



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

Case No. IT-98-30/1-T  
Date: 2 November 2001  
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**IN THE TRIAL CHAMBER**

**Before:** Judge Almiro Rodrigues, Presiding  
Judge Fouad Riad  
Judge Patricia Wald

**Registrar:** Mr. Hans Holthuis

**PROSECUTOR**

v.

**MIROSLAV KVO^KA  
MILOJICA KOS  
MLA\O RADI]  
ZORAN ŽIGI]  
DRAGOLJUB PRCA]**

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**JUDGEMENT**

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## I. INTRODUCTION

1. On 30 April 1992, "life changed overnight, within 24 hours", in the Prijedor area, located in the north-eastern part of Bosnia Herzegovina.<sup>1</sup> On that day, Serb forces conducted a bloodless takeover of the town of Prijedor and declared their intention to rename the territory the "Serb municipality of Prijedor". After the takeover, non-Serbs were dismissed from their jobs, their children were no longer allowed to attend school and their movements were restricted. Propaganda against Muslims and Croats was broadcast on the radio and both mosques and Catholic churches were targeted for destruction.<sup>2</sup>

2. Less than a month after the takeover, Serb forces began hearing rumors of plans for an armed uprising by local Muslims and Croats against the new Serb authorities. In order to suppress the uprising, the Omarska, Keraterm, and Trnopolje camps were established towards the end of May 1992 as "collection centres" to identify individuals suspected of collaborating with the opposition.<sup>3</sup> These camps were initially expected to be of a short duration, lasting approximately 15 days.<sup>4</sup> However, after the Serbs succeeded in defeating the rebels, the camps remained in full operation until they were dismantled at the end of August due to pressure exerted by the international community.<sup>5</sup>

3. Survivors of these camps came to The Hague to testify. Dozens of witnesses testified before the Trial Chamber about the deplorable conditions of detention. The vast majority of the evidence focussed on the Omarska camp, where inhumane treatment and conditions were said to be the most horrendous. Omarska camp was the first to be shut down after reports reached the international community that thousands of non-Serbs detained there were being killed and otherwise gravely

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<sup>1</sup> Emir Beganovi}, T.1345.

<sup>2</sup> Witness J, T. 4730-4735; Emir Beganovi}, T. 1344-1346; Azedin Oklop-i}, T. 1670-1671.

<sup>3</sup> Mirko Jesi}, T.11703, 11762-11763.

<sup>4</sup> Miroslav Kvo-ka, T.864. This was corroborated by other witnesses, e.g. Milenko Jasni}: "Željko told us that it would function for 10 or 15 days until it was established who attacked Prijedor, who got – procured the weapons, who was responsible and so on." T.11534.

<sup>5</sup> Evidence discloses that members of the media visited the camps in late July and August 1992. See e.g. Witness B, T. 2418-2419; further, Radi} testified that a picture was taken of him while some journalists were visiting the camp. Mla|o Radi}, T. 11180.

mistreated.<sup>6</sup> In total, the Trial Chamber heard 139 witnesses over 113 days of trial and viewed 489 exhibits.<sup>7</sup>

4. The accused in this case are Miroslav Kvo-ka, Draglojub Prca}, Milojica Kos (a.k.a. Krle), Mla|o Radi} (a.k.a. Krkan), and Zoran @igi} (a.k.a. Ziga). At the time Omarska camp was established, Kvo-ka and Radi} were professional policemen attached to the Omarska police station, Prca} was a retired policeman and crime technician mobilized to serve in the Omarska police station, and Kos and @igi} were both civilians, a waiter and taxi-driver respectively, mobilized to serve as reserve officers. Kvo-ka, Kos, Radi}, and Prca} were subsequently assigned to serve in various security or administrative positions within Omarska camp. @igi} worked for a short period of time in the Keraterm camp delivering supplies; he was also allowed to enter Omarska, Keraterm, and Trnopolje camps regularly as a civilian. None of the accused was instrumental in establishing the camps or determining official policies practiced on detainees therein.

5. The Prosecution alleges that all accused incur individual responsibility under Article 7(1) of the Statute for their acts or omissions committed against detainees held in the camps. The Prosecution seeks further to attribute superior responsibility under Article 7(3) of the Statute to Kvo-ka, Prca}, Kos, and Radi} for crimes committed by subordinates which they allegedly failed to prevent, halt, or punish.<sup>8</sup>

6. At the conclusion of the Prosecution's presentation, the Trial Chamber entered acquittals for certain charges alleged against Kvo-ka, Kos, Radi}, and Prca} insofar as they concerned the Keraterm and Trnopolje camps. The Trial Chamber found that the Prosecution failed to present sufficient evidence against these accused connecting them to, or demonstrating their responsibility for, abuses committed in Keraterm or Trnopolje camps.<sup>9</sup>

7. This Judgement is divided into seven Parts. Part I consists of this Introduction. The factual findings of the Trial Chamber are contained in Part II, beginning with a narrative overview of the events leading to the establishment of the camps and continuing with the functioning of each camp and evidence of crimes committed therein. Part III of the Judgement provides a legal framework for

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<sup>6</sup> Emir Beganovi} who was detained in Omarska throughout its period of operation, estimated that it had held 3,000 people: T.1391, as did former detainee Witness AK, T.2008. See also the testimony of detainee Zlata Cikota who estimated that 600 people were fed per hour for 4 or 5 hours a day, T.3327. Defense witness Cedo Veluta confirmed that several thousand detainees were held at the camp. Cedo Veluta, T. 7455. Defense witness Dragan Popovi}, a guard at the camp, estimated that there were 2000-2,500 prisoners. Dragan Popovi}, T. 7727. Typist Nada Markovska estimated over 2,000 prisoners could be held at a time. Nada Markovska, T. 7800.

<sup>7</sup> For more details, see Annex A "Procedural History". The Trial Chamber utilized some testimony of witnesses or alleged crimes not included in the indictment or contained in the Schedules attached to the indictment, to the extent that it was found credible and sufficient advance notice had been given to the accused in accordance with Rule 93, as corroborative of a consistent pattern of conduct.

<sup>8</sup> For more details, see Annex D, Amended Indictment.

<sup>9</sup> See Decision on Defense Motions for Acquittal, 15 December 2000.

analyzing the facts set out in Part II. The Trial Chamber considers the requisite legal elements of violations of the laws or customs of war and crimes against humanity, then determines under what circumstances an accused can be convicted for more than one crime based upon the same set of facts and goes on to examine the general principles regulating the attribution of criminal responsibility. Based on the factual conclusions reached in Part II, combined with the legal framework of Part III, in Part IV the Trial Chamber provides its ultimate findings as to the criminal responsibility of each accused on the basis of the role he played in the functioning of the camp(s). Part V of the Judgement addresses matters relating to sentencing and Part VI sets forth the disposition. Finally, Part VII contains five Annexes.

## II. FACTUAL FINDINGS

### A. BACKGROUND, CONTEXT, AND FORMATION OF CAMPS

8. The acts ascribed to the accused occurred generally during the same time and at the same locations as the crimes attributed to Du{an Tadi}, whose sentence was delivered by the Tribunal on 24 January 2000.<sup>10</sup> The parties in this case agreed to a series of facts recounted in the *Tadi}* Trial Chamber Judgement that relate to the historical, geographical, military, and political context of the conflict which raged following the disintegration of the Socialist Federal Republic of Yugoslavia ("SFRY", or "the former Yugoslavia"), especially in the municipality of Prijedor, and which led to the establishment of the camps at Omarska, Trnopolje, and Keraterm. The facts agreed upon by the parties were adopted by the Trial Chamber in its "Decision on Judicial Notice".<sup>11</sup> In addition, the Defense for the accused Radi} submitted an expert report on the background to the conflict,<sup>12</sup> which was countered by a report filed by the Prosecution.<sup>13</sup> The principal determinations of these reports are set out below.

#### 1. The Break-up of the SFRY

9. Under the 1946 Yugoslav Constitution, the SFRY was divided into six republics – Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro.<sup>14</sup> The population of Bosnia and Herzegovina, more so than any other republic of the former Yugoslavia, had been multi-ethnic for centuries, with Serbs, Croats, and Muslims as the largest ethnic groups.<sup>15</sup> Following the Second World War, Marshal Tito and his communist regime took extensive measures to suppress and control all nationalistic tendencies, but in spite of the government's efforts, the Yugoslav population remained very conscious of its so-called ethnic identity.<sup>16</sup> However, apart from the difference of religion (and to a degree of custom and culture), all three of the predominant groups in Bosnia and Herzegovina are of Slav descent, speak the same language (apart from minor regional differences), have often intermarried, and frequently bear common surnames.<sup>17</sup>

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<sup>10</sup> *Tadi}* Sentencing Judgement of 26 January 2000.

<sup>11</sup> Decision on Judicial Notice. The agreed facts are contained in Annex 1 to the "Prosecutor's Motion for Judicial Notice of Adjudicated Facts" of 11 January 1999.

<sup>12</sup> Preface to the wartime events in Prijedor and their context, Witness Expert Opinion of Nenad Kecmanovi}, D34/3.

<sup>13</sup> Review of expert witness statement "Nalaz i Mišljene Dr Nenad Kecmanovi}" prepared by Dr. Robert J. Donia, filed 30 March 2001.

<sup>14</sup> Decision on Judicial Notice, 8 June 2000, para. 49.

<sup>15</sup> Decision on Judicial Notice, para. 1.

<sup>16</sup> Decision on Judicial Notice, paras 48 and 58.

<sup>17</sup> Decision on Judicial Notice, paras 62 and 63.



10. In 1990, the first multi-party elections were held in each of the republics, resulting in the election of strongly nationalist parties that, in turn, heralded the break-up of the federation.<sup>18</sup> In Bosnia and Herzegovina, these parties were the Muslim Party of Democratic Action (SDA), the Serb Democratic Party (SDS), and the Croat Democratic Union (HDZ). On 25 June 1991, Slovenia and Croatia declared their independence from the SFRY.<sup>19</sup> In Bosnia and Herzegovina, a referendum on independence held in February 1992 was opposed by the Bosnian Serbs; an overwhelming majority abstained from voting. Nonetheless, Bosnia and Herzegovina declared independence in March 1992. That independence was recognized by the European Community and the United States of America in April 1992. The Republic of Serbian People of Bosnia and Herzegovina (later to become the *Republika Srpska*) had been declared by the Serbs on 9 January 1992, and was slated to come into force upon formal international recognition of the Republic of Bosnia and Herzegovina.

## 2. The Prijedor Region

11. In September 1991, several Serb Autonomous Regions in Bosnia and Herzegovina were proclaimed. One of these, the Serb Autonomous Region of Krajina (ARK), consisted of the Banja Luka region and surrounding municipalities; however the Prijedor municipality, in which the SDA held a small majority, did not join the Autonomous Region. Crisis Staffs were formed in the Autonomous Regions to assume government functions and carry out general municipal management; members included SDS leaders, the JNA Commander for the area, and Serb police officials. The ARK Crisis Staff was established in April or May 1992.

12. The SDS, assisted by police and military forces, conducted a takeover of the town of Prijedor on 30 April 1992. JNA soldiers occupied all of the prominent institutions in the town, and declared their intention to rename the municipality the "Serb municipality of Prijedor" (*Srpska opština Prijedor*). A local Crisis Staff was established to run the area and to implement the decisions of the central ARK Crisis Staff based in Banja Luka. Non-Serbs were immediately targeted for abusive treatment. A witness testified:

Quite suddenly checkpoints cropped up in town at all major crossroads, in front of all important institutions, all over town, so that citizens had to pass through those checkpoints. They were mistreated, those who were Muslims or Croats ... so that life changed overnight.<sup>20</sup>

13. The acts of discrimination and the resulting increase in tension between the Serb authorities and the other local ethnic groups, culminated in attacks on sections of the non-Serb population where the new regime was resisted. On 23 May 1992, Serb forces attacked and gained control of the

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<sup>18</sup> Decision on Judicial Notice, para. 70.

<sup>19</sup> Decision on Judicial Notice, para. 113.

largely Muslim village of Hambarine, eventually resulting in the displacement of approximately 20,000 non-Serbs. The following day, a successful attack was launched on the town of Kozarac, which was again situated in a predominantly Muslim area (approximately 27,000 non-Serbs lived in the wider Kozarac area and of the 4,000 inhabitants of the town itself, 90% were Muslim). A large number of Muslim citizens of these areas who did not succeed in fleeing in the face of the assaults were rounded up, taken into custody and detained in one of the three camps which are the subject of this case.

14. This scenario was repeated in Prijedor town on 30 May 1992, following an unsuccessful attempt by members of the non-Serb population there to regain control of the town. Muslims were ordered by radio to hang white sheets outside their homes to indicate loyalty to the Serb authorities,<sup>21</sup> to tie white ribbons around their arms and to head towards the centre of town. Emir Beganovi} was among those who obeyed the instructions and he testified to seeing several dead bodies on his way to the center of town. On arrival, he joined a group of an estimated 2000 people, mainly Muslim but also containing some Croats, gathered in front of some high rise buildings. This group was separated into two subgroups: men 15-65 years of age in one group, and women, children, and elderly men in the second group.<sup>22</sup> Others were directed to the "Balkan Hotel", also in the center of town, where they too were separated into two groups.<sup>23</sup> Men from both locations were loaded onto buses, which headed first towards the police station (the "SUP" or Secretariat of the Interior building) in the town. Some individuals were arrested later in the summer on the basis of a pre-designated list of intellectuals and prominent members of society. These community leaders were routinely taken to the Prijedor police station and beaten.<sup>24</sup>

### 3. The Creation of the Omarska, Keraterm, and Trnopolje Camps

15. All non-Serb men arrested and taken to the SUP were then bussed to either the Omarska camp or the Keraterm camp. Women, children, and the elderly tended to be taken to the Trnopolje camp.

16. The Omarska camp was located at the iron ore strip mine outside the Omarska village. The Keraterm camp was established in the premises of a ceramics factory and the Trnopolje camp was based in a variety of buildings in the village of Trnopolje, including a former school, a theatre, and the municipal centre.

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<sup>20</sup> Emir Beganovi}, T.1345.

<sup>21</sup> Azedin Oklop-i}, T.1679.

<sup>22</sup> Emir Beganovi}, T.1350-1354.

<sup>23</sup> See, e.g., Witness AJ, T.1573; Azedin Oklop-i}, T.1688; Witness DA/3, T. 7876-7877.

<sup>24</sup> Sifeta Su{i}, T.2993; Witness Y, T.3580-3581; Nusret Siva}, T.3970-3971; Witness J, T.4735-4736.

17. Although efforts had already begun to set up the camp and staff and detainees began arriving around the 27th of May, the Prijedor Chief of Police, Simo Drljaca, issued the official order to establish the camps on 31 May 1992.<sup>25</sup> Simo Drljaca's order referred to the establishment of "a provisional collection centre for persons captured in combat or detained on the grounds of the Security Services' operational information" in the industrial compound of the Ljubija iron ore strip mine near the village of Omarska, to the southeast of Prijedor town. Drljaca concluded his order with the directive: "I most strictly prohibit giving any information whatsoever concerning the functioning of this collection centre".<sup>26</sup>

18. The Omarska camp was initially intended to be of short duration. According to the accused Kvočka, it was expected to conclude its work after approximately 15 days.<sup>27</sup> Nonetheless, it continued its operation until late August 1992. Investigators drew up lists of people to arrest and bring to the camp based upon information they obtained during the interrogations of detainees.<sup>28</sup>

19. Everyone in the camp was interrogated at least once,<sup>29</sup> and interrogations were typically accompanied by brutal physical and mental suffering. As a result of the interrogations, detainees were divided into 3 categories: the first contained those determined to pose the greatest threat to the Serb regime, defined as "people who had directly organised and taken part in the armed rebellion"; the second consisted of "persons suspected of organising, abetting, financing and illegally supplying arms"<sup>30</sup> to the resistance group; and the third category was limited to those who were, in the words of Simo Drljaca, "of no security interest".<sup>31</sup> Those in the last category were originally slated to be transferred to Trnopolje or released. The others were to be sent to the "prisoner of war" camp in Manjaca.<sup>32</sup> The Prosecution exhibited a list of 174 people in category one, which was drawn up at the Omarska camp on 28 July 1992.<sup>33</sup> The Trial Chamber notes that among the names appearing on this list are those of two women whose bodies were discovered many years later, as well as one woman who was never seen again after the Omarska camp was closed.<sup>34</sup> Those in category one received the very worst treatment at Omarska.

