred to in Article 78(3) of the CPC BiH, the Panel points to the following:

Article 78(3) foresees that "the questioning of the suspect may not commence unless his waiver has been recorded officially and signed by the suspect." Indeed, the objection of the Defense is correct in this regard. Although the waiver was recorded officially on the record of the interrogation, and it was recorded as occurring prior to the commencement of

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questioning, the waiver was not signed until the official record was printed and presented to the suspect, upon completion of the questioning. There is no factual dispute on that point. The dispute instead is as to whether this irregularity is contrary to a "provision" of Article 78 of the CPC BiH so as to require the Court to exclude the statement under the terms of Article 78(6) of the CPC BiH.

The Panel concludes that the "provision" of Article 78(3) of the CPC BiH which must be strictly enforced by the Court is that there must be proof established on the face of the record that the suspect has waived his rights under Article 78(2) and acknowledged that waiver before the questioning commences. This is consistent with the requirement of the ECHR that the waiver be unequivocal (*Bulut v. Austria*, (1997) 24 E.H.R.R. 84). The form of acknowledgement set out in the law is the signature of the suspect. However, that cannot be the only acknowledgement that can assure that the provision of 78(3) of the CPC BiH is met because in some cases there could be a physical impediment that precludes compliance with that condition. The physical impediment could be that the suspect is physically incapable of providing a signature, for example if he is disabled or illiterate. In this case, the physical impediment was that the record was being taken electronically and there was nothing for the suspect to physically sign until the electronic record was reduced to print, which did not occur until the conclusion of the investigatory report of which the waiver was a part.

The Panel cannot conclude that the drafters of Article 78 of the CPC BiH intended that statements on which there was sufficient proof that the suspect understood and waived his rights prior to answering questions should be excluded because a physical impediment precluded the timely signing of a paper form. Such an interpretation assumes that the drafters only contemplated the evidentiary use of statements made by literate and able bodied suspects whose statements were being transcribed simultaneously on paper. This interpretation is unrealistic and inconsistent with Article 79(2) of the CPC BiH which recommends an audio/video record, rather than a paper record, and acknowledges that the printed transcription could only be prepared "after completion of the questioning" (Article 79(2)(d) of the CPC BiH).

The "provision" contained in Article 78(3) of the CPC BiH requires proof of waiver, convincingly acknowledged by the suspect, to assure that the suspect has unequivocally waived his rights before the questioning begins. The record of the statement of Petar Mitrović taken by the Prosecutor on 21 June 2005 complies with this provision, and in that regard, the Panel makes the following findings.

Based on the testimony of the witnesses at the main trial the Court finds that the record was taken simultaneously on computer and that the accused and his lawyer followed the typing on computer monitors provided to them and had the right and opportunity to object to what they saw reproduced on the computer screen. The printed record is identical to the computer record which the accused and his attorney observed and which they had the opportunity to read, review, compare, and to which they could, and did make objections. The record of examination that the accused and his lawyer ultimately signed after it was printed can be relied on by the Court to actually reflect what happened and the order in which it happened. That record shows that, in the presence of his lawyer, the following events occurred in the following order: the accused was properly advised of his rights under Article 7, Article 8 and Article 78(2) of the CPC BiH; the accused orally acknowledged his rights, waived them and agreed to answer the questions of the Prosecutor; the Prosecutor commenced questioning after the accused had verbally acknowledged and waived his rights; and that acknowledgment

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and waiver appeared on the record which was displayed simultaneously to the accused and his lawyer. The questioning began and no objection was raised to the acknowledgement or waiver. There was a signature line provided in the record under the acknowledgment and waiver.

In addition, the testimony confirms that neither the attorney nor the accused objected to the content nor placement of the waiver and acknowledgement provision on the printed record; that the accused, in the presence of his lawyer signed each page of the record, and in addition, affixed his name to the signature line following the waiver, affirming that the waiver and acknowledgment had been orally made prior to the commencement of questioning. Prior to printing the statement out, there was nothing to which the signature could be affixed. The Panel further observes that at the point when they reread and signed the Record of examination of the suspect, neither the defense counsel nor the suspect had any objections to the Record or to how the interview was conducted, and both signed it as such. The waiver was unequivocal and met the demands of Article 6 ECHR.

In the opinion of the Panel, this interpretation of Article 78(3) is in accordance with Article 10 of the CPC BiH, for neither the European Convention or any other international human rights instrument require that the signature of the suspect, placed on a piece of paper before commencement of the questioning, be the one and only proof of unequivocal waiver of the right to remain silent. Therefore, it is clear to the Panel that in this case, the statement was not taken contrary to the provisions of Article 78(3), but instead with full respect of the fundamental rights guaranteed by both the CPC BiH and the international standards.

6. Authenticity: the Record was not "Corrupted"

The Defense finally objects to the authenticity of the record, pointing to the presence of a handwritten comment in the margin of the record made after it was signed by the accused and his attorney. The Panel accepts the explanation provided by the Prosecutor that he wrote the notation as a personal reminder, believing that he was writing on a copy and not the original. The notation includes a name which is similar but not identical to the name of a co-accused. The Panel concludes that the added name is not an integral part of the Record. The objection that it corrupts the original document is unfounded and the Panel therefore accepts this Record, excluding the handwritten addition.

Therefore, having reviewed the Motion of the Prosecution to accept this statement and all objections of the Defense in this regard, the Panel concluded that the statement of the accused Petar Mitrović given at the Prosecutor's Office of BiH is lawful and, as such, the Court is not prevented from basing a decision on it.

b. Stevanović

Although they forcefully contest the admission of these statements into evidence, neither the accused himself nor the defense counsel for the accused made any objections as to the formal correctness of the statement of 24 June and 1 July 2005. Further, the defense attorney for the Accused stated at the main trial on 11 May 2006 that they never disputed anything with reference to the course of the examination in the Prosecutor's interview room. Nevertheless, following the procedure set out in *Brennan*, the Panel scrutinized the statements, having in mind the requirements of CPC BiH Articles 6, 7, 8, 10, 45 and 78, as well as the requirements of Article 6 of the ECHR and the international standards for human rights.

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In the interview on 24 June 2005, the accused invoked his right to silence concerning the charges and made no statement. A review of the statement given on 1 July 2005 revealed that (1) Stevanović's waiver of the right to silence was made on the record prior to the commencement of questioning but only officially signed at the conclusion of the interview when the record was presented in printed form; and (2) there was no audio or visual recording, but instead a verbatim electronic record reduced to print for signature by the accused, the defense lawyer and the Prosecutor and record keeper. For the reasons stated above in Section 1.2.1 a. and a.5 respectively, these apparent omissions do not render the statements unlawful. In relation to the waiver in particular, the Court notes that this statement resulted from an interview requested by the Accused, who had already been in custody for 8 days and who had chosen to exercise his right to silence concerning the charges at the original interview. This evidence establishes that the waiver was voluntary and unequivocal, and made prior to questioning.

Furthermore, the record indicates that at his first questioning on 24 June 2005, Stevanović was advised of the grounds of suspicion against him. The face of the record does not reflect that these grounds were repeated to Stevanović at his second interview on 1 July 2005, and there is no testimony to illuminate this matter further. However, it is clear that Stevanović was aware of the grounds of suspicion at his second interview, both from his previous interview and the three subsequent occasions on which he was informed of the grounds: (i) the grounds were stated in the Prosecutor's motion for custody, to which the Defense responded in their appeal against custody, dated 30 June 2005; (ii) at the custody hearing itself (24 June 2005), the judge recited the grounds in significant detail; and (iii) in the decision on custody, which elaborates further on the grounds of suspicion. The suspect signed an official court slip to indicate that he had received this decision. Furthermore, the accused does not dispute that he was told the grounds of suspicion. Indeed, eight days after his custody hearing, it was the accused who requested this second interview having had time to contemplate his position and he gave a statement in relation to the circumstances of which he had been informed on these four prior occasions. The record of 1 July 2005 states: "Prosecutor asked Suspect if his defense counsel was able to visit him in the Detention Unit. Suspect stated that he was and that, together with his defense counsel, he prepared today's defense, which he would present by answering questions."

Therefore, the Panel concludes that the statements of the Accused Stevanović, given at the Prosecutor's Office of BiH on 24 June and 1 July 2005, are lawful in terms of CPC BiH Article 78, and as such, the Court is not prevented from basing a decision on them.

c. Džinić

Although they forcefully contest the admission of these statements into evidence in the main trial, neither the accused himself nor the defense counsel for the accused made any objections as to the formal correctness of the statement of 22 June 2005. Nevertheless, following the procedure set out in *Brennan*, the Panel scrutinized the statements, having in mind the requirements of CPC BiH Articles 78, 45, 7, 8, 6, and 10, as well as the requirements of Article 6 of the ECHR and the international standards for human rights. The Panel concluded that the statements of the Accused Brano Džinić, given at the Prosecutor's Office of BiH on 22 June 2005, are lawful, and as such, the Court is not prevented from basing a decision on them.

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A review of the statement given on 22 June 2005 revealed that firstly Džinić's waiver of the right to silence concerning the charges was made on the record prior to the commencement of questioning but only officially signed at the conclusion of the interview when the record was presented in printed form; and secondly, there was no audio or visual recording, but instead a verbatim electronic record reduced to print for signature by the accused, the defense lawyer and the Prosecutor and record keeper. For the reasons stated in above Section 1.2.1 a. and a.5 respectively, these apparent omissions do not render the statements unlawful. Thirdly, the accused was informed of the grounds of suspicion against him and this is clearly reflected on the Record.

Therefore, the Panel concludes that the statement of the Accused Džinić, given at the Prosecutor's Office of BiH on 22 June 2005, is lawful in terms of CPC BiH Article 78, and as such, the Court is not prevented from basing a decision on it.