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<sup>25</sup> Kvočka testified that he was ordered to activate the reserve police force to staff the centre on 28 May, and arrived at the Omarska camp with the men that evening to find prisoners already present, T.848-862.

<sup>26</sup> Exhibit P 2/4.11.

<sup>27</sup> Miroslav Kvočka, T.864.

<sup>28</sup> Mirko Jesić, T.11712. Lists dated from 6 to 23 July 1992 and signed by Simo Drljaca were exhibited by the Defense Exhibit D39/5.

<sup>29</sup> Witness B, T.2369.

<sup>30</sup> Exhibit D38/1, p 6; see also Mirko Jesić, T.11703.

<sup>31</sup> Exhibit P 2/3.33, pp 1, 6. The official report on the camps explains that these people were "brought in from areas where there had been fighting, and had happened to be there because their extremists had prevented them from pulling out to a secure place". See also Witness Nada Markovski, T. 7788.

<sup>32</sup> Exhibit D38/1, p 6. Kvočka also said he heard rumours among the guards about categories, and that once Gruban warned him that his brother in law was in the category to go to Manjaca. Miroslav Kvočka, T.8222.

<sup>33</sup> Exhibit P 3/204.

<sup>34</sup> Identified as: Edna Dautović, Sadeta Medunjanin, and Hajra Hadžić.

20. On 5 August 1992, Simo Drlja-a informed his superiors in Banja Luka that

the Prijedor Public Security Station, in co-operation with the competent security services of the Banja Luka CSB [security service centre] and the army of the Serbian Republic of Bosnia and Herzegovina, has completed the processing of the prisoners of war.

The investigation has found elements of criminal liability in 1,466 cases, for which valid documentation exists, which we shall transfer under guard, along with the persons it pertains to, to the Manja-a military camp on 6 August 1992. The remaining persons are of no security interest, and will be transferred to the reception camp in Trnopolje on the same day ...

Further operation of the investigation centre in Omarska is therefore no longer required ...<sup>35</sup>

The camp was finally shut down towards the end of August 1992, and therefore operated for just under 3 months.<sup>36</sup>

21. According to the report on the camps in the Banja Luka area produced by the Bosnian Serb authorities ("the official report on the camps"),<sup>37</sup> 3,334 detainees passed through the Omarska camp during its period of operation. Former inmates estimated that up to 3,000 detainees were held at one time; employees agreed that it was over 2,000.<sup>38</sup> The vast majority of the detainees were men, but there was also a group of approximately thirty-six women, many prominent in local affairs, from the area.<sup>39</sup> Boys as young as 15 were seen in the early days of the camp, as well as some elderly people.<sup>40</sup> The inmates were overwhelmingly of Muslim and Croat ethnicity.<sup>41</sup> The few Bosnian Serbs detained were reportedly there because they were suspected of having collaborated with the Muslims.<sup>42</sup>

22. The Trial Chamber turns now to examine the functioning of the three camps. The bulk of evidence adduced at trial by the parties concerned Omarska camp, where the accused Kvo-ka, Kos, Radi}, and Prca} held official positions.

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<sup>35</sup> Exhibit P 2/3.33, p 4. Those transported to Trnopolje were eventually bussed to areas outside the Serb-held territory in November of 1992. The busses transported detainees to Skender Vakuf, Bugojno, Karlovac, and Gradi{ka, as reported by Drlja-a in his "Report on the Work of the Prijedor Public Security Station during the last months of 1992" to his superiors in the Ministry of the Interior. See Exhibit P 2/4.10, pp 5-6.

<sup>36</sup> Radic said that the camp was disbanded on 12 and 13 August, T.11274. However, according to a report dated 18 August 1992 of the specially-established commission on detention centers in the Banja Luka area of responsibility: Defense Exhibit D38/1, p 6 (hereinafter "Official Report"). Apparently 179 people remained in the center on 18 August 1992. Their interrogation was to be completed within 7 days. This generally corresponds with the information given to the Prosecution by Prcac. See Exhibit P 3/167, p 15 (indicating that 175 people remained in the center at the close of operations in late August 1992).

<sup>37</sup> Exhibit D38/1, p. 6.

<sup>38</sup> See *supra*, note 6.

<sup>39</sup> Zlata Cikota, T.3333, 3303-3336; Emir Beganovi}, T.1391 (estimating there were "30 or maybe 35 women" in the camp).

<sup>40</sup> These numbered "over 90" according to detainee Emir Beganovi}, T.1391. The official report on the camps lists 28 detainees under 18 and 68 people over 60.

<sup>41</sup> According to the official report, "of the total of 3,334 persons brought in to the Omarska Investigation Centre between May 27 and August 16 1992, there were 3,197 Muslims, 125 Croats, 11 Serbs and one other." Exhibit D38/1, pp 6-7. This was confirmed by Mirko Jesi}, one of the three chiefs of the investigators in the camp. Mirko Jesi}, T. 11752; see *also, e.g.*, Emir Beganovi}, T. 1391-1392; Witness AJ, T. 1591; Mirsad Ali{i}, T. 2476.

<sup>42</sup> Witness AK, T. 2004.

## **B. THE OMARSKA CAMP**

### **1. Administration of the Omarska Camp**

23. According to the Prosecution, the Omarska camp was run by the staff of the Omarska Police Station. The commander, deputy commander, and shift leaders of the camp were members of the police force of this station.<sup>43</sup> By contrast, the Kvo-ka Defense asserts that there was no centralized authority conducting the operation of the camp on a daily basis. Instead, separate chains of command operated to ensure the performance of a number of functions, including the securing of the detainees in the camp (provided by the Omarska police) and the external security of the camp (provided by the army), the provision of food, water and cleaning services (provided by the management of the Omarska iron-ore mine), and interrogations (carried out by different branches of the security services in co-operation with military investigators). Kvo-ka maintained that the head of each of these respective service functions reported separately to Simo Drljaca, who governed the whole operation.<sup>44</sup>

24. Within the internal security structure provided by the Omarska police, the Defense concede that @eljko Meaki} was the commander, but assert that there were no other positions of authority in the security service: @eljko Meaki} had no deputy and there were no shift leaders.

25. In order to situate the organs and individuals involved in the running of the Omarska camp, it is first necessary to examine the structure of the security services in Republika Srpska at the time of the camp's constitution, in particular those of the village of Omarska. The Trial Chamber heard considerable testimony on this point.

#### **(a) Structure of the Security Services in Republika Srpska**

26. The evidence established the chain of command in the security services to be as follows: the service was headed on a ministerial level by the Minister of the Interior. Next in the chain of command were the regional authorities, the most relevant in this case being the Banja Luka Security Services Centre (CSB). At the time of the events alleged in the Amended Indictment, the head of the CSB was Stojan Župljanin. The CSB was divided into two principal departments, the State Security Department (SDB) and the Public Security Department (SJB).<sup>45</sup> The State Security Department was occupied with intelligence work. Within the Public Security Department there were several sub-sections dealing, for example, with crime, traffic, personnel, passports, and aliens.

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<sup>43</sup> Prosecution Pre-Trial Brief, para. 26.

<sup>44</sup> Miroslav Kvo-ka, T. 910-911.

<sup>45</sup> See Instruction on the Rules of Conduct and Interpersonal Relations of Employess in the Ministry of Interior, Exhibit D 3/275 (b) (hereinafter "Du{an Lak-evi} Report").

One of these subsections was the general security or militia section, and this section was known as the police department.<sup>46</sup> The accused Kvo-ka, Kos, and Radi} were employees of this branch of the security services, as was Prca}, who worked as a crime technician.<sup>47</sup>

27. The Public Security Station in Prijedor mirrored the structure of the Public Security Department of the CSB. The Public Security Station in Prijedor was one of three Public Security Stations devolving from the Banja Luka Centre. Simo Drljaca was the Head of the Public Security Station in Prijedor during the duration of Omarska camp's existence. The uniformed police department of this station was headed by Dusan Jankovi}, who was immediately subordinate to Simo Drljaca.<sup>48</sup> The head of the Prijedor Police Station, Milutin ^ado, was immediately subordinate to Simo Drlja-a in the chain of command overseeing the uniformed police or militia.<sup>49</sup> There were three sub-offices or "Police Station Departments" attached to the Prijedor Police Station.<sup>50</sup> @eljko Meaki} was the commander of the Police Station Department situated in Omarska, where Kvo-ka and Radi} were also employed.<sup>51</sup>

(b) Authority and Responsibilities in the Omarska Camp

28. As mentioned above, the Omarska camp was established by order of Simo Drljaca, chief of the Prijedor municipality Public Security Station, who was also a member of the Prijedor Crisis Staff.<sup>52</sup> His order was pronounced "in accordance with the Decision of the Crisis Staff",<sup>53</sup> and it established the responsibilities of various actors.<sup>54</sup> The order charged a "mixed group consisting of national, public and military security investigators" with the interrogation and resulting categorization of the detainees. This "mixed group" was comprised of the members of the crime branches of the public and state security services, as well as military investigators. The order assigned responsibility for the work of the investigators to three named coordinators: Ranko Miji},

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<sup>46</sup> Zdravko Samardžija, T.6967-6972.

<sup>47</sup> See Du{an Lak-evi} Report.

<sup>48</sup> Miroslav Kvo-ka, T.759-760.

<sup>49</sup> Exhibit P 3/203, p 135.

<sup>50</sup> See Exhibit D40/1.

<sup>51</sup> Bogdan Deli}, T. 9180-9181.

<sup>52</sup> Exhibit P 2/4.11. For information regarding the establishment of the Crisis Staff and membership of SimoDrlja-a, see Exhibit P 2/5.30.

<sup>53</sup> The relevant decision of the Crisis Staff is not exhibited. However, Exhibit P 2/2.8, presenting the conclusions of the ARK Crisis Staff meeting of 26 May 1992 does make clear that "The Crisis Staffs are now the highest organs of authority in the municipalities".

<sup>54</sup> The order was copied to the Crisis Staff, the security services co-ordinators, the Security Services Centre in Banja Luka, the police chief (Jankovi}), the security chief, and the General Manager of the iron ore mines, in that order.

Mirko Jesi}, and Lieutenant Colonel Majstorovi}.<sup>55</sup> Detainees reported that the investigators came to the camp from Banja Luka each day and wore a different uniform than the guards.<sup>56</sup>

29. Paragraph 6 of the Drlja-a order states that “Security services at the collection centre shall be provided by the Omarska Police Station”, and according to paragraph 2, “the persons taken into custody shall be handed over to the chief of security, who is duty-bound in collaboration with the national, public, and military security co-ordinators to put them up in any of the five premises allocated for the accommodation of detainees”. The Trial Chamber accepts that @eljko Meaki} was the “chief of security” to which the order referred and that he was responsible for allocating detainees to the different detention sites in the camp.<sup>57</sup> The Trial Chamber further considers that there was a duty upon @eljko Meaki} to place the detainees in “appropriate” living quarters in collaboration with the security service or investigation coordinators. Such a collaboration suggests that @eljko Meaki} was not in a position of superior authority over the investigation coordinators. This interpretation of the relationship is supported by reporting instructions contained in the order. The order required the security services coordinators and the chief of security to submit reports to Simo Drljaca every 24 hours.<sup>58</sup> The order prescribed that the Chief of Security’s report was to be limited to evaluation of the operation of the security services (as provided by the Omarska police) and “possible security problems”.<sup>59</sup> The separate chains of command from the police officers and from the investigators to the head of the Public Security Station also mirror the structure of the Omarska station, as both the police and crime branches of the public security section, and the state security section reported independently to Simo Drljaca.<sup>60</sup>

30. This accords with testimony of former detainees who reported that the investigators were separate from the guards and wore different uniforms.<sup>61</sup>

31. The order directed the management of the iron ore mine to organize food, drinking water, and the cleaning and maintenance of the facilities, as well as to provide for logistical support. Nothing in the order suggests that either @eljko Meaki} or the security service co-ordinators bore supervisory responsibility for these tasks. The full list of personnel employed by the mine

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<sup>55</sup> Exhibit P 2/4.11, para.3; confirmed by Mirko Jesi}, T. 11704, Nada Markovska, T. 7764-7766, and Witness DD10, T. 10665-10666.

<sup>56</sup> Witness Y, T.3630; Witness AM, T.3926.

<sup>57</sup> Indeed Kvo-ka said that @eljko Meaki} must have seen this order because the instructions he passed onto the guards reflected the provisions of this paragraph. Mirko Jesi} testified that the guards drew up lists of people detained in each room for the investigators to know who was present in the camp and where. T. 11717.

<sup>58</sup> Exhibit P 2/4.11, para.11, confirmed by Mirko Jesi}, T. 11705.

<sup>59</sup> Exhibit P 2/4.11, para.12.

<sup>60</sup> According to Mirko Jesi}, within the public security service, Ranko Miji} was a step above Zeljko Meaki}, who was the commander, and Miji} was directly responsible to Simo Drljaca for what was happening in the Omarska camp”. T.11773-1174. The Trial Chamber notes, however, that this analysis does not conform with the reporting instructions in the order.

<sup>61</sup> See, e.g., Witness Y, T.3630.

management team under the terms of the order was to be sent directly to the Public Security Station in Prijedor.<sup>62</sup>

32. Pero Rendi}, leader of the quartermaster's squad of the logistics unit of the Omarska territorial defense who was tasked with running the kitchens in the Omarska camp, testified that he received his assignment from Milan Andzi}, the acting assistant commander for logistics. According to the witness, Milan Andzi} "was the one who could issue me orders, and he probably received orders from the battalion commander, and they from the Crisis Staff, but I have no idea".<sup>63</sup> When asked whether the security personnel from the Omarska police station could influence or improve the quality of the food, Pero Rendi} maintained: "No. They had a person who was in charge of procuring the supplies necessary for preparation for the food, and that person was the assistant commander for logistics and the main base. That was the person who was in charge of that."<sup>64</sup> He also testified that Simo Drljaca occasionally visited the kitchens to check on food provisions.<sup>65</sup>

33. Pero Rendi} further testified that he was assisted in his work by a butcher and a cook from the quartermaster's squad, and otherwise} by staff of the Omarska mine and other civilians who were mobilized under wartime obligation.<sup>66</sup> This staff was supervised by someone named "Duško", while the manager of the whole complex was named Babi}.<sup>67</sup> This was corroborated by Dragan Vuleta, a peacetime employee of the mine, who was mobilized during the war to maintain the water and electrical installations in the compound,<sup>68</sup> as well as by Witness J.<sup>69</sup> According to Dragan Vuleta, the women who worked in the kitchen were supervised by someone called Duško, and Mirko Babi} was the overall supervisor of all workers mobilized in the maintenance of the compound, including Dragan Vuleta himself, Duško and the catering staff, and the women who cleaned the premises.<sup>70</sup> When asked whether @eljko Meakic, whom he identified as the boss of the reserve police deployed in Omarska, could issue orders to any of the maintenance workers, Dragan Vuleta replied that he could not, and that only Mirko Babi} could issue orders to them. Dragan Vuleta did not know to

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<sup>62</sup> Exhibit 2/4.11, para.14.

<sup>63</sup> Pero Rendi}, T.7321.

<sup>64</sup> Pero Rendi}, T.7338. See also T.7323.

<sup>65</sup> Pero Rendi}, T.7335-7336.

<sup>66</sup> The testimony of Defense witness Drasko Đervida contradicts this. Drasko Đervida testified that he worked in the kitchen as part of the quartermaster's squad under Pero Rendic along with approximately 10 other soldiers. Drasko Đervida, T.10392.

<sup>67</sup> Pero Rendi}, T.7322. The Trial Chamber notes that the name "Mirko Babi}" appears on Prosecution Exhibit 3/208 under the category of shift employees needing passes for the Omarska camp. Defense witness Obrad Popovi}, who was employed as a porter at one of the entrances to the camp, testified that Duško Tubin, a member of the mines management, was his superior. Obrad Popovi}, T.11559. It is to be noted, however, that Duško Tubin does not appear in Exhibit 3/208.

<sup>68</sup> Cedo Veluta, T. 7434.

<sup>69</sup> Witness J, T. 4847.

<sup>70</sup> Cedo Veluta, T. 7635-7636.



whom Mirko Babi} reported.<sup>71</sup> Dragan Vuleta added that neither @eljko Meakic nor any of the members of the Omarska police could influence the water supply or its quality.<sup>72</sup>

34. The Trial Chamber finds that the Omarska police deployed in the camp under @eljko Meakic's control had no authority over the maintenance work assigned to the management of the Omarska mine.