1.2.3 The Record of Crime Scene Investigation and Reconstruction with Petar Mitrović of 4 October 2005 and Kravica Crime Scene Sketch were Legally Obtained

a. The Record was Derived from a Prior Statement that was Legally Obtained

The Record of crime scene investigation and reconstruction with Petar Mitrović of 4 October 2005 is derived from and based on the statement made at the Prosecutor's Office on 21 June 2005. Since the Panel has found that the statement taken at the Prosecutor's Office complies with Article 10(2) of the CPC BiH, evidence derived from it does not violate Article 10(3) of the CPC BiH.

b. Mitrović Voluntarily Waived his Right to Silence in Compliance with Article 78(3) of the CPC BiH

Defense Counsel for Petar Mitrović put the mental state of the Accused into issue in connection with all of the statements, alleging that his mental condition precluded him from understanding his rights and voluntarily waiving his right to silence concerning the charges. In addition at the main trial (27 July 2006), Mitrović and his defense counsel asserted that Mitrović refused to attend the reconstruction. The Panel notes that Mitrović was not suffering from any mental or physical disability sufficient to interfere with his judgment or render him incapable of making a knowing and voluntary decision to waive his rights and speak to the Prosecutor at the time of the Reconstruction. The official record, signed by the accused Petar Mitrović and his lawyer contradicts their present contention and states "asked whether he was mentally and bodily capable and ready to show all the actions, the suspect confirmed so." He had the assistance of a knowledgeable and competent lawyer-defense counsel who had been representing him for several months, who was present and who could intervene on her client's behalf if she believed he was incapable or incompetent. She did in fact intervene once when Petar Mitrović was failing to give an adequate explanation regarding discrepancies in his statement. This intervention was recorded on the official record and notwithstanding she permitted her client to continue with the reconstruction and signed the official record indicating she had no objections. Further, Mitrović himself was capable of expressing his interests and concerns, and did so when objecting to the recording of the reconstruction by video. It is for this reason that the Prosecutor did not make the video recording of the reconstruction.

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c. Mitrović Waived his Right to Silence in Compliance with Article 78(3) of the CPC BiH

Article 78(3) of the CPC BiH reads that "questioning may not commence unless [the suspect's] waiver has been recorded officially and signed by the suspect." Although the waiver was recorded officially on the record of the interrogation, and it was recorded as occurring prior to the commencement of questioning, the waiver was not signed until the official record was printed and presented to the suspect, after completion of the questioning. The signing was delayed because Mitrović objected to the audio video recording of the reconstruction after he arrived at the warehouse, which led to the need to hand write the record of the reconstruction. The handwritten record lacked the precision that the video record would have provided, but notwithstanding the record was clear that there was compliance with the 'provisions' of Article 78(3) of the CPC BiH.

As explained in Section 1.2.2 a.5 above, the Panel concludes that the "provision" of Article 78(3) of the CPC BiH prescribes that there must be proof established on the face of the record that the suspect has waived his rights under Article 78(2) of the CPC BiH and acknowledged that waiver before the questioning commences. The form of acknowledgement set out in the law is the signature of the suspect. However, for all of the reasons explained above, and incorporated here by reference, the Panel believes that the signature made at the exact moment before the questioning begins cannot be the only acknowledgement that can assure the provision of 78(3) of the CPC BiH is met because in some cases there could be a physical impediment that precludes compliance with that condition. In this case the impediment was created in part by the accused when he refused at the last moment to having the reconstruction videoed, a method of preserving the record preferred by the CPC BiH Article 79. The official record could not be typed at the scene and therefore the signatures of Mitrović and his lawyer, as well as the record taker and the Prosecutor had to wait until the record taker had transcribed the handwritten minutes to computer and printed the copies for signature.

The provision contained in Article 78(3) of the CPC BiH requires proof of waiver, convincingly acknowledged by the suspect, to assure that the suspect has waived his rights before the questioning begins. The Record of the reconstruction complies with this provision, and in that regard, the Panel makes the following findings:

- A lawyer was provided and present before and during the questioning.
- The suspect, in the defense counsel's presence, stated that he understood his rights and chose to exercise his rights by answering the questions and "showing all he had stated for the Suspect examination record."
- This statement of understanding and waiver was included in the record.
- This acknowledgement of understanding and waiver was made before commencement of questioning and appears in the record prior to the commencement of questioning.
- The record, when printed, contained the acknowledgement of understanding and waiver, placed prior to the commencement of the statement, and the record was reviewed by Mitrović and his lawyer and signed by each attesting to its accuracy.

This interpretation of Article 78(3) of the CPC BiH is consistent with Article 10 of the CPC BiH, because neither the European Convention nor any other international human rights treaty requires that a signature of the suspect, given prior to the commencement of questioning, is the only acceptable evidence of an unequivocal waiver of the right to silence

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concerning the charges. A better practice would be to provide a written waiver form to the suspect for signature prior to commencement of questioning, separate from the electronic record, or audio/video record, and referenced by the electronic record or audio/video record. However, in this case it is clear to the Panel that the substance and purpose of Article 78 of the CPC BiH were met and that the statement was taken consistently with the provisions of that Article, and the essential rights protected by the CPC and international law. The waiver was unequivocal and met the demands of Article 6 ECHR. There is no reason under the CPC BiH or international human rights law that would preclude the Court from basing a decision on the Reconstruction Record.

d. Record of Reconstruction was taken in Compliance with Article 77 of the CPC BiH

Suspect Mitrović was questioned by the Prosecutor in compliance with Article 77 of the CPC BiH, with full respect for his personal integrity and without the use of force, threat, fraud, promises, or any other action on the part of the Prosecutor that would interfere with Petar Mitrović's free will and ability to make an independent decision regarding whether or not to give a statement.

e. Record of Reconstruction was taken in Compliance with Article 78(2) of the CPC BiH

Since this was not the first questioning of Petar Mitrović, there was no need to comply with the requirements of Article 78(1) of the CPC BiH. At the beginning of the reconstruction, the Prosecutor strictly complied with Article 78(2) (a) through (e) of the CPC BiH, and informed him of the charge against him and the grounds for the charge as well, and both are reflected on the face of the official record.

f. Admission of the Kravica Crime Scene Sketch (Exhibit No. 122 under the Indictment) is Permitted

Exhibit No. 122, Kravica Crime Scene Sketch of 4 October 2005, drafted during the reconstruction with the suspect Mitrović, is a piece of Prosecution material evidence, and is an integral part of the Record of reconstruction with the suspect Petar Mitrović. The Defense objected to the admission of this evidence as it derives from the previous statements of the accused Mitrović, which they allege to be unlawfully obtained. Given that the requirements to accept the statement of the accused Mitrović given at the Prosecutor's Office of BiH are met, as well as of the Record of reconstruction of October 4, 2005, and given that this sketch is an integral part of the Record of reconstruction, the Panel concluded that the Exhibit No. 122 does not violate Article 10(3) and there is no reason under the CPC or international human rights law that would preclude the Court from basing a decision on it.

1.2.4. Matić

Admission of the Records of statements of Milovan Matić given before the police authorities of the RS Ministry of the Interior and the Record of reconstruction of the Prosecutor's Office of BiH with Milovan Matić, proposed in evidence supporting the Indictment, was subsequently decided by the Panel, because the Trial Motion of the Prosecutor's Office of BiH did not include the Record of examination of the suspect Matić taken at the Prosecutor's Office of BiH, to which the Record of Reconstruction referred. Accordingly, in order to decide on the admissibility of the proposed statements, the Panel needed to first inspect and

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analyze the formal validity of the statement of the accused Matić at the Prosecutor's Office of BiH.

2. Can the Legally Obtained Statements of the Accused be used Against them at the Main Trial where the Accused Decided to Remain Silent?

The Prosecution seeks to admit the record of the statements of Mitrović, Stevanović, and Džinić, which were taken by the Prosecutor, and the Record of reconstruction that was made with Mitrović. The Panel has determined in Part 1 above that these four records were obtained according to law and that there is no legal impediment to the Court basing a decision on them.

2.1. If Appropriately Admitted, the Panel may Consider these Statements as Legally Obtained in Connection with its Decision on the Verdict.

Articles 77, 78, and 10 of the CPC BiH state that "the Court may not base its decision" on illegally obtained or derived evidence. The Panel has found that the four statements were not illegally obtained or derived from unlawful evidence. Therefore there is no impediment to the "Court" basing a "decision" on them. A question has been raised as to whether "Court" includes the trial Panel and "decision" includes the verdict. The statements are only relevant if they are capable of being used by the Trial Panel in any way in regard to the verdict.

The provisions of Articles 77, 78 and 10 of the CPC BiH speak inclusively of the "Court" and of "decisions". Although the CPC BiH does not define "Court" in Article 20 of Basic Terms, it is nonetheless clear from Article 24 that the term "Court" includes first and second instance Panels, as well as judges sitting alone in various capacities. The term "decision" is defined under Article 163(1) of the CPC BiH and covers *verdicts, procedural decisions* or *orders*. Therefore, once the statements are found to be legally-obtained, the Trial Panel is not prevented by the terms of either Articles 10, 77, or 78 of the CPC BiH from basing any decision on them, including the verdict. This understanding is confirmed by the language of CPC BiH Article 219, which provides that if authorized officials collect statements of suspects in accordance with CPC BiH Article 78, "the records on gathered information may be used as evidence in the criminal proceedings."

2.2. The Statements are Admissible as Evidence in the Main Trial under CPC BiH Article 273(1)

Article 273 of the CPC BiH sets out "Exceptions from the Imminent Presentation of Evidence":

> (1) Prior statements given during the investigative phase are admissible as evidence in the main trial and may be used in cross-examination or in rebuttal or in rejoinder. In this case, the person must be given the opportunity to explain or deny a prior statement.[442]

[442] There is a discrepancy between the English and the official local language versions. English uses the mandatory "must" in the second sentence of Article 273(1), whereas the official language version uses the permissive "može" (may). English version is more favorable for the accused; hence the Panel will adopt the meaning of the stricter standard "must" in its analysis.

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> (2) Notwithstanding paragraph 1 of this Article, records on testimony given during the investigative phase, and if the judge or Panel of judges so decides, may be read and used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult due to important reasons.

The CPC BiH expects the imminent presentation of evidence. Article 273 of the CPC provides an exception to that expectation. That exception is - prior statements given during the investigative stage of the present proceeding are admissible as evidence in two circumstances: a) if the declarant is **not** present in court because of death, mental illness, inability to find him, or if his presence is impossible or very difficult to secure (Article 273(2)); and b) if the declarant **is** present in court and 'given the opportunity to explain or deny the prior statement' (Article 273(1) of the CPC BiH). Prior statements of the accused legally obtained during the investigative phase are admissible under Article 273(1), because the accused are present in the courtroom and have the opportunity to explain or deny their statements.

The Defense's position is that Article 273.1 of the CPC BiH is the only provision which would permit admission of the accused's prior statements. The Defense concedes that the statements can be admitted under the Article, but only if the accused who made the statements waive their right to silence during the presentation of the defense case and appear as witnesses. In that eventuality, they maintain that the Prosecution could admit the statements in cross-examination of the accused, but never in the Prosecution's case in chief. All accused and their counsel have stated to the Court that in this case, the accused will exercise their right to silence and none will testify. They therefore conclude that these statements are not admissible in this case.

The Panel disagrees with the way the Defense reads Article 273(1) of the CPC BiH. The first sentence of this Article is phrased in the conjunctive, that is, there are two parts to the sentence joined by the word "and". The part of the sentence before the word "and" refers to the fact that the law allows the statement to be admitted as evidence. The phrase is declaratory; the statements "are admissible". There is no particular method prescribed for admissibility under the first phrase of the first sentence of this Article just as there is none for many other pieces of material evidence noted in the Indictment and presented by the Prosecution.

The second phrase of the first sentence in Article 273(1) of the CPC BiH, occurring after the word "and" refers to the use that can be made of the statements by the parties, and counsel. The phrase is permissive. They "may" be used. The first phrase in the sentence is independent of the second. The statements are admissible regardless of whether the parties or Defense choose to make use of them in cross-examination, rejoinder or rebuttal. The point of Article 273(1) of the CPC BiH is to allow the usage of the investigatory statements, and not to establish any particular manner by which they must be used.

This interpretation of Article 273(1) of the CPC BiH does not breach the ECHR which permits pre-trial statements to be introduced in evidence by the Prosecutor, regardless of whether or not the accused agrees to be a witness in his own case. *See Brennan v UK*, (2002) 34 EHRR 18 (a case in which incriminating pre-trial statements made by the accused were accepted into evidence as the central part of the Prosecution's case, even though the accused exercised his right to remain silent at trial).

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2.3. The statements do not need to be introduced through a witness.

The Defense argues that the statements can only be admitted if the person who made the statement is a witness, and in the case of statements having been made by the accused, that can only happen in the defense portion of the case and then only if the accused who made the statement agrees to testify. However, if the statement can only be admitted if the declarant is a witness in the proceedings, then the law would have called him a witness. Article 273(1) of the CPC BiH refers to the declarant as a "person", specifically it requires, "The person must be given the opportunity to explain or deny a prior statement." When the CPC BiH speaks of witnesses, it exclusively refers to them as witnesses. This is particularly true for the Section VII of the CPC BiH (*See, e.g.*, Articles 266, 267, 268, 271 and 272 of the CPC BiH). Therefore the Panel concludes that the use of the word "person" in this context is meant to include anyone who may have made a statement in the investigatory stage and who is present in the courtroom during the main trial, regardless of whether they appear as a witness. This suggests that the law makers prescribed a term that encompassed not only witnesses, but the accused as well, whether or not they were appearing as witnesses. The accused who gave prior statements fall within the definition of "person", regardless of whether they also may become witnesses in the defense portion of the case.

This conclusion is further supported by other provisions of the CPC BiH containing no requirement that material evidence be introduced through a witness. In fact, Article 15 of the CPC BiH assures the free evaluation of evidence and proclaims that "evaluation of the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules." The manner in which evidence is presented under the CPC BiH is left to the determination of the Presiding Judge, whose authority to make that determination is declared in Article 262(3) of the CPC BiH which reads in relevant part: "The presiding judge shall exercise an appropriate control over the manner and order of… the presentation of evidence so that the… presentation of evidence is effective to ascertain the truth, [and] to avoid loss of time…." In this case, the manner of presentation ordered by the Presiding Judge was through reading the records in open court and accepting the written records as exhibits at the conclusion of the Prosecutor's case in chief.

2.4. There is no Conflict Between the "Right to Explain or Deny" and the Right to Remain Silent.

The Defense further argues that the accused cannot be a person contemplated by the statute because he cannot be given a real opportunity to "explain or deny a prior statement" unless he waives his right to silence. The accused in this case are invoking their right to silence.

The Panel cannot agree with this reasoning. The right to silence and the right to explain or deny evidence presented in the Prosecution's case are separate and compatible rights of the accused under the CPC. Article 6 of the CPC BiH reads as follows in relevant part:

> (2) The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favor.
>
> (3) The suspect or accused shall not be bound to present his defense or to answer questions posed to him.

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The accused at trial can use both possibilities: he can comment on the evidence against him under Article 6(2) of the CPC BiH and at the same time refuse to answer any questions under Article 6(3) of the CPC BiH. This double right is confirmed throughout the CPC. For example, Article 259 of the CPC BiH requires the presiding judge to instruct the accused that he may "offer explanations regarding the testimony" of witnesses against him. Article 277(1) of the CPC BiH gives the accused and his defense counsel the right to present a closing argument. The opportunity required to be given the accused under Article 273(1) of the CPC BiH is no different than the opportunity provided under Article 6(2) of the CPC BiH or the opportunity about which he is advised by the presiding judge, consistent with Article 259 of the CPC BiH. Whether and to what extent the accused decides to avail himself of that opportunity is up to him. The Court is only obligated to provide the opportunity. It is the same opportunity that he is provided to comment on any other piece of evidence in the Prosecutor's case, under Article 6(2) of the CPC BiH. If he decides to comment or explain, he has not waived the right to refrain from answering questions and is not obligated to become a witness, subject himself to cross-examination, or put on any evidence in his defense.

The condition that the declarant be given an opportunity to explain or deny the prior statement is consistent with Article 6 of the ECHR and the jurisprudence that has been developed by the European Court. In the case *Luca v. Italy*, paragraph 41: the Court stated, "Thus, where a deposition [prior statement] may serve to a material degree as the basis for a conviction, then, ...it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see, *mutatis mutandis*, Ferrantelli and Santangelo v. Italy, judgment of 7 August 1996, Reports 1996-III, pp. 950-51, §§ 51-52)." The Court therefore held in *Luca*, at para. 40, "If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d)."

The Panel also notes the position of the European Court in the case *Saidi v. France*, number 14647/89, decision of 20 September 1993, paragraph 43, which reads:

> All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use as evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 [Art. 6(3)(d), Art. 6(1)], provided that the rights of the defense have been respected. As a rule these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings.

During the main trial held on 5 April 2006 the Accused were given the opportunity to challenge the formal, and on 19 and 26 April 2007 also the substantive parts, of the statements they gave during the investigative phase. They had an opportunity to clarify the circumstances of taking the statements, object to the manner in which they were taken and to the content of the statements. They did not do that, and the Panel respected their decision, without asking or making them state their position in that respect. Also, the Panel provided their defense counsels and the defense counsels for the other accused whose statements were not proposed with the possibility to state their position verbally and in writing with regard to

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the possibility to admit the statements, and the Panel considered in detail objections of all defense counsels. Likewise, the accused and their counsel were given additional opportunities throughout the defense portion of the case, and the closing arguments, to comment on, explain, or deny the prior statements had they wished to do so.

2.5. The Defense Interpretation of Article 273(1) of the CPC BiH Conflicts with other Provisions of the Code

The restrictive interpretation that the Defense places on Article 273(1) not only contradicts the plain meaning of the Article 273(1) itself, but requires a result that is contrary to other provisions of the CPC. Chapter VIII of the CPC BiH is entitled "Actions Aimed at Obtaining Evidence". One of such actions referred to in Section 4, Article 77 *et seq.* of the CPC BiH, is "Questioning of the Suspect". Therefore, it is an action aimed at obtaining evidence carried out during the investigation with the exclusive intent to collect material for the purpose of further presentation of evidence at the main trial. This is also the case with each of the actions listed under Chapter VIII, which include the following actions to obtain evidence: "Search of Dwellings and Other Property" (Section 1); "Seizure of Objects and Property" (Section 2); and, relevant to this proceeding, "Crime Scene Investigation and Reconstruction of Events" (Section 6).

Article 78(6) of the CPC BiH requires the exclusion of evidence unlawfully obtained from a suspect, thereby implicitly confirming that statements that are legally obtained can be used. By the application of the *argumentum a contrario* principle, lawfully obtained statements may be admitted into evidence. This interpretation is supported in Article 219(3) of the CPC BiH which confirms that "records gathered on information may be used as evidence in the criminal proceedings" if the authorized official "acts in accordance with Article 78." Similarly Article 233(1) of the CPC BiH anticipates that prior incriminating statements will be used as evidence at the main trial, or else there would be no point in allowing the legality of these statements to be challenged by preliminary motions before the Preliminary Hearing Judge within 15 days after the indictment is delivered (Article 233(2) of the CPC BiH).

In the present case, the accused Petar Mitrović, Miladin Stevanović and Brano Džinić gave their statements before the Prosecutor's Office of BiH as suspects in the course of the investigation. Likewise Petar Mitrović gave a statement in the course of the reconstruction at the crime scene, conducted by the Prosecutor's Office of BiH. Their statements constitute evidence that the Prosecutor's Office is entitled to dispose of and propose as their evidence in their part of the case (Article 261(2)(a)) of the CPC BiH). That may not be rendered impossible to any party to the proceedings. As it has been stated above, the questioning of the suspect during the investigation phase is, according to the letter of the law, an action aimed at obtaining evidence and, as such, it meets the requirements referred to in Article 78 of the CPC BiH.

2.6. The Presentation of these Statements into Evidence does not Violate the Right of the Accused to Remain Silent Secured by the ECHR

The defense attorneys for all the accused opposed the admission and presentation of the evidence, stating primarily that the accused are exercising their right to remain silent now and that using their statements given during the investigative phase constitutes a violation of the CPC BiH and Article 6 of the ECHR. The Panel notes that all three accused waived the right to remain silent when giving these statements, as explained above, documented and clarified.

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The subsequent change of the defense strategy may only affect the proceedings *pro futuro*. That cannot have retroactive consequences on the proceedings and prior actions aimed at obtaining evidence. The Panel respects the rights of the accused protected by Article 6 of the CPC. During the main trial it has provided them with the opportunity to present their position in respect of the formalities and substance of the statements they gave, respecting at the same time their position that they do not want to make any further statement. However, their prior statements which they gave knowingly and voluntarily are admitted as part of evidence of the Prosecutor's Office and their existence may not be disregarded.