35. Dusan Jankovi}, commander of the Prijedor Police Station, supervised the implementation of Simo Drljaca's order.<sup>73</sup> The fact that Dusan Jankovi} was @eljko Meaki}'s immediate superior might suggest that @eljko Meaki}, as the next in that chain of command, bore some subsidiary responsibility for implementation of the order. However, the Trial Chamber notes that Dusan Jankovi}'s duties in this regard were to be carried out "in collaboration with the Banja Luka Security Services Centre", suggesting that his work required the approval of the regional superiors of each branch involved in the operation of the camp.<sup>74</sup>

36. The Defense asserted that only Simo Drljaca had the authority to release a prisoner from the camp. Kvo-ka gave evidence that he asked @eljko Meakic to release his brothers-in-law from detention when he learned the camp authorities could not establish their guilt. @eljko Meakic replied "don't ask me to go to Simo. You know what he's like. You go and talk to him"<sup>75</sup>, implying that the decision lay with Simo Drljaca. Mirko Jesi} testified that he and the other security service co-ordinators released a few people in the first days of the camp, until they received an order from Simo Drljaca that no-one was to be released without his approval.<sup>76</sup> And in a report to the Crisis Staff dated 1 July 1992, Simo Drljaca confirmed that "Conclusion number 02-111-108/92, by which the release of detainees is prohibited, is being fully observed".<sup>77</sup>

37. There were other Bosnian Serbs involved with the camp who were not included in Simo Drljaca's order. In early June 1992, shortly after the establishment of the camp, a special security unit or "intervention platoon" of around 30 men arrived from the Banja Luka CSB. This group was distinguishable from the other guards by their blue camouflage uniforms. They stayed in the camp for one week, and then after a few days a second unit arrived.<sup>78</sup> Members of these two units reportedly inflicted abuses on the detainees and came into conflict with the guards from the

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<sup>71</sup> Cedo Veluta, T. 7440-7441.

<sup>72</sup> Cedo Veluta, T. 7473-7474.

<sup>73</sup> Mirko Jesi}, T.11705 (corroborating this fact).

<sup>74</sup> Mirko Jesi}, para.17 (referring to Exhibit 2/4.11).

<sup>75</sup> Miroslav Kvo-ka, T. 8292.

<sup>76</sup> Mirko Jesi}, T. 11761.

<sup>77</sup> Exhibit D1/20.

<sup>78</sup> Miroslav Kvocka, T. 916-918.

Omarska Police.<sup>79</sup> The Defense exhibited a letter dated 13 June 1992 from Simo Drljaca to the chief of the CSB reporting on the conduct of the second group and explaining that, as a result of this behavior, "all possible measures were taken to have them removed from the prison"<sup>80</sup> (the second unit did leave in mid-June).<sup>81</sup> The commanders of the two groups, Maric and then Strazivuk, were apparently unable or unwilling to control the men under their command.<sup>82</sup> It also appears to the Trial Chamber that these units were not under the authority of @eljko Meakic and his security staff.<sup>83</sup>

38. In addition, a second security ring was established 500-600 metres from the mine complex shortly after the camp was established, with a guard post every 200 metres. These posts were staffed by members of the Omarska territorial defense, who were tasked with preventing unauthorized persons from entering the camp (presumably to repel possible attacks by Muslim forces)<sup>84</sup> as well as with ensuring that no detainees escaped. Novac Pusak was a member of this security ring, under the command first of the head of his company, Drago/Zdravko Mari},<sup>85</sup> and then of the commander of the territorial defense, Ranko Radenovi}.<sup>86</sup> Novac Pusak testified that @eljko Meakic could not issue any orders to him or to the other members of the outer perimeter security ring.<sup>87</sup>

(c) Structure of the Guard Service in the Omarska Camp

39. The guards under @eljko Meakic's authority were organized into three shifts of approximately 30 men who worked for 12 hours at a stretch. The shift changed at 7a.m. and 7p.m.<sup>88</sup> Each shift lasted 12 hours, followed by a 24 hour break. Thus the guards alternated day and night shifts continually.<sup>89</sup>

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<sup>79</sup> Mirko Jesi}, T. 11714.

<sup>80</sup> Exhibit D18/1.

<sup>81</sup> Miroslav Kvocka, T. 921-922.

<sup>82</sup> Exhibit D18/1; Miroslav Kvocka, T. 920.

<sup>83</sup> Miroslav Kvocka, T. 917.

<sup>84</sup> Novac Pusa}, T.7239.

<sup>85</sup> There are conflicting names in the transcript – Drago on T. 7238, Zdravko on T. 7243.

<sup>86</sup> Novak Pusac, T. 7236-7238.

<sup>87</sup> Novak Pusac, T. 7243.

<sup>88</sup> Witness B, T. 2350; Mirsad Ali{i}, T. 2509, 2529; Abdulah Brki}, T. 4499-4500; Witness AT, T. 6066. See also Prosecution Exhibit 3/208, signed by @eljko Meakic on 29 June 1992, which states that "the only other people entering the collection centre compound will be police employees, organised into three shifts." Some witnesses testified that there were only two shifts at the beginning, but soon changed to three, e.g., Milenko Jasnica, T. 11533.

<sup>89</sup> Witness AK, T. 2019; Witness J, T. 4747.

40. Conflicting evidence was presented with regard to whether there was a guard shift leader<sup>90</sup> to co-ordinate each shift. This matter will be considered in Part IV when examining the Prosecution assertion that Kos and Radi} were guard shift leaders in the Omarska camp.

41. The guards had a duty office upstairs in the administration building.<sup>91</sup> This office was equipped with a local telephone line as well as a radio transmitter. A member of the guard service, designated as the duty officer, was in continuous attendance to make and receive calls. Two typists also worked in this office, to type notes of interviews and other documents at the direction of the investigators.<sup>92</sup> Witnesses testified that the task of the duty officer in the camp was similar to that of a duty officer in a police station department and that this duty involved receiving instructions or reports from the commander and passing them on to the guards without any independent authority devolving upon the duty officer.<sup>93</sup>

42. The guards staffing the camp were drawn from the ranks of regular police, reserve police, reserve army, and active duty army units in the area;<sup>94</sup> consequently, they wore distinct uniforms<sup>95</sup> and carried different weapons.<sup>96</sup> According to the evidence, the guards' duties were to ensure that detainees did not escape;<sup>97</sup> Kvocka testified that he understood this duty also included preventing attacks on the detainees from outside the camp.<sup>98</sup>

43. Within Omarska, an atmosphere of sweeping impunity and consuming terror prevailed. Few efforts were made to halt the beating of detainees.<sup>99</sup> To those imprisoned in Omarska, it seemed that the guards were unsupervised: Witness DC5 explained that the guards beat him "at random. When they were feeling bored, they would just lash out at you for no reason at all."<sup>100</sup> Witness AK feared a guard could kill anybody he liked for any reason, at any time.<sup>101</sup> Some guards

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<sup>90</sup> There was a debate as to whether the correct term was shift leader or shift commander. The Prosecution used the term "guard shift commander" in its Final Trial Brief, while the translation of the term utilized by the accused Kvo-ka and Radi} when interviewed and during their testimony was "guard shift leader". The Trial Chamber considers these two terms equivalent but in order to have some language consistency throughout this Judgement, the Trial Chamber will use only one term and will favor the term used by the Defense, thus "guard shift leader".

<sup>91</sup> See, e.g., Mla}o Radic, T. 1040.

<sup>92</sup> Mla}o Radic, T. 1040; Nada Markovski, T. 7763-7764.

<sup>93</sup> Želimir Skrbi}, T. 8589-8590; Milenko Jasni}, T. 11532.

<sup>94</sup> Exhibit P 3/208 lists "members of the army unit helping out" as workers in the camp. These wore old JNA uniforms and had their own superior officer, according to Kvocka. T. 8331.

<sup>95</sup> JNA military uniforms, police uniforms, blue or green camouflage outfits or parts of different uniforms: Witness AK, T. 2004-2005; Witness AI, T. 2110; Witness DC5, T. 8913. Kvocka explained that there were not enough standard uniforms for all the newly called-up reserve police, T. 776.

<sup>96</sup> Witness AK, T. 2010; Ermin Strikovi}, T. 3569.

<sup>97</sup> Miroslav Kvocka, T. 911; Mla}o Radic, T. 1035.

<sup>98</sup> Miroslav Kvo-ka, T. 8122.

<sup>99</sup> This was confirmed by Defense witnesses who told of public beatings, e.g. Witness DC2, T. 8803.

<sup>100</sup> Witness DC5, T. 8907.

<sup>101</sup> Witness AK, T. 2073-2074. Similarly, detainee Abdulah Brki} testified that the guards had great freedom, and seemed to be able to do whatever they wanted. Abdulah Brki}, T. 4548.

were said to be intoxicated much of the time and they acted in a particularly aggressive manner when in this condition.<sup>102</sup>

44. Witnesses identified several of the most oppressive guards by name. They also identified members of the staff who allowed them to receive food brought by relatives or who advised them on how to avoid the worst of the pervasive brutality in the camp.<sup>103</sup>

## 2. Conditions of Detention and Treatment in the Omarska Camp

45. Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will.<sup>104</sup> One witness testified that “during the night, terrible screams could be heard, moans, beatings, from practically all the rooms which served as the Omarska concentration camp”.<sup>105</sup> Murder was common. While every incident of violence and abuse reported by witnesses is not recounted here, the following summary demonstrates vividly that deliberate brutality and appalling conditions were part and parcel of daily life in the camp.

46. The majority of the detainees were housed in the “hangar”, which was the largest of four buildings on the site of the camp, running north-south. The main part of the hangar had been designed for the heavy trucks and machinery used in the iron-ore mine and ran along the eastern side of the building.<sup>106</sup> The western side consisted of two floors of over 40 separate rooms.<sup>107</sup>

47. There were three other structures on the Omarska camp site: the administration building, and two smaller structures, known as the “white house” and the “red house”. The administration building lay at the north of the grounds and was divided in two parts. The single-storied western portion contained a kitchen and eating area. The eastern section had two floors: the ground floor where detainees were held and the first floor, containing a series of rooms used for interrogation, administration of the camp, and female inmates’ sleeping quarters. There was also a small garage at the far north or outer edge of the building.

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<sup>102</sup> Azedin Oklop-i}, T.1757-1758.

<sup>103</sup> See, e.g., Azedin Oklop-i}, T.1753-1755; Witness AK, T.2014-2015.

<sup>104</sup> See the findings in relation to @igi}, *infra*. One night, for example, a group of soldiers returning from the front arrived and beat the prisoners in the white house: Witness T, T.2728-2729.

<sup>105</sup> Azedin Oklop-i}, T. 1714.

<sup>106</sup> Azedin Oklop-i}, T. 1706.

<sup>107</sup> See Annex E.

48. In between the hangar and the administration building was the L-shaped, 30-metre-long concrete strip known as the "pista", and to the west of the hangar was a grassy area, on the far side of which stood the white house and the red house.

(a) Arrival

49. The abuse of detainees began immediately upon their arrival at Omarska. As new detainees got off the buses the guards on duty would physically and verbally abuse them. Two of the female detainees were greeted by @eljko Meaki}, the head of security, with the statement "what are we going to do with these two whores? Why are they here? We ought to kill them".<sup>108</sup> Sometimes the new arrivals would have to run a gauntlet of assembled guards. Witness AM recalled the treatment accorded to two busloads of detainees who arrived the night of his own transfer to Omarska:

Those men were running from the buses, and they had to pass between two lines of Serb guards who hit them as they ran towards this garage.<sup>109</sup>

50. The detainees were forced to stand with arms outstretched against the wall, using the three finger Serb greeting, while their bodies were searched for valuables that were then taken from them.<sup>110</sup> Several witnesses testified that all the staff on duty attended the arrival of new detainees.<sup>111</sup>

(b) Food, Water, and Mealtimes

51. Some detainees did not receive food or water for several days after their arrival in the camp.<sup>112</sup> After that, one meal a day was provided. Detainees reported that this meal was composed of bean stew that often consisted of rotten cabbage and sometimes, a piece of stale bread.<sup>113</sup> Pero Rendi}, the food supervisor, testified that the ingredients in the stew varied and sometimes consisted of vegetables or beef,<sup>114</sup> although the Trial Chamber notes that Dragan Velaula, who worked under Pero Rendi}, corroborated the testimony of the detainees that the stew was mostly potato, cabbage, or beans.<sup>115</sup> Pero Rendi} also testified that the food left his kitchen in the early morning in good condition in thermos containers, but that these containers returned before mid-day. He conceded that if the food was left in other receptacles for four or five hours it was likely to spoil.<sup>116</sup> Pero Rendi} further explained that, although he was able to provide good quality food in appropriate quantities for the first 10 days of his assignment, both quality and quantity deteriorated

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<sup>108</sup> Witness B, T. 2335.

<sup>109</sup> Witness AM, T. 3928.

<sup>110</sup> See, e.g., Witness J, T. 4763; Azedin Oklop-i}, T. 1695; Mirsad Ali{i}, T. 2472.

<sup>111</sup> Witness B, T. 2362; Kerim Mesanovi}, T. 5189.

<sup>112</sup> Fadil Avdagi}, T. 3431

<sup>113</sup> See, e.g., Azedin Oklop-i}, T. 1698-1699.

<sup>114</sup> Pero Rendi}, T. 7333.

<sup>115</sup> Dragan Velaula, T. 11612.

<sup>116</sup> Pero Rendi}, T. 7376-8.

thereafter due, in his view, to the wartime conditions. Electricity shortages meant that it was sometimes impossible to cook all the beans properly, for instance,<sup>117</sup> and for a period of at least 10-15 days insufficient bread was received to meet the army regulation of 150 grams per person.<sup>118</sup>

52. The food was prepared by an army cook and women workers from the mine under Pero Rendi's supervision in the "Separacija" building, which was part of the mine complex but lay 2 km from the camp.<sup>119</sup> Pero Rendi testified that the same food was sent to the army and those on work obligation in the camp as to the detainees.<sup>120</sup> Dragan Velaula, however, explained that the investigators' food was prepared separately.<sup>121</sup> While the army and staff received three meals a day, the detainees received only one. This was corroborated by other workers at the camp, who added that detainees would attempt to supplement the meals with food brought to the camp from relatives, and that detainees also used personal relationships with the kitchen employees in efforts to obtain larger portions.<sup>122</sup> Investigators worked an eight-hour shift and could therefore eat breakfast and dinner outside the camp. The guards, who were present for twelve hours at a time, usually refused to eat the camp food, preferring to bring supplies from home.<sup>123</sup>

53. The food for the detainees was trucked in 50-100 litre containers into the administration building,<sup>124</sup> where the female detainees served it to the male detainees.<sup>125</sup> One witness testified that the same truck that brought the food into the camp was also used to transport dead bodies away from the camp.<sup>126</sup>

54. The one meal a day was served between 8:30 or 9:00 in the morning until 14:00 or 17:00 in the afternoon or early evening. The women serving the meals estimated that six hundred detainees were required to be fed per hour in order to serve each detainee by the end of the day. Each group of thirty detainees was led in to the cafeteria and allowed three minutes to eat, then one minute to return to their quarters.<sup>127</sup> Detainees were regularly beaten on their way to meals, and sometimes while eating, as camp leaders watched from the window area of the circular staircase above the canteen in the administration building. The detainees often had to pass through a gauntlet of guards

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<sup>117</sup> Pero Rendi}, T. 7375-6.

<sup>118</sup> Pero Rendi}, T. 7334.

<sup>119</sup> Pero Rendi}, T. 7324.

<sup>120</sup> Pero Rendi}, T. 7330 and 7371; Dragan Velaula, T. 11596.

<sup>121</sup> Dragan Velaula, T.11596.

<sup>122</sup> Cedo Veluta, T.7444; Novak Pusa}, T. 7248.

<sup>123</sup> Dragan Velaula, T.11613.

<sup>124</sup> Novak Pusa}, T.7250.

<sup>125</sup> Sifeta Su{i}, T.3107; Zlata Cikota, T.3328.

<sup>126</sup> Zlata Cikota, T.3328.