The right to silence is not a right expressly enumerated in the ECHR, but rather it has been inferred by the European Court from the Article 6(1) right to a fair trial and the Article 6(3)(d) right to the presumption of innocence. The right to silence as recognized by the European Court is not an absolute right. The European Court has never ruled in the manner that the Defense now argues. The Defense has presented no case law that would support in any way their argument that the prior legally obtained statement of the accused cannot be admitted against him at trial if he invokes his right to remain silent at the trial stage. Most European countries bound by the ECHR in fact routinely admit legally obtained prior statements of the accused in their main trial regardless of whether they testify or invoke their right to silence at the trial stage: for example, England (*Police and Criminal Evidence Act* Section 76(1)), France (*Code de Procedure Penale,* Article 428) and Holland (Criminal Procedural Code, Article 341). That practice has never been criticized by the European Court. Those European countries that do not allow the use of investigative statements against the accused at main trial have express statutory prohibitions against it, and it is the statute, not the ECHR, that precludes the practice. In Germany, for example, the statutory law prohibits the written statement given by a suspect to a police officer from being tendered into evidence (*Strafprozess Ordnung*, Art. 254). However, the officer can be questioned at the main trial and can recite the contents of the statement to the Court, should the accused remains silent. It can also be used as the basis for questioning the accused, should they decide to testify.

Notwithstanding the assertions of the Defense, the right of the accused to silence under the ECHR is no greater than their right protected by CPC BiH Article 6. The European Court has not only approved the admission into evidence at trial of investigative statements made by accused who have waived their right to silence in the course of investigation, but that Court has gone even further. For example, the European Court has declared it permissible for a national court to draw inferences as to guilt where a defendant invokes his right to silence in the investigative phase and later relies on a fact during his defense which he could have disclosed in the investigation. *Averill v. UK*, (2001) 31 EHRR 36. The European Court has approved convictions based solely on the prior statement of an accused who invoked his right to silence at the main trial. In *Brennan v. UK*, (2002) 34 EHRR 18, the accused had made incriminating statements regarding his involvement in terrorist activities during a police interview. He did not give testimony at his trial, invoking his right to remain silent. The Prosecutor was permitted to enter the accused's pre-trial statements into evidence and he was found guilty in a verdict based on these statements. The pre-trial statements were the only evidence against him. The European Court did not find his trial or conviction unfair on these grounds. As long as the accused is given the opportunity to explain or deny his statement at some stage of the proceeding, the European Court will not interfere with a verdict based in any degree on the prior legally obtained statements, regardless of whether the accused invokes his right to silence at the main trial. *See Luca v. Italy, infra*.

3. Conclusion

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CPC BiH Article 6(2) and 6(3), Article 273(1), and all other relevant sections of the CPC have been respected, both at the time the statements were given, for the reasons set out in Part 1 above, and at the time the evidence was allowed at trial, for the reasons set out in Part 2, above. Likewise, the rights of the accused secured by Article 6 of the ECHR have been respected. The statements "are admissible" under Article 273(1) of the CPC BiH. The Panel, through the Presiding Judge, properly exercised authority under Article 262(3) in the manner in which the statements were presented as evidence, and thereby met the obligation "to ensure that the subject matter is fully examined, that the truth is found and that everything is eliminated that prolongs the proceedings but does not serve to clarify the matter." (Article 239(2) of the CPC BiH).

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M. Admission of the Accused Matić's Pretrial Statements

The Panel refused the Motion of the Prosecutor's Office of BiH No. KT-RZ-10/05 of 5 May 2006 to admit into evidence the following statements of the Accused Milovan Matić:

- the record of the statement taken from Milovan Matić 21 August 2003 and 19 June 2005 (Public Security Center in Bijeljina);

- the record on reconstruction with the accused Milovan Matić of 29 September 2005 with a video recording proposed under the reference number 39 in the Indictment.

On 5 May 2006 the Prosecutor's Office of BiH filed the Motion that this evidence be read out at the trial and adduced into the case file. The Prosecutor's Office filed the Motion pursuant to Article 273 as read with Article 78 of the BiH CPC, stating that the accused Matić gave statements indicating his participation on the relevant day in the relevant location in the commission of the criminal offence he is charged with by the Indictment. The Prosecutor's Office further stated that while taking the statements from the Accused at the police station the requirements under Article 78 of the BiH CPC were respected and that the statements were given voluntarily and with full understanding of the right to remain silent.

The Defense for the Accused Matić objected to the admission and presentation of this evidence primarily stating that all statements the Accused Matić had given were not obtained by law and that the verdict might not be based on them, given that the provisions under Article 78 of the BiH CPC were not respected. Specifically defense argued that the suspect was not informed of the grounds for suspicion and the offense for which he was a suspect, and that he did not choose the defense counsel and he did not sign the waiver of the right to silence prior to giving his statement.

While giving the statement in the PSC in Bijeljina in 2003 and 2005 the Accused Matić was examined as a witness. On those occasions the Accused Matić gave statements that have given rise to this criminal prosecution, however, the authorized official persons did not interrupt his examination nor instructed him of his right to a defense counsel. The Accused Matić gave both statements to the police as a witness and without the presence of the defense counsel, which Defense asserts is in contravention of Article 45 of the BiH CPC.

As for the statement given during the reconstruction in Kravica on 29 September 2005, the defense stated that his client was mislead during the reconstruction, believing that what he stated did not incriminate him. He was not at any point during the reconstruction told what he was charged with, and he believed that what he stated on that day would not be evidence against him. The Defense stresses that this misconception was also based on the fact that the custody of the suspect Matić was terminated by the Decision of 27 June 2005, at which time the Panel of the Court of BiH that decided on the defense counsel's appeal from the Decision to order custody revoked the First Instance Decision, stating that the statement given by the accused, which the Prosecution at that time used to support the grounded suspicion, was not sufficient evidence that the grounded suspicion indeed existed.

During the trial the Court gave an opportunity to the Accused Matić to state his opinion regarding the circumstances surrounding his statements. The accused pointed out that he used silence in his defense and that he did not wish to comment the statements.

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Having considered the Motion of the Prosecution and the positions of the Defense, the Panel decided as in the operative part for the reasons that follow.

While analyzing the statements the Panel took into account the provisions of the BiH CPC and the constitutional provisions under Article 2(2) of the Constitution of Bosnia and Herzegovina, primarily the European Convention on Human Rights and Fundamental Freedoms. The European Convention was directly incorporated into the national laws and provides for the basic individual rights whose protection is guaranteed. In connection with this analysis, the Panel also took into account the practice of the European Court of Human Rights ("the European Court"). Article 6 of the European Convention sets out the rights of criminal defendants. Although it is not expressly stated under Article 6, the European Court concluded that this Article protects the right of the Accused to remain silent.[443] The court infers this right from the right to a fair trial and the right of the accused to the presumption of innocence.

The European Court will not interfere with evidentiary rules applied by state courts generally, unless the application of the rule renders the entire proceeding unfair. In this case, the Statements which the Prosecutor proposes are of fundamental importance to the pending proceedings, and as such, a determination of their admissibility and use must be carefully scrutinized. The European Court has had occasion to decide on the sufficiency of the judicial scrutiny necessary to assure the fair use of prior statements of the accused In the case of *Brennan v. UK*, (2002) 34 EHRR 18, the European Court approved the use of suspect statements against the accused who made them for a determination of guilt when the trial court:

(1) Heard testimony from the police officers and others present when the statements were taken;
(2) Heard testimony from a neuro-psychologist regarding the competence of an accused's whose mental state had been put at issue;
(3) Reviewed carefully the statements themselves and the circumstances in which they were made;
(4) Heard arguments from the lawyers of the accused;
(5) Gave the accused the opportunity to be heard in order to explain the circumstances in which the statements were obtained.

The European Court concluded that the use of the prior statements of the accused, given as suspects, having been reviewed under these circumstances, was admissible against the accused at trial, regardless of whether or not the accused appeared as witnesses in the main trial.

In this case, the Court followed the procedure approved by the European Court in *Brennan.*

1. On 25 April 2007, the Court of BiH forwarded an official letter to the Prosecutor's Office of BiH to request that the prosecutor present evidence on the manner in which the statements were taken so that the Panel could more fully analyze those circumstances in connection with the defense position that the statements were taken without regard for the essential requirements of the CPC and the ECHR. On 26 April 2007 during the main trial the

[443] The right to remain silent is regulated in the second part of Article 6(3) of the BiH CPC: "The suspect or accused shall not be bound to present his defense or to answer questions posed to him." *See also* Article 78(2)(a) of the BiH CPC.

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Prosecution made certain representations that the Record on the Statement made in the Prosecutor's office on 23 June 2005 did not contain the information on the grounded suspicion and instructions referred to in Article 78 due to a technical error committed by the record taker, but that the prosecution had complied with these requirements and that there is evidence on the Record dated 24 June 2005 which implies that the instructions were read out to suspect Matić and that he had understood them. Although the record taker was available, she was not called as a witness by the prosecution nor was there testimony presented by any other person who was present at the taking of any of Matić's statements. Therefore though mindful of the prosecutor's representations, the Panel points out that these are only arguments and there is no evidence to support these arguments.

2. The mental state of accused Matić was not put into question, and the Panel concludes that there is no issue that would suggest that he was not competent at the time of questioning to understand his rights if properly informed of them, or to waive his rights at the time he was questioned.

3. The Court admitted each of the offered statements for the limited purpose of reviewing them in connection with this decision as to their admissibility for use by the Panel in determining the verdict. The Panel concluded that it was impossible to evaluate whether the rights secured by the CPC and the ECHR were respected, and the procedure required by the CPC enforced without seeing each statement in its entirety. In addition, the Panel watched the video record on the reconstruction several times. The Panel notes that the Prosecution does not propose that the statement given to the Prosecutor's Office of BiH on 23 and 24 June 2005 be admitted. However, having watched the video-recording of the reconstruction done with the accused Matić on 29 September 2005, the Panel concluded that the reconstruction was derived from the statement previously given by the accused Matić to the Prosecution on 23 and 24 June 2005. Therefore the Panel *ex officio* requested from the Prosecutor to produce the statement of 23 and 24 June only to determine its legality as the source of the reconstruction statement.

This procedure proved to be justified because issues such as the point at which the accused changed from witness to suspect, the manner in which the reconstruction record referenced the statement of 23 and 24 June and the absence of information, and waivers required by law were inextricably intertwined with the statements themselves. Failure to review each statement in its entirety would have deprived the Panel of the information necessary to make a decision and would have been inconsistent with the process approved by the European Court in *Brennan*.

4. The court heard arguments of the prosecutor and the defense attorney for Matić throughout the presentation of evidence relevant to the statements In addition, the Panel announced on 29 March 2007, that additional arguments on the admissibility of the statements would be heard on 5 April 2007, on which date the Prosecutor and defense counsel for Matić were given unlimited time to make their arguments. The Court also heard additional arguments on 26 April 2007. These arguments were seriously considered by the Panel in connection with the decisions herein.

5. The Court gave Matić the opportunity to comment on the testimony relevant to the statements as well as on the circumstances of the taking of the statements themselves. In addition, the Panel announced on 29 March 2007 that additional opportunity to be heard on

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the statements would be provided to all accused on 5 April 2007. On that date, Matić waived the opportunity for further comment and proceeded on his right to remain silent.

The CPC provisions relevant to the rights of the suspect who is questioned are designed to ensure that the ECHR Article 6 rights are protected, in particular the right to silence, the right to a defense attorney and the right to understand the nature of the accusation against him and the right to an interpreter. Like the ECHR, the CPC provides that the right to silence may be waived, but only if that waiver is made knowingly and voluntarily. The CPC protects this right further by requiring evidence of the waiver prior to questioning, and in the case of crimes for which a penalty of long term imprisonment can be imposed, the mandatory provision of a defense lawyer at no cost to the suspect. The CPC likewise makes clear that the choice whether to waive his right to silence cannot be influenced in anyway by "force, threat, fraud, narcotics, or other means that might affect the freedom of decision-making and expression of will while giving a statement or confession" (CPC Article 77(2)) and further "it shall be forbidden to extort a confession or any other statement from the suspect" (CPC Article 10(1)). If a statement of a suspect is taken contrary to the provisions of Article 77 or 78, "the decision of the Court may not be based on the statement of the suspect" (CPC 77(3); 78(6)). If any evidence, including a statement of the suspect, is taken in violation of international human rights or as an essential violation of the CPC, "the court may not base its decision on [that] evidence" (CPC Article 10(2)). Furthermore, the Court is likewise precluded from basing its decision on any evidence which is "derived" from evidence taken in violation of international human rights or through an essential violation of the Code. (Article 10(3)).

The Panel therefore must decide whether or not each statement was obtained lawfully.

1. None of the Statements given by Matić were Obtained Lawfully

A. The Accused Matić's Statements taken at the Public Security Center (PSC) Bijeljina were not Obtained Lawfully.

As for the statements of the accused Matić taken on 21 August 2003 and 19 June 2005, the Panel observes that these are the statements given at the PSC Bijeljina. The Prosecution presented no testimony in regard to circumstances of the taking of the statement.

It is evident from the analysis of respective statements of the accused that he was questioned by the police and made his statements in the capacity of a witness (CPC Article 86) and not as a suspect (CPC Article 78). The police are authorized under the CPC to take statements from both witnesses and suspects, but they are also obligated to act in accordance with the correct provision of the CPC in order for the record of those statements "to be used as evidence in the criminal proceedings." (CPC Article 219.3). In this case, the accused was instructed on his rights and obligations as a witness: that is, that he must tell the truth on everything known to him in relation to the events in Srebrenica, specifically the facilities of the Farmer's Cooperative in Kravica in July 1995. Based on these "witness" statements, Matić was subsequently arrested as a suspect against whom the criminal proceedings were instituted.

The Records on obtaining the statements from Matić, conducted by the police in Bijeljina at the police station violates in particular Article 45 and 78 of the CPC of BiH at the point at which it became clear that he was providing them with evidence that he committed a crime

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for which long-term imprisonment was the penalty. At that point he became a suspect for commission of the gravest form of serious crime. The police were required to stop the questioning at this point and inform him of his rights under Article 78 and provide him with a lawyer under Article 45(1). Statements taken as a consequence of failure to stop the questioning and proceed according to Article 78 and Article 45 renders the statement inadmissible under Article 78(6) as it was taken "contrary to the provisions" of Article 78. There is no evidence however that any force, threats or duress was applied to Matić in connection with either statement, and therefore there is no violation of CPC Article 77, or 10(1).

The Prosecution argues that the police would not necessarily know that Matić was incriminating himself in connection with a crime for which appointment of a defense lawyer was mandated under Article 45(1). This argument is not persuasive. The police knew that they were investigating the alleged killing of 1000 civilians in the Kravica warehouse, an event that was allegedly part of the military operation in Srebrenica in July 1995, which had already been determined by the ICTY to be genocide. Even if the police were not aware of the crime that might be actually charged by the prosecutor, they did know that they were investigating a crime for which the most serious penalty could be imposed.

Article 219(3) explicitly prescribes that in gathering information from persons, the authorized official shall also act in accordance with Article 78 of the CPC BiH. Thereby, it is clearly noted as to which procedural requirements should have been met, from the point when the examiner had clear understanding that the person being interviewed is giving a statement by which he incriminates himself. In the specific case, the police officials evidently did not instruct the persons examined on their rights under Article 78 nor was the questioning stopped to clarify the issue, as authorized officials are obliged to in these specific circumstances.

The right to defense is a fundamental right of the accused guaranteed by Article 7 of the CPC BiH, and Article 6(3)(c) of the ECHR. In cases like Matić, where long-term imprisonment could be imposed, the CPC goes further to protect the rights of the suspect in Article 45(1) of the CPC BiH prescribing the mandatory defense for the suspect at the first examination. Evidently, the examination before a law enforcement agency was the very first examination before national authorities. In the examinations, the suspect made statements in regard to circumstances which could indicate the existence of the grounds for suspicion against him.

The right to the appointment of defense counsel early in the investigation was discussed by the European Court in *John Murray v. the United Kingdom* and *Imbrioscia v. Switzerland*, where it was noted how the later proceedings are subsequently affected by the failure to appoint an attorney in early stages of the procedure.

Notably, it was concluded in *John Murray v. the United Kingdom*, (1996) 22 E.H.R.R. 29, para. 62, that Article 6 of the ECHR "applies even at the stage of the preliminary investigation into an offence by the police." It is noted in *Imbrioscia v. Switzerland*, (1994) 17 E.H.R.R. 441, para. 36, that Article 6, and paragraph 3 in particular "may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions [Art. 6(3)]." Furthermore:

> National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the

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> defense in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation." (*John Murray*, para. 63).

In conclusion, the rights and obligations of suspects questioned by authorized officials are different from the rights and obligations of witnesses. The rights of suspects during questioning, relevant to Matić, are protected by Article 6 of the ECHR, and Articles 6, 7, 45, 77, 78, and 79 of the CPC. These rights were violated by the police when they failed to stop the questioning at the point at which it became clear that Matić was not a witness but in fact a suspect in a crime for which long term imprisonment could be imposed. At that point the police were required to treat him as a suspect and inform him of his rights under CPC Article 78 and provide him with defense counsel according to Article 45(1). Failure to do so represents violations of the rights secured by Article 6 of the ECHR and of the CPC Articles 219, 78, and 10, all of which require that the court exclude the statements from evidence and that the Court refrain from basing any decisions on them.

B. The Accused Matić's Statement taken in the Prosecutor's Office of BiH was not Obtained Lawfully

The prosecution did not seek the admission of the statement taken in the Prosecutor's office on 23 and 24 June 2005. However, because the statement that they do seek to admit, the record of reconstruction taken on 29 September 2005 derives from and is connected to the statement taken in the Prosecutor's office, the Panel is required to analyze the admissibility of the Record that is being offered in terms of the legality of the previous statements taken by the prosecutor. In the analysis of the statement in the context of procedural requirements stipulated under Article 78 of the CPC of BiH the Panel concluded that the statement given by the accused Matić on 23 and 24 June 2005 was unlawfully obtained. Specifically, the Panel concludes for the reasons set out below that the statement violated both the rights of the accused preserved by the ECHR, Article 6, and the procedure required by law to ensure those rights set out in CPC Article 78. The statement was therefore obtained "in violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina [and] through essential violation of the Code." (CPC Article 10(2).

i. Article 78 of the BiH CPC: Formal Requirements

Particular formal objections raised by the accused are based on CPC Article 78, and Article 6 of the ECHR.

Article 78 of the CPC BiH prescribes the basic instructions which the person interviewed as suspect needs be advised on by the one conducting the examination (prosecutor).

Relevant to this case, the suspect should have been informed on the following:

(1) The charge against the suspect and the grounds for the charge.
(2) The right not to present evidence or answer questions.
(3) The right to retain a defense attorney of his choice who may be present at questioning and the right to a defense attorney at no cost in such cases as provided by the Code

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when the charge carries a sentence of long-term imprisonment, the mandatory right to assigned defense counsel.

(4) The right to comment on the charges against him, and to present all facts and evidence in his favor.

(5) The right to study files during the investigation, and view the collected items in his favor unless the files and items concerned are such that their disclosure would endanger the aim of investigation.

(6) The right to an interpreter service at no cost if the suspect does not understand the language used for questioning.

(7) That the suspect may voluntarily waive any of these rights, except the right to a defense lawyer if the charge is one that requires a mandatory defense.

(8) The continuing right to present views on all facts and evidence that speak in his favor, even if the suspect has voluntarily waived the right not to answer the questions asked.

According to Article 78(6), "If any actions have been taken contrary to the provisions of this Article, the Court's decision may not be based on the statement of the suspect."

ii. Matić was not Warned about the Grounds for Suspicion against Him

Article 78(2) requires that at the beginning of the questioning the suspect be informed of the charge against him and the grounds for the charge. Although the record reflects that the charge of genocide was set out on the written record at the beginning of the questioning, there is insufficient evidence for the Panel to conclude that Matić was ever informed of the grounds for the charge. Violation of this provision requires that the Court may not base a decision on the statement that followed. (CPC Article 78(6)). Violation of this provision is also contrary to Article 6(1) of the CPC and Article 5(3) and 6(3)(a) of the ECHR, and therefore demands exclusion of the statement (CPC Article 10(2)) and exclusion of evidence derived from the statement (CPC Article 10(3)).