<sup>127</sup> Zlata Cikota, T.3327; Witness Y, T.3660.

who beat them on their way into and out of the eating area.<sup>128</sup> Witness B testified to one day when detainees were beaten particularly badly:

The bread would fly out of their hands. They had very little time to come in, get their food, eat it, and go out, and all this would be accompanied by blows. Everyone tried to hold on to his eighth of a loaf of bread. If they were able to put the bread in their pockets, they managed to save the bread, but all the others carrying this bread, when the blows fell, they would open their hands and the bread would fall out of their hands.<sup>129</sup>

55. The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992.<sup>130</sup> The food was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more.<sup>131</sup>

56. Some detainees testified that the water provided to them was not of drinking quality, but industrial water.<sup>132</sup> Zlata Cikota testified that she urinated blood while in the camp, which she attributed to the quality of the water she had to drink.<sup>133</sup> However, the Defense presented persuasive evidence that this was a misapprehension on the part of the detainees. Cedo Vuleta, whom the Trial Chamber found to be a credible witness, testified that one of his duties as technician at the camp was to ensure that drinking water was available at all times.<sup>134</sup> Drinking water was supplied from wells on the premises, as it had been for the mine employees before the war.<sup>135</sup> This water was piped to taps in the kitchen and in the bathrooms in the camp, as well as to taps outside in the hangar area.<sup>136</sup> There had been problems with the quality of this water before the war, but Dragan Vuleta believed that these had been rectified.<sup>137</sup> Water from the wells was on occasion supplemented by water brought in in tanks or cisterns, as when the well distribution system broke down.<sup>138</sup> Industrial water for use in the mining process flowed through different channels and came out via special taps in an area set aside for washing the mine equipment, which was not generally accessible to detainees.<sup>139</sup> Several camp employees and one detainee who had worked in the mine

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<sup>128</sup> Nusret Siva}, T. 4075-4076; Cedo Veluta, T. 7475.

<sup>129</sup> Witness B, T. 2365.

<sup>130</sup> See, e.g., Djordje Stupar, testifying about a power cut that lasted for 42 days beginning toward the end of June 1992: "Heats were very bad. It was difficult to preserve food. You don't have the fridge; you can't use it. You have to cook on fire. It was 40 degrees [celsius] outside and about the same inside." Djordje Stupar, T. 7279.

<sup>131</sup> See, e.g., Jasmir Oki} lost 27 kilos, T. 2586; Nusret Siva} lost 34 kilos, T. 4089; Witness AJ lost 36 kilos, T. 1612.

<sup>132</sup> See, e.g., Zlata Cikota, T. 3331; Emir Beganovi}, T. 1399.

<sup>133</sup> Zlata Cikota, T. 3332.

<sup>134</sup> Cedo Vuleta, T. 7437-7438.

<sup>135</sup> Cedo Vuleta, T. 7445-7446.

<sup>136</sup> Cedo Vuleta, T. 7472.

<sup>137</sup> Cedo Vuleta, T. 7446.

<sup>138</sup> Cedo Vuleta, T. 7453.

<sup>139</sup> Cedo Vuleta, T. 7472-7473.

before the war testified that the same water was available for drinking at the camp as had been previously available to employees of the mine.<sup>140</sup>

57. Based on the evidence before it, the Trial Chamber finds that the detainees were supplied with drinking rather than industrial water, although this may have been of varying quality and the detainees may well have believed that they were receiving water which was not fit to drink. The Trial Chamber notes, however, that this finding relates to the quality of the water only. The quantity of water supplied to the detainees was clearly inadequate.

(c) Toilet Beatings and Facilities, Hygiene, and Medical Care

58. There were two toilet facilities in the hangar building for use by over a thousand detainees.<sup>141</sup> However, detainees soon understood that they would be beaten by guards if they attempted to use the facilities<sup>142</sup> and accordingly relieved themselves in their clothing.<sup>143</sup> In other locations, such as the garage in the administration building, there were no toilet facilities at all. At first, detainees asked the guards for permission to use the toilets in the canteen area of the administration building, but, as former detainee Sabit Murcehaji} explained:

The first ten people who went to the toilet came back covered in blood and beaten up, and when the next group of ten was allowed to go to the toilet, they didn't dare go out because they were told that they would all be beaten up and killed. The conditions were impossible.<sup>144</sup>

59. Detainees thus had to defecate and urinate in their clothes or, sometimes, outside on the grass.<sup>145</sup> Even when a detainee opted for a beating in order to use toilet facilities, the conditions were deplorable. Witness AJ described them as follows:

There were three toilets. One of them was stopped up, and then the others would get stopped up too. And sometimes there was faeces 20 to 30 centimetres high. So sometimes bricks would be laid down for us to be able to go to the toilet. It was dreadful.<sup>146</sup>

60. While female detainees reported that they had access to showers,<sup>147</sup> the male detainees reported that they had no washing facilities, even when they soiled themselves.<sup>148</sup> In contrast, Kvo-ka testified that he saw people washing at sinks in the administration building<sup>149</sup> and Defense

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<sup>140</sup> E.g. DC1, T. 8768; Vinka Andzi}, T. 9129.

<sup>141</sup> Milenko Jasic, a guard at the hangar, estimated 1000-2000 detainees, T. 11557.

<sup>142</sup> Witness DC5, T. 8909-8910; Witness DC1, T. 8766.

<sup>143</sup> Witness Y, T. 3617.

<sup>144</sup> Sabit Murcehaji}, T. 4171.

<sup>145</sup> Fadil Avdagi}, T. 3431, Witness DC5, T. 8875. Ljuban Andzi}, a paramedic, confirmed that there were insufficient latrines in the camp for the number of detainees, T. 7591.

<sup>146</sup> Witness AJ, T. 1597.

<sup>147</sup> Zuhra Hrni}, T.3138.

<sup>148</sup> Witness AI, T.2143.

<sup>149</sup> Miroslav Kvo-ka, T.8195.



witness Vinka Andi} testified that detainees had facilities to wash their clothes.<sup>150</sup> Occasionally, the detainees were hosed down on the pista, although this too turned into a means of assault. Witness Y recalls one such occasion when the guards used the water stream as a weapon, making comments like “increase the jet. Hit the Baliija. Let the jet of water throw them on the ground”.<sup>151</sup>

61. The meagre washing facilities available were clearly insufficient. Dr. Slobodan Gaji}, who visited the camp, testified that “there were no adequate conditions provided for sleeping, bathing, changing of clothes, personal hygiene in general.”<sup>152</sup> The majority of the detainees had lice and skin rashes, diarrhea, and dysentery were widespread.<sup>153</sup> Ljuban Andi}, a paramedic who assisted Dr. Gaji} and the staff of the Omarska Health Centre with their duties in the camp, testified that his team managed to prevent a major outbreak of dysentery in the camp by treating those infected with streptomycin.<sup>154</sup> Both Dr. Gaji} and Ljuban Andi} further testified that detainees dipped their hands in chloride solution on their way to the cafeteria to prevent disease.<sup>155</sup> However, the Trial Chamber is struck by the lack of any testimony to this effect from the detainees and, in view of the rushed and brutal feeding routine in the camp, finds it unlikely that this hygiene measure was regularly implemented.

62. Dr. Slobodan Gaji} testified that the detention rooms were disinfected.<sup>156</sup> Although this may have been the doctor’s recommendation, the Trial Chamber heard testimony from detainees that only the rooms in the administration building were cleaned and the use of a disinfectant was not mentioned.<sup>157</sup> The Trial Chamber did not receive evidence that any of the other detention sites were cleaned. On the contrary, testimony consistently confirmed that a terrible odor pervaded the other sites. For example, Branko Starkevi}, a guard assigned to the hangar, testified that “there was a stench, a bad smell, and every day I had to wash myself and wash my clothes to wash the smell out”.<sup>158</sup>

63. Detainees testified that virtually no medical care was provided.<sup>159</sup> The Trial Chamber accepts the testimony of Defense witnesses Dr. Gaji} and Ljuban Andi} that the Omarska camp was included within the sphere of responsibility of the local health centre under the supervision of Dr.

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<sup>150</sup> Vinka Andi}, T.9132.

<sup>151</sup> Witness Y, T.3648. Although the witness testified that it was Kvo-ka who gave this order, the Trial Chamber is satisfied that it was not the accused Kvocka but another guard by this name. The witness put this incident at around the last week of July 1992, after Kvocka’s departure.

<sup>152</sup> Slobodan Gaji}, T.11686.

<sup>153</sup> Witness AJ testified, for example, that almost all the detainees in Mujo’s room had dysentery, T.1598.

<sup>154</sup> Ljuban Andi}, T. 7591.

<sup>155</sup> Ljuban Andi}, T. 7569; Slobodan Gaji}, T. 11674.

<sup>156</sup> Slobodan Gaji}, T. 11687.

<sup>157</sup> Vinka Andi}, T. 9130.

<sup>158</sup> Branko Starkevi}, T. 9268.

<sup>159</sup> Ermin Strikovi}, T.3550; Hase Ici}, T. 4664. Witness A said the women received no medical care, T. 5496.

Slavica Popovi}.<sup>160</sup> Dr. Gaji}, who was mobilized and assigned to the centre for most of July 1992, testified that he would visit the camp “practically every day”<sup>161</sup> and that other doctors visited less frequently.<sup>162</sup> According to Ljuban Andi}, the duties of the team were to treat people who were injured, to distribute medicines to people suffering from chronic ailments, and to prevent the spread of infectious diseases.<sup>163</sup> However, the assistance this team offered to the thousands of detainees was grossly inadequate. Ljuban Andi} confirmed that several detainees with chronic medical conditions died from lack of attention<sup>164</sup> despite the fact that, according to Dr. Gaji}, there was no shortage of medical supplies during the month of July.<sup>165</sup>

64. Some responsibility for this lack of medical attention must fall on the guards, who were tasked with selecting detainees in need of treatment when the medical team arrived. Dr. Gaji} explained how, at first, he would visit detainees in their specific places of detention, but that, later, he set up a table outside and relied on the guards to bring those most in need of care to see him.<sup>166</sup> This new system was adopted in view of the massive medical crisis presented by the detainees. Dr. Gaji} explained that he stopped entering the hangar and other locations because

the places were crowded. There were lots of sick and wounded people. Everybody needed something. They kept asking me lots of questions. I could have remained in one room for hours. And later on, I was just trying to reduce that pressure on myself.<sup>167</sup>

He added that the “conditions were extremely bad. That’s all I can say.”<sup>168</sup>

65. The wounded had clearly been badly beaten. Dr. Gaji}'s diagnosis was that most of the injuries occurred from blows with blunt instruments, “including, for example, an army boot, then the butt of a rifle, hands, fists”.<sup>169</sup> Ljuban Andi} testified to two specific occasions when the medical service treated detainees who had been attacked in the camp. On the first, a young man who had been beaten was sent to the hospital in Banja Luka for more extensive medical attention, but he died from his injuries enroute.<sup>170</sup> In the second instance, Ljuban Andi} found a man shot through the shoulder lying on the grass at the camp and was permitted to take him to Prijedor for

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<sup>160</sup> Ljuban Andi}, T. 7534. Dr. Popovi} submitted an affidavit in corroboration of Dr. Gaji}'s testimony, see “Decision on Dragoljub Prcac’s Request to Introduce Affidavit Evidence (Rule 94 ter)”, 17 May 2001.

<sup>161</sup> Slobodan Gaji}, T. 11672.

<sup>162</sup> Slobodan Gaji}, T. 11686.

<sup>163</sup> Ljuban Andi}, T. 7559.

<sup>164</sup> Including Safet Ramadani, and Nezir Krak, who had a chronic heart condition according to Ljuban Andi}, T. 7590. Ismet Hod`i}, a diabetic, died. T. 2566-2567. The official report on the camps recorded two deaths due to natural causes. Exhibit D 38/1(b), p 7.

<sup>165</sup> He did, however, report a lack of insulin. Slobodan Gaji}, T. 11682.

<sup>166</sup> Slobodan Gaji}, T. 11673, 11685.

<sup>167</sup> Slobodan Gaji}, T. 11685.

<sup>168</sup> Slobodan Gaji}, T. 11686.

<sup>169</sup> Slobodan Gaji}, T. 11692.

<sup>170</sup> The witness testified that this detainee was a Serb. Ljuban Andi}, T. 7560-7561.

surgery.<sup>171</sup> Dr. Gaji} estimated that he sent approximately 20 people to the hospital in Prijedor during the month he attended the camp.<sup>172</sup> He further testified that the medical service would be called to the camp for emergencies at least once a day.<sup>173</sup> The guards placed these calls to the emergency services.<sup>174</sup>

66. The vast majority of detainees, however, received no care for their wounds or ailments. Women had no access to sanitary protection.<sup>175</sup> Dead bodies were left to fester outside for days at a time, and a terrible stench and fear pervaded the camp.<sup>176</sup>

67. The Trial Chamber finds the hygienic conditions and the medical care available in Omarska camp were grossly inadequate.<sup>177</sup>

(d) Interrogations

68. Interrogations were carried out in the administration building by mixed teams of investigators from the army and the state and public security services in Banja Luka.<sup>178</sup> Initially detainees were interviewed according to their places of residence. On the basis of preliminary information obtained in the first interrogation, detainees might be called back for further interrogation.<sup>179</sup> The guards and others received directions from the investigators concerning whom to bring to the investigators' offices.<sup>180</sup>

69. Questioning focused on the political activities of the detainee, such as opposition to the takeover of Prijedor, possession of weapons, and links to the Muslim opposition forces in the area. The purpose of the interrogations was primarily to identify opponents of the Serb regime.<sup>181</sup> Those against whom no evidence was found were placed in "category three" and should have, theoretically, been released. However, the Crisis Staff made a decision not to release these detainees (mainly female detainees and the sick or elderly) until August 1992, when they were transferred to the Trnopolje camp.<sup>182</sup> Category 1 and 2 detainees, who were thought to have either played a role in the opposition or been in possession of arms used against the Serb authorities, should have had

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<sup>171</sup> Ljuban Andi}, T. 7561.

<sup>172</sup> Slobodan Gaji}, T. 11688.

<sup>173</sup> Slobodan Gaji}, T. 11689.

<sup>174</sup> Ljuban Andzi}, T. 7586.

<sup>175</sup> Ljuban Andzi}, T. 7571.

<sup>176</sup> Witness AJ, T. 1592; Witness Y, T. 3637.

<sup>177</sup> Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 663 of 31 July 1957 and 2076 of 13 May 1977; Basic Principles for the Treatment of Prisoners, GA Res. 45/111 of 14 December 1990; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988.

<sup>178</sup> While the military investigators sometimes interrogated alone, members of the state and public security services always operated in teams: Mirko Jesi}, T. 11766.

<sup>179</sup> Mirko Jesi}, T. 11716-11717.

<sup>180</sup> Mirko Jesi}, T. 11772.

<sup>181</sup> Witness AJ, T. 1609; Witness AM, T. 3926; Witness J, T. 4755-4756.

criminal proceedings instituted against them, according to Mirko Jesi}, co-ordinator of the State Security investigators.<sup>183</sup> However, he could only remember this happening in about 20 cases.<sup>184</sup>

70. Detainees were not told why they had been arrested, although they knew that it was on the basis of their non-Serb ethnicity, and they feared the worst.<sup>185</sup> Witness J explained:

None of us knew why we were - what we were accused of, and I didn't know either; but from my talk with the interrogators I was able to conclude what - why I was there.

Q. And were you able to form an opinion as to what they were going to do with that information or what the purpose of these talks were, these interrogations?

A. Well, for the possible liquidation of people.<sup>186</sup>

71. Both Prosecution and Defense witnesses reported hearing cries and screams emanating from the interrogation rooms and seeing detainees carried out injured or unconscious.<sup>187</sup> The women inmates that cleaned the interrogation rooms told horrific tales of the state of these rooms after the interrogators had finished their work for the day:

On the table, on the wooden board, there were blots of blood. On the walls ... there would be drops of blood. There was blood on the floor as well. And behind the door I found a broken pair of glasses with very thick lenses ...

There was a whip made from a plaited strand. Then there were metal bars. What they were used for I don't know. And on one of those metal bars there were traces of blood.<sup>188</sup>

72. A parade of witnesses described the terrible beatings they received during these interrogation sessions.<sup>189</sup> Witness DC7, for example, who was 65 at the time of his interrogation, was rendered unconscious by the violence inflicted against him.<sup>190</sup> Only on rare occasions were interrogations conducted without any form of physical violence.<sup>191</sup>

73. The Trial Chamber finds that interrogations were regularly conducted in Omarska in a cruel and inhumane manner and that these interrogations resulted in an atmosphere of terror and violence.

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<sup>182</sup> Mirko Jesi}, T. 11720-11722.