The grounds for the charge were not recited at the beginning of the record of the statement. However, the requirement that the suspect be told the grounds of suspicion does not require that it appear on the face of the record. It is of course better practice to include it as it would be evidence both of the substance of the grounds for suspicion and that the appropriate grounds for suspicion were in fact conveyed to the Suspect. However, if the grounds for suspicion do not appear on the face of the record, the Panel will look to other evidence produced by the Prosecutor to establish compliance with the requirement. For example, the record of the statement of co-accused Petar Mitrović did not contain recitation of the grounded suspicion. In that case however, the prosecutor provided live testimony from a witness who was present throughout the questioning who confirmed that the suspect was twice advised of the actual grounds of suspicion appropriate to that case before the questioning began. There was also evidence on the written record that corroborated the sworn testimony, and there was acknowledgement on the written record of the accuracy of that corroboration by the suspect's attorney who was present when the grounded suspicion had been repeated for her in front of the accused.

In this case there is no sworn testimony of any witness regarding this issue. The official record reflects that the suspect was taken to the prosecutors for examination on 23 June 2005 and on that day the questioning "began" for the purposes of CPC Article 78(2). There is nothing in the record that day that suggests that Matić was informed of the grounds for charge against him. The record reflects that questioning was interrupted so that a lawyer could be

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appointed by the Court, and resumed in the presence of counsel on the following day, 24 June 2005. There is nothing in the record on the second day that either recites the grounds for suspicion or indicates that it was provided to the suspect on that day either. There is likewise no sworn testimony from any person who was present for the examination to assist the court in determining whether and what was told the suspect on either the 23rd or the 24th of June.

The record on the second day (June 24) contains one comment relevant to this question: "When asked if he understood all the instructions that were read to him at the hearing held on the previous day as well as the grounds of suspicion against him, the suspect states: 'I understand it and there is no need to repeat it today.'" The Panel may only conclude from Matić's statement that he 'understood' it that the prosecutor did say something to him, but the Panel cannot conclude just what exactly that may be. Although the attorney for the accused by signing the record, attested to the fact that the remark was accurately recorded, his signature cannot be relied on as verifying the accuracy of the substance of the remark because he had not been present the previous day, to which the remark referred.

From this statement the prosecutor asks us to conclude that Matić was informed of the appropriate grounds of suspicion on the preceding day. However, Matić was not asked if the grounds of suspicion had been explained to him or if they had been mentioned at all, only if he understood them. The provision of CPC Article 78(2) and the human rights requirements on which it is based have a specific purpose, that is, to assure that a citizen who is accused of a crime and asked to comment on it knows in detail what evidence the prosecutor is relying on that supports guilt so that the suspect knows what he is defending against and can make a knowing decision as to whether he wishes to remain silent about the facts at issue. It is not enough that the suspect thinks he understands what the evidence against him might be, nor that he is informed of the wrong information. In the statement made on the second day, there is no acknowledgement that Matić was actually told what the prosecutor believed the evidence against him was, and the record from the previous day is likewise silent. There is likewise no testimony to enlighten us about whether and what was told the suspect regarding the facts that made up the grounded suspicion. There is also no video or audio record of what Matić was told on either day. Furthermore there is no verification in the form of the signature of the lawyer as to what was told Matić on the first day, since the defence counsel was not present until the second day.

The statement of Matić recorded on the official record fails to provide evidence that he was *informed* of anything regarding grounded suspicion, and there is no additional evidence or corroborating evidence or authenticating evidence on which the court can rely to support the assertion that he was informed and informed accurately. In fact, extrinsic evidence casts doubt on whether, if he had been informed, that information would have been correct. In examining the Court's own files, the Panel notes that the two other documents written by the Prosecutor at or around the time of the examination of Matić and filed with the Court, misstate the grounded suspicion against Matić: one document, written on June 21st 2005, alleges that there is grounds for suspicion that he was a member of the 2nd Šekovići Detachment; the second, dated June 24, states that "he participated in the killing of 1000 Bosniaks by firing from automatic rifles, machine guns and hand grenades." Neither reflect the actual grounded suspicion against the suspect.

It is the Prosecutor's burden to prove that he complied with the CPC if he wants the Court to use statements of the accused or evidence derived from them. The means for proving compliance are not prescribed by statute and the Court is flexible in accepting relevant

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reliable evidence to meet that burden. However, in the absence of any convincing evidence, the Prosecutor has failed to meet that burden in this case.

iii. Matić was not Informed about his Rights as Required by Article 78(2) of the BiH CPC (a) through (e)

The prosecutor failed to comply with Article 78(2)(a) through (e). Neither the record on the 23rd of June or the 24th of June state, recite, or even suggest that the prosecutor at any point read or explained to the suspect his rights under Article 78(2). All other records of examination of suspects in this case clearly set out *verbatim* the Article 78 and Article 7 and 8 rights that were explained The record for Matić sets out the Article 7 rights but makes no reference whatsoever to the Article 78(2) rights. The law is clear: "At the beginning of the questioning the suspect shall be informed of the following rights; [a through e]." The questioning began on 23 June 2005. There is an official record typed by an official record keeper who subsequently signed the record along with the prosecutor who was conducting the examination, and the suspect, and the suspect's lawyer. The prosecutor suggests that his recollection is that he did recite the rights to the suspect on June 23, prior to the appointment of the defense lawyer, and assumes that the problem occurred because the record taker was inexperienced and may have deleted that portion of the examination. However, the record taker was never presented by the prosecutor as a witness to explain how such an error could have occurred, or whether she recalls that the rights were read and that she somehow deleted them from the record prior to printing it, even though the prosecutor was given the opportunity to call her as a witness.

Without any evidence either in the written record or from the testimony of a witness, the Panel can only conclude that the prosecutor must be mistaken. This conclusion is supported by the record, which shows that the encounter between the prosecutor and Matić on the 23rd began at 15:55 hours, at which time the record shows that the prosecutor asked 22 questions having to do with identifying information and Matić answered them, and that the Prosecutor read the Article 7 rights and asked questions regarding those rights to which Matić responded. The interview is then concluded in order to petition the Court for appointment of counsel, and the time is recorded at 16:05. That amount of time, ten minutes, is barely sufficient to accomplish the questioning that was recorded. It is manifestly insufficient to also include an explanation of the grounds for the charges and the reading of the Article 78 rights. In addition, both the record taker and the Prosecutor signed the printed record, verifying its accuracy. It is not likely that neither would notice that compliance with the mandatory provisions of the law had accidentally been deleted.

The record reflects that on the second day (June 24) the following statement by Mr Matić was reported: "When asked if he understood all the instructions that were read to him at the hearing held on the previous day as well as the grounds of suspicion against him, the suspect states 'I understand it and there is no need to repeat it today.'" The prosecutor argues that this supports his position that the rights were read. However, the only "instructions" to which that statement could refer are the rights under Article 7, because these were the only rights that appear to have been read to him.

Failure to advise Matić of his rights under Article 78(2) (a) through (e) is an essential violation of the Code (CPC Article 78(6); Article 297(1)(h)) and evidence derived from it cannot be the basis of the court's decision (CPC Article 10(3)).

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iv. Matić did not Knowingly and Voluntarily Waive his Right to Silence

Article 78(3) requires that "the questioning of the suspect may not commence unless his waiver has been recorded officially and signed by the suspect." The Panel has concluded in the case of the co-defendant Mitrović that the "provision" of Article 78(3) which must be strictly enforced by the Court is that there must be proof established on the face of the record that the suspect has waived his rights under Article 78(2) and acknowledged that waiver before the questioning commences. The form of acknowledgement set out in the law is the signature of the suspect, but the Panel has found that if there is a physical impediment to producing a signature at the time of the waiver, the Court may be flexible in accepting other reliable evidence that the waiver was made and independently acknowledged prior to the commencement of questioning.

On Matić's statement there is no proof whatsoever on the face of the record or anywhere else that the suspect ever waived his rights nor is there any other form of acknowledgement of waiver, made prior to or after the questioning commenced or the official record was created. The statement was taken contrary the provision of Article 78(3), and is an essential violation of the Code (CPC Article 78(6); Article 297(1)(h)) and evidence derived from it cannot be the basis of the court's decision (CPC Article 10(3)).

In addition, and more fundamentally, the suspect could not voluntarily waive rights of which he had not been informed in order to make a statement regarding his defense to a crime for which he had not received accurate notice of the grounded suspicion. The record is not only devoid of any formal waiver on the part of the Matić but the conditions precedent to making the waiver, that is, the receipt from the prosecutor of information regarding the rights that are being waived and the grounds of suspicion against him about which those rights apply, is completely lacking from the face of the official record, and that lack is nowhere corrected by other reliable evidence. Without that information, Matić not only did not waive his rights, but could not have made a waiver that would meet the standards of voluntariness required by the ECHR Article 6 (*Bulut vs. Austria* (1997) 24 E.H.R.R. 84). Interrogation of a suspect absent a voluntary waiver of the right to remain silent violates international human rights standards, and evidence derived from a statement obtained in violation of those standards cannot be the basis of the Court's decision (CPC Article 10(3)).

C. Matić's Statement taken as part of the Reconstruction was NOT Legally Obtained

i. The Crime Scene Reconstruction Record violates Article 10(3)

Article 10(3) prohibits the Court from basing a decision on evidence derived from evidence that was obtained through violation of fundamental human rights or taken through an essential violation of the Code. After reviewing the audio tape of the Crime scene reconstructions the Panel reached the inevitable conclusion that this statement was derived directly from the illegally obtained statement taken in the prosecutor's office. The prosecutor in fact at the beginning of the video taped record explains that the purpose of the crime scene reconstruction is to demonstrate everything that the suspect had already told the prosecutor on 24 June 2005. For the reasons set out in part B above, the statement taken on 24 June was obtained in violation of Article 6 of the ECHR and CPC Article 78, which constitutes an essential violation of the Code (Articles 78(6), 297(1)(i) and 10(2)) because the Crime Scene reconstruction record was derived solely and completely from the statement which was illegal under Article 10(2), it cannot be used by the Court to base a decision. CPC Article 10(3).