<sup>183</sup> Mirko Jesi}, T. 11705.

<sup>184</sup> Mirko Jesi}, T. 11764-11765.

<sup>185</sup> Mirko Jesi} confirmed that the arrests were not carried out in accordance with any regular arrest procedure and no reasons for the arrests were given to the detainees, T.11764-11765.

<sup>186</sup> Witness J, T. 4760.

<sup>187</sup> Witness B, T. 2371; Nada Markovska, T. 7772; Witness DA/3, T. 7894; Mirko Jesi}, head of the investigators from the state security service, saw an investigator mistreating a suspect on one occasion, T. 11731-11732.

<sup>188</sup> Witness B, T. 2372; *see also* Sifeta Su{i}, T. 3017: "One day I saw something that looked like a whip. There was a wooden handle wound with string, a very long whip, and at the end of this whip there was a metal ball ... I also recollect well there was an iron metal hanger, clothes hanger, and it was close to a plug. And on this hanger, used for umbrellas, there was a wire, and this wire could be plugged into the socket."

<sup>189</sup> *See, e.g.*, Witness Y, T. 3627-3630; Witness T, T. 2663; Witness AJ, T. 1610; Witness DC5, T. 8879-8880.

<sup>190</sup> Witness DC7, T. 9019-9020.

<sup>191</sup> Witness AI, T. 2116; Witness J was not beaten during interrogation. T. 4755.

(e) The Administration Building

74. Many prominent people were held in "Mujo's room" on the ground floor of the administration building, so called because "Mujo", a well-known local who was also a detainee, acted as a liaison between the guards and the other detainees in that room.<sup>192</sup> Emir Beganovi} was led there on arrival by a guard who took pity on him and told him to "[j]ust go there and hide. Don't answer when they call you. If you answer you will be killed."<sup>193</sup> Indeed, detainees were called out from Mujo's room to be interrogated and abused.<sup>194</sup> On at least one occasion savage beatings also occurred inside the room.<sup>195</sup>

75. Next to Mujo's room was a space of approximately five by six metres, known as "the garage," where between 150-300 people were detained in intolerable proximity.<sup>196</sup> One detainee described the situation as follows:

Conditions were such that you could hardly touch the floor with your two feet, people were so crowded. I was up against a wall so that I tried to place my palms on the wall and cool down a little in that way, get some coolness from the wall. So it was all overheated. People would urinate on the spot, relieve themselves on the spot. And two or three times in a very brief space of time, for as long I was in the garage, which was about 45 minutes, two or three times I lost consciousness.<sup>197</sup>

In an attempt to survive these conditions, detainees would cry out for water, but guards would make them sing Serb nationalist songs before throwing a jerrycan into the room.<sup>198</sup> Their pleas and singing could be heard outside on the pista.<sup>199</sup>

76. The detainees in the administration building had far more than cramped conditions to fear. A group of detainees transferred from Keraterm received notice of what to expect during their time in Omarska when former police officer Ahil Dedi}, a Muslim, was brought into the small room in which they were detained:

Ahil had blood all over his body. He had a wound on his head. He was all black and blue. And we were rather scared and we all moved backwards ...

Ahil Dedi} asked the armed guard, who accompanied him back to the room, "Do you really think you would solve the Yugoslav problem in this way?" In response, the guards beat him on the head

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<sup>192</sup> Witness AK, T. 1993.

<sup>193</sup> Emir Beganovi}, T. 1357.

<sup>194</sup> See, e.g., Zijad Mahmuljin; Zlatan Bezirevi}; Nedžad Seri}. Nusret Siva}, T. 4085-4088.

<sup>195</sup> See the beating of Bajram Zgog: Nusret Siva}, T. 4084-4085; Mirsad Ali{i}, T. 2497-2498.

<sup>196</sup> Witness AK estimated 150 in 30 square metres, T. 1995-1996; Fadil Avdagi} estimated 200-300 in 25 square metres, T.3430.

<sup>197</sup> Witness AK, T. 1996.

<sup>198</sup> Witness AJ, T. 1599; 2191-2192.

<sup>199</sup> Witness AI, T. 2142.

until he fell unconscious. On regaining consciousness he began to batter the locked door of the room:

After that, probably because of the noise ... they came back to the room, and they started beating him like crazy until he fell down and lost consciousness again ...

... The two men in uniform who had beat him and thrown him to the ground took him under the arms and dragged him outside. They dragged him outside because he was unconscious.

Q What, if anything did you hear after Ahil Dedi} was removed from that room?

A We just heard a shot when he had been dragged outside, and that was all.

[...]

Q Mr. Avdagi}, did you ever see Ahil Dedi} again?

A No, neither me nor anyone else ever saw him again.<sup>200</sup>

77. The Trial Chamber finds that mental and physical violence was repeatedly inflicted on detainees confined in the administration building.

(e) The Hangar

78. The conditions confronting detainees in the hangar were vile: "It was terrible. There was such a terrible stench. People had lice. People were sick. Half of the men had been badly beaten up."<sup>201</sup> One witness described a young boy named Avdi} detained in the hangar who "had such wounds on his – on the right and left side of his chest that he had maggots crawling under his skin, and he had completely cut off parts of his undershirt because it hurt him so much to have any cloth on the wounds".<sup>202</sup> There was motor oil on the concrete floor and, despite the heat of summer, a witness recalled that the atmosphere was cold and damp.<sup>203</sup> When the first group of detainees were moved into the hangar, the guards forced them to clean the floor with their bodies.<sup>204</sup> Here, too, the guards coerced the detainees into singing Serb nationalist songs by withholding water unless the detainees followed orders. When the singing met with the guard's satisfaction, they threw the water through a window in the wall separating the guards from the detainees, often spilling it on the floor.<sup>205</sup>

79. Except for the beatings received for attempting to use the toilet facilities in the hangar, detainees were usually taken outside the building when the guards intended to inflict particularly

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<sup>200</sup> Fadil Avdagi}, T. 3426-3429. Jasmir Oki} reported the shooting of Mehmed Ali{i} in this room in July. Jasmir Oki}, T. 2578-2579.

<sup>201</sup> Witness Y, T. 3618.

<sup>202</sup> Witness T, T. 2746.

<sup>203</sup> Witness AI, T. 2141.

<sup>204</sup> Witness DC5, T. 8883.

serious physical violence upon them. Witness Y testified about four individuals who were twice called out from the hangar for beatings, returning with broken limbs, until, on their third call out, shots were heard and none of the four were seen again.<sup>206</sup> Mirsad Ali{i} testified that one morning he saw the dead body of his friend, Gordan Kardumovi}, outside the hangar amongst a pile of cadavers. Mirsad Ali{i} was forced by the guard to urinate next to the corpse.<sup>207</sup> The beatings reported outside the hangar were confirmed by Defense witnesses, such as DC1 who spent one month detained in the hangar and observed detainees returning to the hangar with bruises from their beatings. He speculated that this could have occurred in the toilets.<sup>208</sup>

80. The Trial Chamber finds that physical and mental violence was regularly inflicted on those detained in the hangar.

(f) The Pista

81. The pista was a large L-shaped outdoor area composed primarily of concrete. The vast majority of detainees held here were forced to endure whatever environmental conditions existed during those summer months, whether it was unrelenting exposure to the heat and sun or torrents of rain. According to one witness, when asked about knowledge of abuses committed on the pista:

Yes, I saw that infamous pista where people were sitting with their heads bowed between their knees. It was a dreadful sight. They hardly looked like human beings.<sup>209</sup>

82. Hundreds of detainees were held on the pista for days or weeks on end with only intermittent shelter.<sup>210</sup> While some former detainees testified that they were allowed indoors to sleep,<sup>211</sup> others spent both days and nights outside on the tarmac.<sup>212</sup> Mirsad Ali{i} was often forced to lie on his stomach on the asphalt for hours at a time.<sup>213</sup> In his testimony before the Court, the accused Radic said:

I hated seeing 500 men sitting in the heat on the concrete, and there's nothing I can do to assist them. Of course I was bothered by the whole situation. There was no way I could find shelter for them. You know, to watch those people in the blazing sun for hours, and it's not easy even if you have an animal tied in the sunshine all day it's awful, never mind a human being.<sup>214</sup>

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<sup>205</sup> Witness AI, T. 2142.

<sup>206</sup> Witness Y, T. 3634-3635.

<sup>207</sup> Mirsad Ali{i}, T. 2493.

<sup>208</sup> Witness DC1, T. 8766-8767.

<sup>209</sup> Sifeta Su{i}, T.2999.

<sup>210</sup> Sifeta Su{i} estimated over a hundred detainees. Sifeta Su{i}, T.2999. Nusret Siva} estimated 500 detainees in July. Nusret Siva}, T. 4070. However, Witness T saw only 40-50 when he arrived at the camp in early June. Witness T, T. 2743.

<sup>211</sup> See, e.g., Witness DC5, T. 8880-8881.

<sup>212</sup> See, e.g., Witness DD5, T. 10061.

<sup>213</sup> Mirsad Ali{i}, T. 2482.

<sup>214</sup> Mla|o Radi}, T. 11294.

To prevent escape and maintain control, a machine gun was trained on the detainees from the roof of the administration building.<sup>215</sup>

83. Sometimes the unbearable conditions appear to have driven the detainees insane. For example, one day an elderly man named Nasi} stood up in the eating hall and said "it was unbearable, that we couldn't – he couldn't take it any more, that those of us who had been persecuted couldn't take it any more". He was shot dead in a burst of gunfire that also wounded three others.<sup>216</sup> Asmir Crnali} also appeared to have been pushed past the point of rationality by the situation. He stood up without permission and began to dance, until he was taken off to the white house and executed with a gun.<sup>217</sup>

84. The Trial Chamber finds that detainees were regularly subjected to mental and physical violence on the pista.

(g) The White House and the Red House

85. Two smaller buildings on the outskirts of the camp, known as the white house and red house because of the color of the building, appear to have been reserved for particularly savage treatment of detainees. Azedin Oklop-i} described how detainees returning from the white house "had injuries all over their head, all over their body. Their backs were injured. They had bruises. They had scabs on their ears and on their heads. Their hands would be bandaged in T-shirts or whatever clothing they had, makeshift bandages, and so forth."<sup>218</sup>

86. Indeed, the testimony of several witnesses confirmed that many detainees seen entering the red house or the white house did not come out alive.<sup>219</sup> Witness AI was held in the white house for one day, during which he saw "more than 5 or 6" bodies piled up behind the building. They were removed by truck the following day.<sup>220</sup> Mirsad Ali{i}, another detainee, also saw guards loading bodies from the white house onto a truck.<sup>221</sup> Zuhra Hrni} testified that she saw dead bodies near the white house every other day, one day 5, another day 13 - most days there were several.<sup>222</sup> According to Witness DC7,

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<sup>215</sup> Mirsad Ali{i}, T. 2482-2483.

<sup>216</sup> Azedin Oklop-i}, T. 1723; Mirsad Ali{j}, T. 2482-2486. This witness also reported the shooting of Mehmed Ali{j} on the pista when he refused to sit down. T. 2490.

<sup>217</sup> Nusret Siva}, T. 4081-4083.

<sup>218</sup> Azedin Oklop-i}, T.1714.

<sup>219</sup> See, e.g., Zuhra Hrni}, T. 3131; Gavranovi} and Alagi}: Witness Y, T. 3632-3634.

<sup>220</sup> Witness AI, T. 2133.

<sup>221</sup> Mirsad Ali{i}, T. 2480-2481.

<sup>222</sup> Zuhra Hrni}, T. 3132.



the white house was renowned that anybody who found himself in the "white house", it was a very difficult – the prospects for staying alive were very slight, and they could only stay alive if somebody saved them, like they saved me.<sup>223</sup>

87. Witness DC3 explained that the life of anybody detained in the white house was at constant risk,

because many would come in, would storm that "white house." Even civilians came from outside and they beat the people. The military came, the military that held points round about, they beat people too.<sup>224</sup>

88. Witness Y described having to collect dead bodies from inside the white house and the red house and load them onto a truck. In the white house, the witness discovered "very big stains in that room. Almost all of the floor was covered in very dark stains, bloodstains. And on the radiator, I noticed some hair, parts of the head, brains, pieces of skull .... [A body in the room] was stiff. The joints around the elbows and in the area of the ankles were cut, and the throat was cut almost to the middle".<sup>225</sup> A pile of bodies lay outside the red house, and "the dead bodies were still warm; the skulls were fractured; their jaws were fractured; there were bodies with throats slit".<sup>226</sup>

89. Routine killings appeared to intensify at the end of July 1992, as international exposure loomed and humanitarian organisations sought access to the camp. Former policeman Nusret Siva} testified that between 25 and 30 July:

They kept taking people out all the time, and I think that during that time, massive killings were committed. It was during that period of time that most of the people were taken out, most of them intellectuals and other prominent citizens of Prijedor, and they never came back.<sup>227</sup>

90. Forensic reports on the exhumation of two gravesites, the Kevljani and the Donji Dubovik-Jama Lisac gravesites, both located in the Omarska area, provided evidence of the fate of some of the former detainees of Omarska camp.<sup>228</sup>

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<sup>223</sup> Witness DC7, T.9021-9022.

<sup>224</sup> Witness DC3, T.8832.

<sup>225</sup> Witness Y, T.3636-3637.

<sup>226</sup> Witness Y, T. 3637. Witness AI reported seeing bodies outside the red house, Witness AI, T. 2122.

<sup>227</sup> Nusret Siva}, T. 4087.

<sup>228</sup> At the Kevljani gravesite, located in a meadow, 25 graves were found, 10 of which were robbed before exhumation. The exhumation team recorded 72 bodies, plus some dismembered remains. Ninety-three percent (93%) of the corpses showed genuine *ante mortem* injuries, such as bone fractures or gunshot damage, with rib bone fracture the most frequent type of injury (comprising 86%). Autopsy reports documented the brutality to which these persons were submitted before their deaths. There was also evidence linking these bodies to the Omarska camp, such as iron ore and slag samples found in four of the graves corresponded to those existing near the "hangar building" in the camp. At the Donji Dubovik-Jama Lisac gravesite, the exhumation team recovered the remains of a minimum of 51 persons from a cave known as "Jama Lisac", two of which were identified as female and the remainder as male. The two women were eventually identified as Edna Dautovi} and Sadeta Medunjanin, former prisoners of the Omarska camp. Ninety percent (90%) of all the bodies found there had been shot. The remains also showed signs that the victims received blunt force trauma injuries. (See Exhibit 3/155a, "Prosecution's Summary of Forensic Evidence presented by Investigator Tariq Malik").

91. The Trial Chamber finds that detainees were frequently beaten and murdered in and around the red house and white house.

(h) Petrovdan and the Massacre of Muslims from Hambarine

92. In addition to the regular stream of murders, tortures, and other forms of physical and mental violence committed, two incidents stand out in the notorious three month functioning of Omarska camp.

(i) Petrovdan (12 July 1992)

93. Petrovdan, or St. Peter's Day, is an orthodox religious festival that occurs on the 12<sup>th</sup> of July each year. It is customary to build bonfires on the eve of the holiday in celebration. In 1992, this tradition took on a terrifying aspect in Omarska. A huge fire was made in front of the white house from dump truck tyres. Former detainee Hase Ici} described the events that followed:

At the time, the Serbs, on the eve of Petrovdan, had a real, all-out sort of manifestation rally of civilians and guards. ... As night began to fall, they started to take the people out of the first rooms ...

Q. What did you hear after some detainees were taken out?

A. I remember that, and I'll remember it for the rest of my life, the cries of women who were outside or in the first room. I'll never forget their cries and screams. Then I smelt the stench of burning meat. You know when meat begins to burn, it has a specific smell, and this smell of burning flesh was mixed with the smell of the burning rubber from the tyres.<sup>229</sup>

94. This witness heard from other detainees that their fellow inmates had been thrown onto the fire. This terrible incident was corroborated by Witness AM, who watched the massacre from a window.<sup>230</sup> Ermin Strikovi} was able to see people walking round a big fire from the small window in his detention room. He heard screams of pain, although he was not able to see the cause.<sup>231</sup> Zuhra Hrni} testified that the following morning, on her way to the cafeteria, she saw a large "FAP" lorry fully loaded with dead bodies parked in the Omarska camp.<sup>232</sup>

(ii) Massacre of Muslims from Hambarine

95. One afternoon during the second half of July, two bus loads of detainees from the Muslim village of Hambarine, which had been captured by the Serbs in late May,<sup>233</sup> arrived in Omarska from the Keraterm camp. The detainees were taken to the white house. That night, Witness AM was

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<sup>229</sup> Hase I-i}, T. 4666.

<sup>230</sup> Witness AM, T. 3929-3930.

<sup>231</sup> Ermin Strikovi}, T. 3542-3543.

<sup>232</sup> Zuhra Hrni}, T. 3136. This may have been the incident referred to by Mirko Jesi}, who told the Trial Chamber that a group of approximately 18 prisoners were killed sometime in mid-July, T. 11753-11754.

<sup>233</sup> See *supra*: "Background, context and formation of the camps".

awakened by pistol shots and rose to see guards walking among a large number of bodies, firing into their heads, apparently to “finish them off.” The witness vividly recalled the event:

I remember well when this bullet was fired, the brain would come out as if the bullet had hit milk, and it came out like white dust.<sup>234</sup>

96. The corpses were so numerous they covered “some 50 or 70 metres”. A truck arrived to dispose of the bodies and two detainees were ordered to load them onto the truck. The witness described how, after filling the truck with bodies, it would drive away, returning a quarter of an hour later. It took 5 or 6 round trips for all the bodies to be removed. Witness AM estimated that the truck had 7 or 8 cubic metres of loading space.<sup>235</sup>

97. The Trial Chamber finds that the Petrovdan and Hambarine incidents occurred as recounted, resulting in the death of an unknown number of detainees.

(i) Sexual Violence

98. Approximately thirty-six of the detainees held at Omarska camp were women. The women detained at Omarska were of different ages; the oldest were in their sixties and there was one young girl. The Trial Chamber heard compelling evidence from several female detainees who testified that it was commonplace for women to be subjected to sexual intimidation or violence in Omarska.<sup>236</sup> For example, Sifeta Susi} felt threatened by @eljko Meaki} when he said to her that someone had “asked whether it was true that Sifeta Su{i} was raped by 20 soldiers...and I said ‘Yes, it is. I was the 20<sup>th</sup> in line.’”<sup>237</sup> Several witnesses told of an occasion when a man approached a female detainee in the eating area, unbuttoned her shirt, drew a knife over one of her breasts, and threatened to cut it off.<sup>238</sup> Many others testified that women were frequently called out from the administration building or the cafeteria at night and were subsequently raped or subjected to other forms of sexual violence.<sup>239</sup>

99. Witness J testified that on one occasion Nedeljko Grabovac, known as “Kapitan”, called her out. She was afraid he might kill her and described how he started touching her on her genitals and grabbing her breasts. Despite her pleas, he took out his penis and attempted to rape her, finally

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<sup>234</sup> Witness AM, T. 3931.

<sup>235</sup> Witness AM, T. 3930-3933. The witness later heard that these people had arrived from Keraterm and were supposed to be “exchanged”.

<sup>236</sup> Witness J, T. 4774-4775; Witness F, T. 5382-5383; Witness B, T. 2338, 2430; Nedzija Fazli}, T. 5102; Sifeta Su{i}, T. 3018-3019.

<sup>237</sup> Sifeta Su{i}, T. 3020-3021.

<sup>238</sup> Witness J, T. 4769; Zlata Cikota, T. 3337-3338.

<sup>239</sup> Witness J, T. 4774-4775; Witness AT, T. 6083; Witness K, T. 4983; Witness A, T. 5486; Witness F, T. 5382; Sifeta Su{i}, T. 3018.

ejaculating on her before she managed to escape.<sup>240</sup> The witness incurred bruises on her thighs and breasts as she struggled to get away.<sup>241</sup>

100. Witness F testified that she was often taken away by a guard named Gruban.<sup>242</sup> The witness described how this guard took her on several occasions, at any time of the day or night, to a room upstairs in the administration building where he forced her to have sex with him.<sup>243</sup> Another guard, named Kole, called her out twice during the night where he took her to the same room where Gruban had raped her and then raped her himself.<sup>244</sup> She further testified that she was taken to the "Separacija" building (a kitchen outside the Omarska camp) where she was forced to have sexual intercourse with Mirko Babi} and Dule Tadi}.245

101. Witness U testified that she was detained with another woman in one room of the white house. There they heard cries of pain and terror emanating from male detainees and heard interrogators or guards yelling and cursing at the detainees.<sup>246</sup> On one occasion, a guard prevented other guards at the white house from assaulting the two female detainees.<sup>247</sup>

102. Witness U however also testified that, when she was detained in the administration building with the other women, a guard took her from her room several times at night to a room at the end of the corridor, where she was systematically raped by a string of perpetrators:

...He would rape me...He would leave, and then all the time, one after the other, others would come in, I don't know the exact number...they also raped me.

103. She was also taken twice during the day to that same room by another guard, where she was again subjected to repeated rapes by multiple assailants:

...First he raped me, and then afterwards again others entered...three or four men who raped me.

Q. Did you experience bleeding due to the multiple rapes that you endured at the Omarska camp?

A. Yes, throughout [the time] I was there.<sup>248</sup>

104. Witness B was taken to one of the offices in the administration building by a young guard who attempted to rape her:

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<sup>240</sup> Witness J, T. 4779-4782.

<sup>241</sup> Witness J, T. 4782-4783.

<sup>242</sup> Witness F, T. 5383.

<sup>243</sup> Witness F, T. 5385-5386.

<sup>244</sup> Witness F, T. 5386-5387.

<sup>245</sup> Witness F, T. 5389-5390.

<sup>246</sup> Witness U, T. 6201, 6202-6203.

<sup>247</sup> Witness U, T. 6203.

<sup>248</sup> Witness U, T. 6229-6230.

He lay on top of me and started physically abusing me. I tried to defend myself, and I did for as long as my strength lasted, and at one point, he threatened to kill me if I wouldn't let him have his way...I felt a very strong pain in the neck area of my spine...

Witness B continued to struggle and the guard finally stopped when she said that she would report him to Radic.<sup>249</sup>

105. Nedzija Fazli} testified that on one occasion a guard called Lugar called her to a room at the end of the corridor and ordered her to take off her clothes. She told him that she could not have sexual intercourse with him as she was menstruating. He forced her to prove it to him and then told her that he would sleep with her later.<sup>250</sup> Nedzija Fazli} continued to be threatened by Lugar until she complained to @eljko Meaki}.<sup>251</sup>

106. The women testified that they spoke little amongst themselves about the sexual violence they were forced to endure. Defense witness Vinka Andic, who cleaned the administration building, testified that the female detainees never complained about mistreatment to her.<sup>252</sup> The Trial Chamber notes however that, as the female detainees were reluctant to talk about the abuses among themselves, it would be unlikely they would discuss it with a cleaning lady of Serb ethnicity employed by the camp authorities.

107. The testimony given by female detainees did suggest that they had their suspicions about what was happening to the other women.<sup>253</sup> Witness J testified that during her stay in the administration building, women were very often called out at night. When they returned, they appeared absent-minded and did not speak to the others.<sup>254</sup> Similarly, Witness F testified that during the time she spent at Omarska, almost every woman from her room was taken out at night. She said that when a woman came back to the room, she would usually be withdrawn or crying.<sup>255</sup> Witness A described an occasion when guards took her and another woman to the "Separacija" building. The other woman was forced to go off with a man called Mirko Babi} and when she returned she was in tears.<sup>256</sup> Witness B reported how one woman would often be taken out for interrogation and when she returned showed signs of "physical abuse."<sup>257</sup> Zuhra Hrnica was kept in a room above the cafeteria with seventeen other women and she testified that their "room leader" was separated from

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<sup>249</sup> Witness B, T. 2383-2384.

<sup>250</sup> Nedzija Fazli}, T. 5096-5097.

<sup>251</sup> Nedzija Fazli}, T. 5098-5099.

<sup>252</sup> Vinka Andic, T. 9133.

<sup>253</sup> Sifeta Su{i}, T. 3104-3105. Nedzija Fazli} testified that on one occasion she went down to the cafeteria with other women and found a detainee called Mirsada there crying because she had been taken out that night by a guard named Lugar. When the women approached Mirsada to help her, Lugar went up to them, stuck out his rifle and said that nobody should go near her. Nedzija Fazli}, T. 5102-5103.

<sup>254</sup> Witness J, 4774-4776.

<sup>255</sup> Witness F, T. 5382-5383.

<sup>256</sup> Witness A, T. 5488-5489.

<sup>257</sup> Witness B, T. 2338.

them during the night. The witness later noticed that the "room leader" had an enormous bruise on her right thigh and that she kept crying all the time.<sup>258</sup>

108. The Trial Chamber finds that female detainees were subjected to various forms of sexual violence in Omarska camp.

109. The Trial Chamber turns now to examine the conditions of detention in the Keraterm and Trnopolje camps where @igi} allegedly committed crimes, in addition to the ones he is charged with in Omarska.

### C. THE KERATERM AND TRNOPOLJE CAMPS

110. The Prosecution did not produce a great deal of evidence relating to the functioning of the Keraterm camp. It produced even less with regard to the Trnopolje camp. Nevertheless, the evidence presented indicates that the Keraterm and Trnopolje camps functioned according to the model established by the concurrently operating Omarska camp.

111. As in the Omarska camp, most of the detainees in the Keraterm camp were Muslims and a few were Croats.<sup>259</sup> There were also only a small number of women detained in Keraterm camp.<sup>260</sup>

112. In Keraterm, detainees were held in four separate rooms known as rooms 1, 2, 3, and 4. As in Omarska, overcrowding was severe. Witnesses estimated that between 220 and 500 people were detained in room 2, which was 12 meters long by 7 or 8 meters wide.<sup>261</sup> The conditions were equally terrible in room 4. Some detainees were allowed to bring in wooden palettes to sleep on the concrete floor. However, because these were piled one on top of the other, space was reduced and it was impossible for the rest to lie down.<sup>262</sup> The detainees were only allowed to leave the room to use the toilet.<sup>263</sup>

113. In Keraterm camp, the conditions of hygiene were also dreadful. There were few toilet facilities and the detainees were allowed to go to the toilet only once a day, with five men at time escorted by guards.<sup>264</sup> They could never bathe although, occasionally, they could wash a little with cold water. The detainees received no soap or toothpaste and they were given inadequate food and water. Infestations of lice appeared.<sup>265</sup> Witness Y reported he was fed for the first time 48 hours

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<sup>258</sup> Zuhra Hrnica, T. 3138-3139. Witness U testified that Radi} took a female detainee out and when she returned, she looked afraid, was quiet, and her face was all red. Witness U, T. 6217.

<sup>259</sup> Safet Ta}i, T. 3758; Witness AD, T.3795.

<sup>260</sup> Witness B, T.2331.

<sup>261</sup> Safet Ta}i, T. 3757; Witness AD, T. 3813.

<sup>262</sup> Witness Y, T.3603.

<sup>263</sup> Witness Y, T. 3605.

<sup>264</sup> Witness Y, T. 3605.

<sup>265</sup> Witness AD, T. 3837.

after his arrival at the camp and thereafter only once every 24 hours. The quality and quantity of food provided was totally inadequate, and detainees suffered from malnutrition and starvation.<sup>266</sup> The detainees received two pieces of bread that they had to eat very quickly or they would be beaten.<sup>267</sup> Furthermore, the food was not delivered regularly<sup>268</sup> and, according to Witness DD/8, sometimes there was no food provided at all.<sup>269</sup> To supplement the meager camp provisions, detainees were sometimes allowed to receive food brought from their families, although these occasional supplements were not enough to alleviate the hunger and malnutrition.<sup>270</sup>

114. As in the Omarska camp, most of the detainees in Keraterm were interrogated in an attempt to identify opponents of the new Serb regime.<sup>271</sup> According to the testimony, the interrogators asked the detainees for their personal data, whether they had weapons or knew anyone who had weapons, and for whom they voted in the last election.<sup>272</sup> Without any apparent reason, people were called out from their rooms and mercilessly beaten. According to Witness AE, every night people were taken out, beaten, and sometimes killed.<sup>273</sup> Witnesses testified to seeing dead bodies in the camp on several occasions. Sounds of pain being inflicted were common.<sup>274</sup> The Trial Chamber also heard credible evidence that women were raped in the Keraterm camp.<sup>275</sup>

115. Trnopolje was also a notoriously brutal camp, although a few witnesses testified that conditions in Trnopolje were more bearable than in Omarska and Keraterm.<sup>276</sup> Food, water, and hygiene facilities were far less than adequate, and violence was pervasive throughout the camp.<sup>277</sup>

#### **D. CONCLUSION**

116. The evidence is overwhelming that abusive treatment and inhumane conditions in the camps were standard operating procedure. Camp personnel and participants in the camp's operation rarely attempted to alleviate the suffering of detainees. Indeed, most often those who participated in and contributed to the camp's operation made extensive efforts to ensure that the detainees were tormented relentlessly. Many detainees perished as a result of the inhumane conditions, in addition to those who died as a result of the physical violence inflicted upon them.

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<sup>266</sup> Witness Y, T. 3601; Witness AD, T. 3836.

<sup>267</sup> Witness AD, T. 3836.

<sup>268</sup> Witness AD, T. 3836.

<sup>269</sup> Witness DD/8, T. 10879.

<sup>270</sup> Abdulah Brki}, T. 4486.

<sup>271</sup> Witness AD, T. 3835.

<sup>272</sup> Witness AD, T. 3835-3836; Witness N, T. 3890.

<sup>273</sup> Witness AE, T. 4295.

<sup>274</sup> Safet Ta}i, T. 3758.

<sup>275</sup> Witness K, T. 4959.

<sup>276</sup> See, e.g., Witness AD, T. 3851; Witness AE, T. 3837-3838, 3879.

<sup>277</sup> See, e.g., Witness AE, T. 4272-4273.

117. The Trial Chamber finds that the non-Serbs detained in these camps were subjected to a series of atrocities and that the inhumane conditions were imposed as a means of degrading and subjugating them. Extreme brutality was systematic in the camps and utilized as a tool to terrorize the Muslims, Croats, and other non-Serbs imprisoned therein.

118. The Trial Chamber will now consider the applicable law and explore whether the particular facts, as found by the Trial Chamber above in Part II, support a finding beyond a reasonable doubt that the crimes alleged in the Amended Indictment have been committed. By their nature, certain of the crimes alleged, particularly persecution as a crime against humanity, tend to involve many people with differing degrees of participation. The Trial Chamber will first ascertain whether the legal prerequisites for each crime have been proved. If so, it will then determine the degree of culpability, if any, attributable to each of the accused. The legal prerequisites will be determined in light of the state of codified and customary international law at the time of the events alleged in the Amended Indictment.



### III. APPLICABLE LAW AND LEGAL FINDINGS

119. The charges remaining in the Amended Indictment after the Trial Chamber's Decision on Defense Motions for Acquittal<sup>278</sup> are as follows: Kvo-ka, Prca}, Kos, Radi}, and @igi} are each charged on the basis of the same facts, under Article 5 of the Statute (crimes against humanity), with persecution and inhumane acts (counts 1-2) and under Article 3 of the Statute (violations of the laws or customs of war) with outrages upon personal dignity (count 3). The charges of persecution on political, racial, or religious grounds includes the murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions, of Bosnian Muslims, Bosnian Croats, and other non-Serbs. The charges remaining against Kvo-ka, Prca}, Kos, and Radi} are limited to crimes committed against detainees in Omarska camp; the charges are brought against @igi} for crimes committed in Omarska, Keraterm, and Trnopolje camps.

120. Kvo-ka, Prca}, Kos, and Radi} are charged on the basis of the same acts under Articles 3 (violations of the laws or customs of war) and 5 (crimes against humanity) of the Statute for the murder (counts 4-5), torture, and cruel treatment (counts 8-10) of prisoners in the Omarska camp; @igi} is separately charged with murder (counts 6-7), torture, and cruel treatment (counts 11-13) under Articles 3 and 5 of the Statute for crimes alleged against certain named or identified persons detained in the Omarska, Keraterm, and Trnopolje camps.

121. In addition to the above charges, Radi} is also separately charged with rape and torture as crimes against humanity (counts 14-15) under Article 5 and with torture and outrages upon personal dignity (counts 16-17) under Article 3 of the Statute for crimes of sexual violence committed against detainees in Omarska camp.