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ii. The Crime Scene Reconstruction Record Violates Article 78

The reconstruction itself does not meet the requirements of Article 78. The entire reconstruction is contained on an audio video record which shows that the prosecutor again failed at the beginning of the reconstruction, to advise Matić of his rights under Article 78(2) (a) through (e), and failed to inform him of the grounds for suspicion. This is particularly problematic, since he never had done so for the previous statements. Absent compliance with the law, the decision to answer questions of the prosecutor cannot be considered a voluntary waiver under CPC Article 78(3), or CPC Article 6, or ECHR Article 6, and it is a direct violation of Article 78(6).

This continued failure on the part of the prosecutor to comply with Article 78 is not simply a technicality. On 27 June 2005, the Appellate Panel of this Court overturned a pre-trial custody order against Matić because the Appellate Panel concluded that the statement that Matić gave to the prosecutor on 24 June was the only evidence against him and the activities to which he admitted in that statement were not sufficient to establish grounds for suspicion (under CPC Article 132) that he had committed the crime of genocide. Matić's defense counsel argues that, based on that decision, at the time they agreed to the reconstruction, Matić and his lawyer no longer believed that Matić was the target of the investigation. Likewise he did not believe that demonstrating the activities he had recited in his statement would incriminate him, because the Appellate Panel had already determined that the facts he agreed to demonstrate were insufficient to establish grounded suspicion. The defense argues that Matić had no reason to believe that he would become an accused and so it was in his interest to cooperate in order to hasten the conclusion of the investigation so that he would be formally relieved if his status as a suspect when the investigation was concluded. It is the defense position that if the prosecutor continued to believe he had grounded suspicion against Matić, he should have told him what it was, and told him his rights as a suspect under Article 78. The attorney for Matić further argues that the prosecutor willfully and fraudulently misled Matić and his lawyer by failing to give him and his attorney the information required under Article 78, especially what the prosecutor was relying on for grounded suspicion. They allege that the reconstruction statement was extorted by the fraud of the prosecutor, and thus it violated CPC Articles 77 and 10(1).

The Panel does not find that the Prosecutor acted fraudulently. However the prosecutor indisputably acted contrary to the law in proceeding to question Matić at the reconstruction without ever having advised him of the grounds for suspicion on which the prosecutor continued to believe that Matić had committed the crime of genocide. This is not only a formal violation, but one with practical consequences in light of the ruling by the Appellate Panel.

Article 78(6) is clear and unambiguous: if a statement is taken contrary to the provisions of Article 78, the Court's decision may not be based on it. The reconstruction, in addition to being derived from an illegally obtained statement, was itself illegally obtained because of violations of Article 78(2) and Article 78(3), as well as CPC Article 6, and the provisions of the ECHR cited above.

2. Matić's statements are not admissible as evidence

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Articles 78, 10(2), and 10(3) say that "the court cannot base its decision" on illegally obtained or derived evidence. Each of the statements obtained from the Accused Matić were illegally obtained. The statement at the reconstruction is, in addition, illegally derived. Therefore the statements must be considered inadmissible.

In Article 24, "Composition of the Court", the term "Court" includes first and second instance Panels. The term "decision" is defined under CPC Article 163(1): "Decisions shall be rendered in criminal proceedings in the form of a verdict, a procedural decision or order." Therefore, once the statements are determined to have been obtained in violation of Article 78 and Article 10, they cannot be used by the Trial Panel to base the verdict in any form, either as direct or corroborating evidence. To do so would violate Article 297(1)(i), rendering any verdict in which they were used subject to a grounded appeal (CPC Article 296(a)). They therefore have no relevance to the proceedings and are rejected (CPC Article 263(2)).

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N. Disclosure of Potentially Exculpatory Evidence

On 8 February 2008, the Panel decided on the Motion of the Defense Counsel for the Accused Milenko Trifunović, Lawyer Rade Golić, of 25 January 2008, to disclose the evidence to protect the right of the accused to their defense, and ordered the Prosecutor's Office of BiH to make available to the defense of all the accused in the case the evidence based on which the Indictment had been filed against the Accused Trbić within seven days from the delivery of the Decision. The Prosecutor's Office was to decide how it would familiarize the defense with the evidence and the manner of protection of the confidential information from the evidence which it deems need protection.

On 25 January 2008 the Defense Counsel for the Accused submitted a request with the Court to reveal the evidence from the case *Milorad Trbić*, No. KT-RZ-139/07. The request states that the Accused Trbić is charged with the events which are directly linked with the event his client is charged with. The Defense for Trifunović believes that in terms of Article 14 of the BiH CPC, the Defense should be enabled to review this evidence, which it deems to be acquitting for his client.

Having considered the delivered request the Panel decided as stated in the operative part for the following reasons:

The Panel found that the accused Milorad Trbić was charged with the incidents which are indeed in connection with those alleged against all the Accused and concluded that the Motion by the Trifunović's Defense for reviewing the evidence against the accused Trbić was founded as regards this specific count he is indicted for. It can be reasonably assumed that the body of evidence in the Trbić case might contain the evidence which the Defense considers to be in favor of their clients. Considering that all the eleven Accused are charged with the same alleged incident, for which, among other things, the accused Trbić has been indicted, the Panel opines that this sort of evidence might be of interest to all the Accused in this case, not only to the accused Trifunović.

The Panel finds that the Defense is entitled to become acquainted with the evidence in possession of the Prosecutor's Office, which might be in favor of their clients.

The Panel noted the submission by the Prosecutor's Office of BiH concerning the large volume of the documentary evidence in the Trbić case and considers that, by making it possible for the Defense to review the evidence contained in the case file on the Prosecutor's premises, the purpose of the Motion by the Defense Counsel for the accused Trifunović will be fulfilled.

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O. Decision on Severance of Proceedings

On 21 May 2008, the Panel deciding *ex officio* on the separation of the proceedings pursuant to Article 26 of the BiH CPC, decided that in the criminal case against the accused Miloš Stupar and others, the criminal cases against the accused Petar Mitrović and the accused Miladin Stevanović shall be separated, therefore, they shall be completed as three separate cases.

It was decided that the accused Petar Mitrović and the accused Miladin Stevanović shall be called to testify in their mutual cases and in the case against others, and shall be obliged to testify under the penalty for an unjustifiable refusal to testify.

Any information or evidence obtained from the testimonies of the accused Mitrović and Stevanović shall not be used in the proceedings against them.

Reasoning the decision, the Panel stated the following:

On April 18, 2007, the Panel admitted into evidence:

(1) The statement of Accused Petar Mitrović given to the Prosecutor's Office of BiH on June 2, 2005.
(2) The statement of Accused Miladin Stevanović given to the Prosecutor's Office of BiH on June 24 and July 1, 2005.
(3) The statement of Accused Brano Džinić given to the Prosecutor's Office of BiH on June 2, 2005.
(4) The record of the crime scene investigation on reconstruction with Accused Petar Mitrović on October 4, 2005.
(5) The Crime Scene Sketch prepared in conjunction with the reconstruction with Accused Petar Mitrović on October 4, 2005.

For the reasons set out in the procedural decision of 18 April 2007, these statements were determined to be admissible in this case and were read out at the main trial. Then the Panel *ex officio* deliberated on the possibility of separation of the proceedings with regard to the accused Miladin Stevanović and Petar Mitrović, while with regard to Brane Džinić, the Panel did not find it relevant, considering that the statement of the accused Džinić does not incriminate other co-accused persons in the case. On 26 April 2007, the Panel held a hearing on the issue of severance of the cases of the Accused whose statements were admitted into evidence. At that hearing, all parties and counsel were given the opportunity to be heard. All Accused and defense counsel objected to severance at that time, and none exercised their right to cross-examine Stevanović, Mitrović and Džinić on the admitted statements.

The Panel is of the view that the Accused who are, directly or indirectly, incriminated by the testimonies of Stevanović and Mitrović, are entitled to cross-examine the makers of these statements, according to Articles 262(1) of the CPC and Articles 6(1) and Article 6(3)(d) of the ECHR. At the same time, the Accused have an absolute right to remain silent in their own proceedings, according to CPC Article 6(3). They have, in addition, a right against self-incrimination when testifying as witnesses in proceedings other than their own, but that right is not absolute. (CPC Article 84 and ECHR Article 6(1)). It is the Panel's obligation to ensure the rights of all Accused to cross-examination, and it is also the Panel's obligation to ensure that the Accused are not placed in a position where their right to refrain from

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producing evidence in their own cases is impaired or their right to refuse to incriminate themselves is denied.

The Panel concludes that it has the means to protect the rights of all Accused by:

(1) **Severing** the proceedings and creating two additional separate proceedings against Stevanović and Mitrović, respectively;
(2) **Compelling** Stevanović and Mitrović to testify as witnesses in the two cases in which they are not the Accused; and
(3) **Excluding** the use of the testimony of Stevanović and Mitrović given as witnesses in the other two cases for any purpose in their own trials.

1. **Severance**

The cases of Mitrović and Stevanović will be severed from each other and from the cases against the remaining Accused.

The Accused may not be called as witnesses in their own cases, pursuant to CPC Article 6(3), and the European Convention of Human Rights, Article 6(1) and (2). Although the European Convention does not explicitly set out the right of an Accused not to testify, the fair trial rights protected by Article 6(1) in combination with the presumption of innocence protected by Article 6(2) have been interpreted to include a specific immunity possessed by accused at trial from being compelled to produce any evidence, including testimonial evidence, in their own case. Therefore, the Court is without the power to compel them to testify in the case as it is presently constituted because both Mitrović and Stevanović are Accused in this case.

The Court does have the authority to sever the cases of Mitrović and Stevanović. By doing so, they can be called as witnesses and placed under oath in the case of the remaining Accused. This authority comes from Article 26(1) of the CPC which reads in relevant part: "(1) Before the main trial is complete, the Court may, for important reasons…decide to separate the proceedings …against certain accused persons and complete them separately."

Protecting the right to cross-examination of the other Accused is an important reason to sever. As all other evidence will already have been admitted as to all Accused at the time of severance, there is no prejudice that will attend any of the 11 Accused by severance.

Accused Mitrović and Accused Stevanović will each have separate trials in which each may cross-examine the other on the statements admitted. The remaining nine Accused will continue to have their cases joined and Mitrović and Stevanović will be called as witnesses, placed under oath, and defense counsel and Accused will be given the opportunity to cross-examine each as to the previously admitted statements.

2) Compulsion

After severance, Mitrović and Stevanović will be compelled to give testimony as witnesses in the cases of the other Accused.