122. In its Decision on Judicial Notice, the Trial Chamber accepted certain facts agreed to by the parties, and decided that "at the times and places alleged in the Amended Indictment" there was "a widespread and systematic attack against notably the Muslim and Croat civilian population; and that there was a nexus between this armed conflict and the widespread and systematic attack on the civilian population and the existence of the Omarska, Keraterm, and Trnopolje camps and the

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<sup>278</sup> See Decision on Defense Motions for Acquittal, para. 63.

mistreatment of the prisoners therein.”<sup>279</sup> The Decision also recognized that such notice does not “indicate in itself that the accused are responsible for the commission of the alleged crimes”.<sup>280</sup>

## **A. ARTICLES 3 AND 5 OF THE STATUTE**

### **1. Prerequisites for Article 3 Crimes**

123. For a crime to be adjudicated under Article 3 of the Statute (violations of the laws or customs of war), the Trial Chamber must determine that a state of armed conflict existed at the time the crime was committed and that the crime was “closely related” to the armed conflict, whether internal or international in character.<sup>281</sup> According to the Appeals Chamber, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>282</sup> For a successful prosecution under Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>283</sup>

124. All charges alleged in the Amended Indictment under Article 3 (violations of the laws or customs of war) are based on Common Article 3 of the four 1949 Geneva Conventions (“Common Article 3”). It is firmly established in the Tribunal jurisprudence that Common Article 3 has acquired the status of customary law.<sup>284</sup> An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons “taking no active part in the hostilities.”<sup>285</sup> In the present case, none of the victims was injured during combat operations and the vast majority was unarmed persons held in detention camps, so that requirement is satisfied.

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<sup>279</sup> See Decision on Judicial Notice, 8 June 2000.

<sup>280</sup> See Decision on Judicial Notice, 8 June 2000.

<sup>281</sup> This means it is “sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.” *Tadić* Decision on Jurisdiction, para. 70.

<sup>282</sup> *Tadić* Decision on Jurisdiction, para. 70.

<sup>283</sup> *Tadić* Decision on Jurisdiction, para. 94.

<sup>284</sup> *Tadić* Trial Chamber Judgement, para. 609; *elebići* Appeals Chamber Judgement, para.143; *Kunara* Trial Chamber Judgement, para. 406.

<sup>285</sup> See e.g. *Kunara* Trial Chamber Judgement, para. 407; *Tadić* Trial Chamber Judgement, paras 614-616; *elebići* Appeals Chamber Judgement, para.420.

125. The Trial Chamber has previously found that an armed conflict existed at the times relevant to the crimes alleged and that there was a nexus between the armed conflict and the existence of the Omarska, Keraterm, and Trnopolje camps, and the mistreatment of the detainees therein.<sup>286</sup>

126. The Trial Chamber thus finds that all the requirements necessary for prosecution of a crime under Article 3 of the Statute have been satisfied.

## 2. Prerequisites for Article 5 Crimes

127. Article 5 of the Statute, crimes against humanity, requires the existence of an armed conflict, whether international or internal, and that the criminal acts alleged occurred during that armed conflict. In summarizing the jurisprudence of the Tribunal for crimes brought under Article 5 of the Statute, the *Kunara* Trial Chamber stipulated:<sup>287</sup>

- (i) There must be an attack.<sup>288</sup>
- (ii) The acts of the perpetrator must be part of the attack.<sup>289</sup>
- (iii) The attack must be “directed against any civilian population”.
- (iv) The attack must be “widespread or systematic”.
- (v) The perpetrator must know of the wider context in which his acts occur and that his acts are part of the attack.<sup>290</sup>

128. The critical element of crimes charged under Article 5 is that the criminal acts form part of a widespread or systematic attack directed against any civilian population. Such acts may constitute persecution under 5(h) only if they were perpetrated with a discriminatory intent on political, racial, or religious grounds.

129. Based upon the facts found in Part II and agreed upon in the Trial Chamber’s prior Decision on Judicial Notice, the Trial Chamber notes that the required elements that there must be an attack, that the attack must be directed against any civilian population, and that the attack be widespread or systematic have been satisfied. The Trial Chamber also notes that crimes committed in Omarska camp formed part of an attack directed against the civilian population and this would have had to have been known to all who worked in or regularly visited the camp.

130. In sum, all of the statutory prerequisites for crimes charged under Articles 3 and 5 are met in this case.

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<sup>286</sup> See Decision on Judicial Notice.

<sup>287</sup> *Kunara* Trial Chamber Judgement, para. 410.

<sup>288</sup> *Tadic* Appeals Chamber Judgement, para. 251.

<sup>289</sup> *Tadic* Appeals Chamber Judgement, para. 248.

<sup>290</sup> *Tadic* Appeals Chamber Judgement, para. 248.

131. The Trial Chamber will next examine whether the elements of each of the specific crimes charged under Articles 3 and 5 in the Amended Indictment have been satisfied. These include the elements of murder, torture, inhumane acts, cruel treatment, outrages upon personal dignity, rape, and persecution.

### 3. The Constituent Elements of the Offences Charged Under Articles 3 and 5

#### (a) Murder<sup>291</sup>

132. The ICTY and the ICTR have consistently defined the crime of murder as requiring that the death of the victim result from an act or omission of the accused committed with the intent to kill, or with the intent to cause serious bodily harm which the perpetrator should reasonably have known might lead to death.<sup>292</sup>

133. Kvo-ka, Prca}, Kos, and Radi} are charged under Article 5(a) and Article 3 with murder as a crime against humanity for their participation in or responsibility for the murder of Bosnian Muslim, Bosnian Croat, and other non-Serb detainees at the Omarska camp between 24 May 1992 and 30 August 1992, including the victims listed in Schedules A-E annexed to the Amended Indictment (counts 4 and 5).

134. @igi} is also charged with murder as a war crime and a crime against humanity for crimes committed in Omarska and Keraterm camps against named individuals or as part of specified incidents set out in the Amended Indictment or Schedule (counts 6 and 7).

135. As examined in Part II of this Judgement, it is clear that murder occurred within the camps. Many individual victims were identified by name and witnesses also testified about killings of unidentified men, seeing piles of dead bodies left near the white house and the red house, and about the murder of detainees on Petrovdan day or after the Hambarine incident.

136. The Trial Chamber is satisfied that murder falling within the meaning of Articles 3 and 5 (murder and persecution) of the Statute was committed in the camps. Whether responsibility for any murders can be imputed to the accused is a separate issue to be subsequently addressed.

#### (b) Torture

##### (i) No State Actor Requirement

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<sup>291</sup> Different terminology is used in the English and French versions of the Statute. The French version specifies "assassinat" whereas the English version uses the term "murder". *Bla{ki}* Trial Chamber Judgement, para. 216; *Kordi}* Trial Chamber Judgement, para. 235; *Akayesu* Trial Chamber Judgement, para. 588.

<sup>292</sup> See in particular *Akayesu* Trial Chamber Judgement, para. 589; *^elebi}* Trial Chamber Judgement, para. 439; *Bla{ki}* Trial Chamber Judgement, paras 153, 181, and 217; *Krsti}* Trial Chamber Judgement, para. 485.

137. Torture has been defined by the Tribunal jurisprudence as severe mental or physical suffering deliberately inflicted upon a person for a prohibited purpose, such as to obtain information or to discriminate against the victim. Differing views have been expressed in the jurisprudence of the Tribunal as to whether the suffering must be inflicted by a public agent or the representative of a public authority in order to meet the definition of torture.

138. The *Kunara* Judgment departed from the previous definitions of torture set forth by the Trial Chambers of the ICTY<sup>293</sup> and the ICTR,<sup>294</sup> in ruling that, in contrast to international human rights law, international humanitarian law does not require the involvement of a state official or of any other authority-wielding person in order for the offence to be regarded as torture.<sup>295</sup>

139. The Trial Chamber is persuaded by the reasoning of the *Kunara* Trial Chamber that the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.<sup>296</sup>

140. The Trial Chamber also agrees with the *elebi* Trial Chamber that the prohibited purposes listed in the Torture Convention as reflected by customary international law "do not constitute an exhaustive list, and should be regarded as merely representative",<sup>297</sup> and notes that the *Furund`ija* Trial Chamber concluded that humiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law.<sup>298</sup>

141. The Trial Chamber applies the following definition of torture to this case:

(i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental;

(ii) the act or omission must be intentional; and

(iii) the act or omission must be for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.

(ii) Severe Pain or Suffering

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<sup>293</sup> *Furund`ija* Trial Chamber Judgement, para. 162.

<sup>294</sup> *Akayesu* Trial Chamber Judgement, para. 594.

<sup>295</sup> *Kunara* Trial Chamber Judgement, para. 496.

<sup>296</sup> Article 7(2)(e) of the Rome Statute, concerning torture as a crime against humanity, similarly does not impose the State action requirement: "(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

<sup>297</sup> *elebi* Trial Chamber Judgement, para. 470.

<sup>298</sup> *Furund`ija* Trial Chamber Judgement, para. 162.

142. Consistent with human rights jurisprudence interpreting torture,<sup>299</sup> the *^elebi}i* Trial Chamber has indicated that the severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences.<sup>300</sup>

143. A precise threshold for determining what degree of suffering is sufficient to meet the definition of torture has not been delineated.<sup>301</sup> In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm.<sup>302</sup>

144. The UN Special Rapporteur on Torture, human rights bodies, and legal scholars have listed several acts that are considered severe enough *per se* to constitute torture and those that are likely to constitute torture depending on the circumstances.<sup>303</sup> Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts *per se* constituting torture.

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<sup>299</sup> See for instance *Ireland v. United Kingdom*, 18 January 1978, Series A no. 25, para. 167 in which the European Court of Human Rights indicated that the distinction between the notions of torture, inhuman treatment and degrading treatment, "derives principally from the difference in the intensity of the suffering inflicted". See also the Human Rights Committee 20/44 of 3 April 1992, para. 4.

<sup>300</sup> *^elebi}i* Trial Chamber Judgement, para. 468.

<sup>301</sup> *^elebi}i* Trial Chamber Judgement, para. 469.

<sup>302</sup> The Trial Chamber's position is consistent in that regard with the position of the ECHR with respect to Article 3 of the European Convention, which indicated that the minimum level of severity required is necessarily a relative assessment which "depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim." *Ireland v. United Kingdom*, 18 January 1978, Series A no. 25, para. 162.

<sup>303</sup> UN Special Rapporteur on Torture, Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/56/156, 3 July 2001, paras 8 et seq. The Human Rights Committee, in its concluding observations on Israel in 1998, found that interrogation techniques such as handcuffing, hooding, shaking, and sleep deprivation constitute a violation of Article 7 of the International Covenant on Civil and Political Rights in any circumstances, whether used alone or in combination. "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant", UN Doc. CCPR/C/79/Add.93, 18 August 1998, para. 19. In *Domukovsky et al. v. Georgia*, the Human Rights Committee described, as both torture and inhuman treatment, the cumulative effect of severe beatings, physical and moral pressure, including infliction of concussion, broken bones, burning and wounding, scarring and threats to family. Human Rights Committee, 623-624, 626, 627/95, para. 18.6. But see *Ireland v. United Kingdom*, Judgement of 18 January 1978, Series A/25 (1979-1980) 2 EHRR 25, para. 167, which found that the cumulative effects of hooding detainees, subjecting them to constant and intense 'white' noise, sleep deprivation, giving them insufficient food and drink, and making them stand for long periods in a painful posture, was inhuman treatment, but did not amount to torture. The contemporary jurisprudence and analysis is more reflective of the current recognition of the various forms that torture may take. See e.g. Rhonda Copelon, Recognizing the Egregious in the Everyday, Domestic Violence as Torture, 25 Colum. Hum. Rts. L. Rev. 291 (1994).

145. The jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies,<sup>304</sup> has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.<sup>305</sup>

146. In several cases involving Zaire, the U.N. Human Rights Committee found that various combinations of the following acts constituted torture: beatings, electric shocks to the genitals, mock executions, deprivation of food and water, and the "thumb press."<sup>306</sup> In considering individual complaints brought against Uruguay and Bolivia, the Human Rights Committee found that systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, repeated immersion in a mixture of blood, urine, vomit and excrement ('submarino'), standing for great lengths of time, and simulated executions or amputations amounted to torture.<sup>307</sup>

147. In the post World War II trials held in Japan, the International Military Tribunal for the Far East (IMTFE) found that the most prevalent forms of torture systematically inflicted by Japanese soldiers upon Allied forces or occupied civilians included "water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging."<sup>308</sup> Clearly, an exhaustive list of torturous practices is impossible to devise.

148. Although such torture practices often cause permanent damage to the health of the victims, permanent injury is not a requirement for torture.

149. Damage to physical or mental health will be taken into account in assessing the gravity of the harm inflicted. The Trial Chamber notes that abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. Similarly, the *Furund`ija* Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer.<sup>309</sup> The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.

150. As to intentional infliction, in the *Aksoy v. Turkey* case, the European Court of Human Rights found that when the victim was stripped naked, had his arms tied together behind his back,

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<sup>304</sup> For example, the European Commission for Human Rights found that repeated rape in detention constitutes torture. *Aydin v. Turkey*, 26 August 1997 (1998) 25 EHRR 251, para. 82.

<sup>305</sup> *^elebi}i* Trial Chamber Judgement, paras 495-496 and 941-943, *Furund`ija* Trial Chamber Judgement, paras 163 and 171, *Akayesu* Trial Chamber Judgement, paras 597-598.

<sup>306</sup> *Muteba v. Zaire* (124/82), *Miango Muiyo v. Zaire* (194/85) and *Kanana v. Zaire* (366/89).

<sup>307</sup> *Grille Motta*, No. 11/1977; *Lopez Burgos*, No. 52/1979; *Sendic*, No. 63/1979; *Angel Estrella*, No. 74/1980; *Arzuaga Gilboa*, No. 147/1983; *Cariboni*, No. 159/1983; *Berberretche Acosta*, No. 162/1983; *Herrera Rubio v. Colombia*, No. 161/1983; *Lafuente Penarrieta et al. v. Bolivia*, No. 176/1984.

<sup>308</sup> IMTFE Judgement, p 406.

and was suspended by his arms, "this treatment could only have been deliberately inflicted: indeed, a certain amount of preparation and exertion would have been required to carry it out."<sup>310</sup>

151. The Trial Chamber, in evaluating the perpetrator's actions, take into account the general atmosphere and conditions of detention prevailing in the camps, the absence of any medical care after abuse, and the repetitive, systematic character of the mistreatment of detainees. The Trial Chamber also notes the status of the victims and the perpetrators. The nature, purpose, consistency, and severity of the abuse are also indicia of torture.

(iii) Prohibited Purposes

152. The jurisprudence of the Tribunals recognizes certain prohibited purposes that qualify as torture. The *Akayesu* Trial Chamber adopted the prohibited purposes contained in the Convention against Torture, namely to obtain information or a confession from the victim or a third person, to punish the victim or a third person, to intimidate or coerce the victim or the third person, or for any reason based on discrimination of any kind.<sup>311</sup> The *Furund`ija* Trial Chamber added intent to humiliate to the list of prohibited purposes.<sup>312</sup>

153. The *^elebi}i* Trial Chamber rightly emphasized that the prohibited purpose need be neither the sole nor the main purpose of inflicting the severe pain or suffering.<sup>313</sup>

154. In interpreting the prohibited purposes of torture, the Trial Chambers have regularly found torture existed when the perpetrator's intent was to punish or to obtain information or a confession.<sup>314</sup> The Tribunals have also found instances when torture was inflicted as a means of discriminating on the basis of gender.<sup>315</sup> Moreover, the *^elebi}i* Trial Chamber emphasized that violence inflicted in a detention camp is often committed with the "purpose of seeking to intimidate not only the victim but also other inmates".<sup>316</sup>

155. Kvo-ka, Prca}, Kos, and Radi} are charged with torture as a crime against humanity and war crime based on certain treatment inflicted upon Bosnian Muslim, Bosnian Croat, and other non-Serb detainees in the Omarska camp, including those detainees and incidents listed in Schedules A, B, C, and E (counts 8 and 9). Radi} is also charged with torture as a crime against humanity and

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<sup>309</sup> *Furund`ija* Trial Chamber Judgement, para. 267.

<sup>310</sup> *Aksoy v. Turkey*, Judgement of 18 Dec. 1996, ECHR.

<sup>311</sup> *Akayesu* Trial Chamber Judgement, para. 594.

<sup>312</sup> *Furund`ija* Trial Chamber Judgement, para. 162.

<sup>313</sup> *Celebi}i* Trial Chamber Judgement, para. 470.