The Court has the Authority to compel them to testify under CPC Article 81(7). There is a duty of witnesses with relevant information who are summoned to Court to answer legal questions posed to them. (CPC Article 81(1)). That duty is especially important here

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because they are being called for the sole purpose of protecting the rights of the other accused to cross-examine the statements these two witnesses gave before the trial commenced which were read into the trial record and which incriminate several of the other Accused. As has been pointed out in the Motion submitted on behalf of the Accused Trifunović, and previously also on behalf of the Accused Stupar, Articles 6(1) and 6(3)(d) of European Convention provide them with the right to cross-examine witnesses against them.

Article 6(1) guarantees the right to a fair trial, and Article 6(3)(d) provides that:

> Everyone charged with a criminal offence has the following minimum rights:
> (d) to examine or have examined witnesses against him….

The European Court has ruled that the term "witnesses against him" is an autonomous concept that has been interpreted to include persons whose pre-trial statements incriminate the Accused and are read out in the Accused's trial. *Asch v Austria*, Judgment of 26 April 1991, para. 25. The European Court in *Asch* went on to affirm that statements of witnesses could be introduced by reading them out at trial without violating the Accused's right to fair trial, but that the Accused against whom the statement was made should "be given an *adequate and proper opportunity to challenge and question a witness against him*, either when he was making his statement or at a later stage of the proceedings." *Asche*, at para 27 (emphasis added). In *Asch*, the witness who made the statement refused to testify at trial under the statutory privilege against testifying in the case of a family member. The European Court held "the right on which she[the witness] relied in order to avoid giving evidence cannot be allowed to block the prosecution," and left it to the national court to fashion a solution "to have regard to this statement… subject to the rights of the defense being respected." *Asche* at para. 28.

In the present case, the Accused incriminated by the statements have never been given the opportunity to challenge or question the witnesses who made the statements. We are presently at the latest stage of the proceedings, all other evidence having been introduced, so there is no later stage in which the Accused may exercise this right. It is up to this Court to fashion a solution which allows us "to have regard to the statement" while at the same time respecting the rights of the Accused to cross-examination. We therefore shall compel Stevanović and Mitrović to appear as witnesses in the other two cases and to answer questions put to them by the Accused and their defense counsel in cross-examination of the statements previously given and read at the main trial.

3. Exclusion

<u>The testimony given by Stevanović and Mitrović as witnesses in the other two trials will not incriminate them in their own trial.</u>

As witnesses in the two cases of the other Accused, Stevanović and Mitrović have the right shared by all witnesses to "refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself." (CPC Article 84(1)).

In this case, Mitrović and Stevanović are already under prosecution for the subject matter on which they would be questioned. The risk that they now run is that their answers will be used against them in the prosecution of the indictments already filed against them. That risk is obviated in its entirety because the Panel will exclude that testimony in each of the witnesses'

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own cases and will not use the answers they give as witnesses in any way, directly or indirectly, against them individually.

The protection against self-incrimination is predicated upon there being a real danger that testimony might be used against a witness in a criminal proceeding in which they are the accused. Where there is no possibility of that happening, then the witness must answer the questions. CPC Article 84(2) provides that if a witness refuses to answer based on a risk of *future* criminal prosecution, that refusal will not be permitted once the Prosecutor represents that no prosecution will be brought against the witness. This provision demonstrates that the right to silence is co-extensive with criminal liability; further, that the right to refuse to answer self-incriminating questions is *not* absolute. Rather, that right is only concerned with protecting an individual from being forced to give testimony which could later lead to the infliction of criminal penalties. Only the Prosecutor can make a promise regarding *future* prosecutions, because only the Prosecutor has the power to initiate a prosecution, according to CPC Article 16. In the present case, the prosecution has already been instituted and at this stage only the Panel is in a position to obviate the risk that the testimony will be held against the witness in his own proceeding, because only the Panel can exclude evidence from consideration and only the Panel can control the use of the evidence and guarantee that it will not be used in any way in regard to rendering the verdicts in Mitrović and Stevanović's own cases. If there is no risk that the testimony will incur any criminal consequences for the witness in his own case, then he has exactly the same protection as is afforded by his right to remain silent and he is compelled to answer all questions.

The rule set out in CPC Article 84(1) is not designed to prevent compulsory disclosure of criminal evidence, but to prevent punishment as a result of any such revelations. When the risk that the testimony will be used to subject the witness to punishment is removed, then the duty of a witness to testify must be enforced. This is especially true when that duty involves the rights of Accused to cross examine evidence that the witness has given which could potentially incriminate them.

A. The European Court of Human Rights

The European Court of Human Rights has recognized that the right to remain silent does not protect persons from being compelled to provide evidence that may incriminate them, but only protects them from having that evidence used against them in their own criminal proceedings. In *Saunders v United Kingdom*, (1997) 23 ECHR 313, testimony which Saunders was compelled to give in an administrative proceeding was introduced against the Accused in his criminal proceedings. The European Court held that whether or not there was an unjustifiable infringement of the right of an Accused not to incriminate himself did not depend on the fact that the testimony was compelled in the other proceeding, but the use that was made of it in the criminal proceeding against the Accused. If it was not used against him in his own criminal proceeding, there would be no violation of Article 6 of the European Convention of Human Rights. On the other hand, since in the case before the European Court, the compelled evidence was used against him in his own criminal proceeding, Mr. Saunder's rights were in fact violated.

In this case, Stevanović and Mitrović may be compelled to give testimony as witnesses in cases other than their own without violation of their rights protected by the European Convention, because that compelled testimony will not be used against them in their own criminal cases.

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B CPC BiH

The Panel is aware that this procedure is not specifically set out in the CPC. However, the authority of the Panel to undertake this procedure is based on the CPC and fully supported by the Procedural Code.

Under CPC Article 239, the Court is under an obligation to ensure that the subject-matter of a case is fully examined and the truth is found. In addition, the Presiding judge is required to control the proceedings "so that the examination of and presentation of evidence is effective to ascertain the truth, to avoid loss of time and to protect the witnesses from harassment and confusion." (CPC Article 262(3)).

The Panel, when exercising its obligation to fully review evidence, and to protect the rights of all accused, is entitled to compel what would otherwise be incriminating testimony, subject to guarantees that it will not be used against the witness. The answers given as a witness, under the duty to testify in the case other than his own, are inadmissible in his own case, under CPC Article 6. Pursuant to CPC Article 263, the Judge "shall forbid" its admission into the case in which the witness is Accused. This is exactly what the Panel is doing. In forbidding the use of the compelled testimony against the witnesses in their own cases, the Panel guarantees Stevanović and Mitrović that their compelled testimony will not lead to the infliction of criminal penalties. In effect, the witness is in exactly the same position as if he had remained silent. A witness who suffers no adverse legal consequences from testifying is, necessarily, not incriminated by such testimony, and the testimony can therefore be compelled, without contravening CPC Article 84(1), and his rights against self incrimination guaranteed by CPC Article 6 are protected.

C. Jurisprudence of other Courts

The ICTY has recognized that the right against self-incrimination must give way when the witness is protected against use of that testimony against him as an Accused. The ICTY has found that the right against self-incrimination is not absolute and that the witness may be compelled to answer even incriminating questions, provided that incriminating testimony he is compelled to give is not used for any criminal prosecution against that witness, except for prosecution for perjury if the testimony is false. *Simić* case, ICTY, 27 March 2003.

The jurisprudence of the United States, in interpreting the right to remain silent enshrined in the Fifth Amendment to the US Constitution, has also taken the same approach. The United States Supreme Court has held that incriminating testimony can be compelled without violating the right to silence provided that testimony is not used in any criminal proceeding against the witness. This is because forbidding its use in criminal prosecutions of the witness essentially has the effect of cutting the casual link between the testimony and any subsequent punishment. *Kastigar v U.S.* (US Sup. Ct.), 406 U.S. 441 (1972).

D. Judicial Exclusion

The Panel in this case is composed of professional judges. The fact that the Panel under this ruling is precluding itself from using against Stevanović and Mitrović in their own cases any testimony compelled from them as witnesses in other cases is consistent with the role professional judges play in every case. This Panel has been called upon repeatedly in this

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trial, and the others in which it sits, to review evidence, which it sometimes then excludes if it determines that reliance on that evidence is forbidden by the CPC and/or the ECHR and other law to which the Court is subject. It is part of the judicial function to assure that decisions are based solely on the evidence admitted, and as professional judges, the Panel understands and accepts its obligation to assign evidence only to the cases where it is legally admitted and disregard it as the basis of any decisions where it has been determined by the Panel to be forbidden.

4. Conclusion

The three cases were severed from one another effective **22 May 2008**. Stevanović and Mitrović were called as witnesses in the cases of each other and the remaining nine Accused and compelled to answer questions put to them by Accused and defense counsel in cross-examination of the previous statements they made and that had been admitted into the case. The Panel was committed to the exclusion for all purposes the compelled testimony of each witness from evidence in the case in which the witness stood accused, and the Panel further bound itself to exclude from consideration any inferences to be drawn from that testimony relevant to each of their own cases, and gave assurances that it would not base any decisions in the cases of Mitrović and Stevanović, respectively, including but not limited to the verdict, on testimony given by Mitrović or Stevanović as witnesses in the other cases.

Severance was ordered to protect Stevanović and Mitrović's rights to refuse to produce evidence in their own cases, consistent with CPC Article 6(3); and to protect the Accused's rights to cross-examine witnesses against them. By severing the cases, each of the Accused was given the opportunity to challenge and question the witnesses regarding the statements previously given; thereby protecting their rights under CPC Article 262 and ECHR Article 6(1) and 6(3)(d). The testimony the witnesses gave was to be excluded from the case of each of the witnesses, thereby extinguishing any risk that the compelled testimony would jeopardize them criminally in any way, and placing them in the identical position as they would be in if they remained silent, consistent with CPC Article 84, ECHR Article 6(1), and the jurisprudence of the ECHR, the ICTY, and the US. The prosecution would not be "blocked". The Panel fulfilled its responsibilities under CPC Articles 239 and 262.

On 28 May 2008, under the conditions outlined above, Mitrović and Stevanović each appeared for cross-examination in the two cases in which they were not the accused. Each accused was given the opportunity to cross-examine, as was each defense counsel. Each accused and each defense counsel knowingly and expressly waived their right to cross-examination on the record during the main trial on that day.

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