<sup>314</sup> See, e.g., *Celebi}i* Trial Chamber Judgement, para. 494; *Furund`ija* Trial Chamber Judgement, para. 162; *Kunara}* Trial Chamber Judgement, para. 485.

<sup>315</sup> *^elebi}i* Trial Chamber Judgement, paras 941, 963.



war crime based on sexual violence inflicted upon women held in the Omarska camp (counts 14 and 16).

156. @igi} is also charged with torture as a crime against humanity and war crime for specific instances of mistreatment and/or beating of Bosnian Muslim, Bosnian Croat and other non-Serb detainees in the Omarska, Keraterm, and Trnopolje camps (counts 11 and 12) in Schedule D.

157. The parties do not contest that detainees in the three camps were subjected to torture as defined in the Tribunal jurisprudence. The Trial Chamber finds that many of the acts of beating or interrogating detainees and acts of humiliation and psychological abuses, as described in Part II of this Judgement, were committed with a specific intent to punish detainees suspected of participating in armed rebellion against Bosnian Serb forces and other acts were committed to obtain information or a confession. Virtually all acts of intentionally inflicting physical and mental violence were committed with an intent to intimidate, humiliate, and discriminate against non-Serb detainees.

158. The Trial Chamber is satisfied that torture falling within the meaning of Articles 3 and 5 (torture and persecution) of the Statute was committed in the camp. Whether responsibility for torture can be imputed to each accused is a separate issue to be subsequently addressed.

(c) Cruel Treatment

159. The Tribunal has consistently defined cruel treatment, which is prohibited by Common Article 3 to the Geneva Conventions, as an intentional act or omission that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.<sup>317</sup>

160. In assessing the degree of harm required for an offence to qualify as cruel treatment, consideration should be given to the object and purpose of Common Article 3, which attempts to delineate a minimum standard of treatment to be afforded to persons taking no active part in the hostilities.

161. The Trial Chamber, following the lead of the ^elebi}i Trial Chamber Judgement, considers that the degree of physical or mental suffering required to prove cruel treatment is lower than the one required for torture, though it must be at the same level as "wilfully causing great suffering or

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<sup>316</sup> ^elebi}i Trial Chamber Judgement, para. 941.

<sup>317</sup> ^elebi}i Trial Chamber Judgement, para. 552; Jelisi} Trial Chamber Judgement, para. 41; Bla{ki} Trial Chamber Judgement, para. 186; ^elebi}i Appeals Chamber Judgement, para. 424; Kordi} Trial Chamber Judgement, para. 265. See also the E.C.H.R. decision in Costello-Roberts, which found that a long-lasting effect was not required for a mistreatment to fall within the ambit of Article 3 of its Charter. Costello-Roberts, 25 March 1993, Series A no. 247-C.

serious injury to body or health.”<sup>318</sup> The *^elebi}i* Trial Chamber found that the degree of suffering required to prove cruel or inhuman treatment was not as high as that required to sustain a charge of torture.<sup>319</sup> The *Blaski}* Trial Chamber, for example, held that the use of human shields constitutes cruel treatment under Article 3 of the Statute.<sup>320</sup>

162. Kvo~ka, Prca}, Kos, and Radi} are charged with cruel treatment for the torture and beating of Bosnian Muslim, Bosnian Croat and other non-Serb detainees in the Omarska camp, including those detainees listed in Schedules A, B, C, and E (count 10). The accused are also charged with torture for those same acts.

163. @igi} is also charged with cruel treatment for specific instances of torture and/or beating of Bosnian Muslim, Bosnian Croat and other non-Serb detainees in the Omarska, Keraterm, and Trnopolje camps (count 13) and Schedule D.

164. Psychological abuses, humiliation, harassment, and inhumane conditions of detention caused severe pain and suffering to the detainees. The Trial Chamber finds that cruel treatment, in particular in the form of beatings and attempts at degradation, was committed in the camps.

165. The Trial Chamber is satisfied that cruel treatment within the meaning of Article 3 of the Statute was committed. Whether responsibility for cruel treatment can be imputed to the accused is a separate issue to be subsequently addressed.

(d) Outrages Upon Personal Dignity

166. Common Article 3 to the Geneva Conventions prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment.” As indicated in the *Aleksovski* and *Kunara}* Trial Chamber Judgements, “the prohibition of the offence of outrages upon personal dignity is a category of the broader proscription of inhuman treatment in common article 3”.<sup>321</sup>

167. The *Kunara}* Trial Chamber stipulated that the offence requires “(i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii)

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<sup>318</sup> The *^elebi}i* Trial Chamber Judgement indicates that cruel treatment “carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions.” Para. 552. It defined inhuman treatment as “treatment which causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.” Para. 542.

<sup>319</sup> *^elebi}i* Trial Chamber Judgement, para. 510; see also *Kordi}* Trial Chamber Judgement, para. 245. The offence of “wilfully causing great suffering or serious injury to body or health”, which constitutes a grave breach of the 1949 Geneva Conventions, did require the same degree of suffering as torture.

<sup>320</sup> *Bla{ki}* Trial Chamber Judgement, para. 700.

<sup>321</sup> *Aleksovski* Trial Chamber Judgement, para. 54; *Kunara}* Trial Chamber Judgement, para. 502.

that he knew that the act or omission could have that effect.”<sup>322</sup> The *Aleksovski* Judgement emphasized that the offence is “an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim.”<sup>323</sup> It also noted that subjective criteria must be taken into account, including a particular victim’s temperament or sensitivity, although the “reasonable person” standard must also be considered.<sup>324</sup>

168. This Trial Chamber agrees with the *Kunara*} Judgement that the act or omission need not cause lasting suffering; it is sufficient if the act or omission “would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.”<sup>325</sup> *Kunara*} further found that the *mens rea* element of the offence did not require any specific intent from the perpetrator to humiliate, ridicule, or degrade the victim,<sup>326</sup> but that it was enough if the perpetrator knew that his or her act or omission “could cause serious humiliation, degradation or affront to human dignity.”<sup>327</sup>

169. The term “outrages upon personal dignity” has been compared with inhuman treatment in the jurisprudence of the Tribunal.<sup>328</sup> International human rights bodies have found that inhuman and/or degrading treatment can be committed on the sole basis of inappropriate conditions of detention.<sup>329</sup>

170. The *Aleksovski* Trial Chamber found the following acts to constitute outrages upon personal dignity: the use of detainees as human shields or trench diggers,<sup>330</sup> beatings, and the constant fear of being robbed or beaten endured by vulnerable persons like detainees.<sup>331</sup> The *Furund`ija* and *Kunara*} Trial Chambers have found that rape and other forms of sexual violence, including forced public nudity, cause severe physical or mental pain and amount to outrages upon personal dignity.<sup>332</sup>

171. In the Amended Indictment, the five accused are charged with outrages upon personal dignity based upon the same set of facts underlying the persecution count: murder, torture and

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<sup>322</sup> *Kunara*} Trial Chamber Judgement, para. 514.

<sup>323</sup> *Aleksovski* Trial Chamber Judgement, para. 56.

<sup>324</sup> *Aleksovski* Trial Chamber Judgement, para. 56.

<sup>325</sup> *Kunara*} Trial Chamber Judgement, para. 507.

<sup>326</sup> *Kunara*} Trial Chamber Judgement, para. 509.

<sup>327</sup> *Kunara*} Trial Chamber Judgement, para. 512.

<sup>328</sup> See, e.g., *Aleksovski* Trial Chamber Judgement, para. 54.

<sup>329</sup> *Portorreal v. Dominican Republic*, Human Rights Committee, No. 188/84; see also *Brown v. Jamaica*, Human Rights Committee, No. 775/97; *Estrella v. Uruguay*, Human Rights Committee, No. 79/1980; *Greek case* (1969) 12 Y.B.E. Comm. H.R.; *Cyprus v. Turkey*, (1976) 4 E.H.R.R. 482, 541.

<sup>330</sup> *Aleksovski* Trial Chamber Judgement, para. 229.

<sup>331</sup> *Aleksovski* Trial Chamber Judgement, paras 184-210.

<sup>332</sup> *Furund`ija* Trial Chamber Judgement, para. 272; *Kunara*} Trial Chamber Judgement, paras 766-774.

beating, rape and sexual assault, harassment, humiliation and psychological abuse, and confinement in inhumane conditions (count 3). In addition, Radi} is separately charged with outrages upon personal dignity (count 17) for rape and sexual violence committed against named or identified female detainees.

172. In the view of the Trial Chamber, murder in and of itself cannot be characterized as an outrage upon personal dignity. Murder causes death, which is different from concepts of serious humiliation, degradation or attacks on human dignity. The focus of violations of dignity is primarily on acts, omission, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment.

173. Evidence discloses that the detainees were subjected to serious humiliating and degrading treatment through such means as inappropriate conditions of confinement in the Omarska camp. The detainees were forced to perform subservient acts demonstrating Serb superiority, forced to relieve bodily functions in their clothing, and they endured the constant fear of being subjected to physical, mental, or sexual violence in the camp, as described in Part II of this Judgement.

174. The Trial Chamber finds that outrages upon personal dignity within the meaning of Article 3 of the Statute were regularly committed upon detainees in Omarska camp. Whether responsibility for outrages upon personal dignity can be imputed to the accused is a separate issue to be subsequently addressed.

(e) Rape

175. Rape was succinctly defined in the *Akayesu* Trial Chamber Judgement as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>333</sup> The *Furund`ija* Trial Chamber articulated the objective elements of rape as follows:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>334</sup>

176. The *Kunara}* Trial Chamber, however, found element (ii) of the *Furund`ija* element more restrictive than required by international law, and concluded that it should be interpreted to mean “where such sexual penetration occurs without the consent of the victim.”<sup>335</sup> The *Kunara}*

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<sup>333</sup> *Akayesu* Trial Chamber Judgement, para. 688.

<sup>334</sup> *Furundi`ja* Trial Chamber Judgement, para. 185.

<sup>335</sup> *Kunara}* Trial Chamber Judgement, para. 460.

Judgement emphasizes that the consent must be “given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances”<sup>336</sup> and the principal focus should be whether there were serious violations of sexual autonomy.<sup>337</sup>

177. The Trial Chamber agrees with the factors set out by the Trial Chamber in *Kunara*}, defining rape as a violation of sexual autonomy. In order for sexual activity to be classified as rape:

- (i) the sexual activity must be accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity must be accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- (iii) the sexual activity must occur without the consent of the victim.<sup>338</sup>

178. In considering allegations of rape, the *^elebi}i* Trial Chamber stressed that coercive conditions are inherent in situations of armed conflict.<sup>339</sup> Further, the *Furund`ija* Trial Chamber emphasized that “any form of captivity vitiates consent.”<sup>340</sup> This Trial Chamber endorses these holdings.

179. The *mens rea* of the crime of rape is the intent to effect a sexual penetration and the knowledge that it occurs without the consent of the victim.<sup>341</sup>

180. The *Akayesu* Trial Chamber defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>342</sup> Thus, sexual violence is broader than rape and includes such crimes as sexual slavery or molestation.<sup>343</sup> Moreover, the *Akayesu* Trial Chamber emphasized that sexual violence need not necessarily involve physical contact and cited forced public nudity as an example.<sup>344</sup>

181. The Amended Indictment charges sexual violence as one of the acts that may constitute persecution if the requisite intent is shown (count 1). In addition, rape as a crime against humanity is charged against Mla|o Radi} for his assaults on specified victims (count 15).

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<sup>336</sup> *Kunara*} Trial Chamber Judgement, para. 460.

<sup>337</sup> *Kunara*} Trial Chamber Judgement, para. 440.

<sup>338</sup> *Kunara*} Trial Chamber Judgement, para. 442.

<sup>339</sup> *^elebi}i* Trial Chamber Judgement, para. 495. See also *Akayesu* Trial Chamber Judgement, para. 688.

<sup>340</sup> *Furund`ija* Trial Chamber Judgement, para. 271.

<sup>341</sup> *Kunara*} Trial Chamber Judgement, para. 460.

<sup>342</sup> *Akayesu* Trial Chamber Judgement, para. 688.

<sup>343</sup> Sexual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other similar forms of violence. Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998, at Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi).

<sup>344</sup> *Akayesu* Trial Chamber Judgement, para. 688.

182. The evidence establishes, as demonstrated in Part II of this Judgement, that female detainees in Omarska camp were subjected to forced or coerced acts of sexual penetration, as well as other acts of a sexual nature committed under coercive or abusive circumstances.

183. The Trial Chamber is satisfied that rape and other forms of sexual violence falling within the meaning of Articles 3 and 5 (rape and persecution) of the Statute were committed. Whether responsibility for these crimes can be imputed to the accused is a separate issue to be subsequently addressed.

(f) Persecution on Political, Racial, and Religious Grounds

184. The *Tadić* Trial Chamber articulated three basic requirements for the crime of persecution: (1) the occurrence of a discriminatory act or omission; (2) a basis for that act or omission founded on race, religion, or politics; and (3) the intent to infringe an individual's enjoyment of a basic or fundamental right.<sup>345</sup> The *Kupreški* Trial Chamber defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5."<sup>346</sup>

185. The Tribunal's caselaw has specified that persecutory acts include those crimes enumerated in other sub-clauses of Article 5,<sup>347</sup> crimes found elsewhere in the Statute,<sup>348</sup> and acts not enumerated in the Statute but which may entail the denial of other fundamental human rights provided that, separately or combined, the acts are of the same gravity or severity as the other enumerated crimes in Article 5.<sup>349</sup> Further, "discriminatory acts charged as persecution must not be considered in isolation, but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane'".<sup>350</sup>

186. Thus far, the Trial Chambers of the ICTY have found that the following acts may constitute persecution when committed with the requisite discriminatory intent: imprisonment,<sup>351</sup> unlawful detention of civilians<sup>352</sup> or infringement upon individual freedom,<sup>353</sup> murder,<sup>354</sup> deportation or forcible transfer,<sup>355</sup> "seizure, collection, segregation and forced transfer of civilians to camps",<sup>356</sup>

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<sup>345</sup> *Tadić* Trial Chamber Judgement, para. 715.

<sup>346</sup> *Kupreški* Trial Chamber Judgement, para. 621.

<sup>347</sup> *Kupreški* Trial Chamber Judgement, para. 605.

<sup>348</sup> *Kordi* Trial Chamber Judgement, para. 193.

<sup>349</sup> *Kupreški* Trial Chamber Judgement, para. 619; *Kordi* Trial Chamber Judgement, para. 195.

<sup>350</sup> *Kupreški* Trial Chamber Judgement, para. 622.

<sup>351</sup> *Kupreški* Trial Chamber Judgement, para. 629.

<sup>352</sup> *Blaški* Trial Chamber Judgement, para. 234.

<sup>353</sup> *Blaški* Trial Chamber Judgement, para. 220.

<sup>354</sup> *Kupreški* Trial Chamber Judgement, para. 629.

<sup>355</sup> *Kupreški* Trial Chamber Judgement, para. 631.

comprehensive destruction of homes and property,<sup>357</sup> the destruction of towns, villages and other public or private property and the plunder of property,<sup>358</sup> attacks upon cities, towns and villages,<sup>359</sup> trench-digging and the use of hostages and human shields,<sup>360</sup> the destruction and damage of religious or educational institutions,<sup>361</sup> and sexual violence.<sup>362</sup> The Trial Chamber also notes jurisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution.<sup>363</sup> Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent. The *Kordi* Trial Chamber Judgement stated that “in order for the principle of legality not to be violated, acts in respect of which the accused are indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission.”<sup>364</sup> The Trial Chamber reads this statement as meaning that jointly or severally, the acts alleged in the Amended Indictment must amount to persecution, not that each discriminatory act alleged must individually be regarded as a violation of international law.

187. If based on the same acts against the same victims, the Trial Chamber considers that the crime of persecution subsumes other alleged acts separately constituting crimes against humanity, as long as the additional element of discrimination on specified grounds is present.

188. The five accused are charged with persecution under Article 5(h) for the following acts committed against Bosnian Muslims, Bosnian Croats and other non-Serbs: murder, torture and beating, rape and sexual assault, harassment, humiliation, and psychological abuse, and confinement in inhumane conditions (count 1).

189. Murder, torture, and rape are explicitly listed under sub-clauses (a), (f), and (g) of Article 5 of the Statute and constitute persecutory acts if committed on discriminatory grounds. Confinement in camps under inhumane conditions can be included under sub-clauses (e) and (i) prohibiting “imprisonment” and “other inhumane acts” and also meets the definition of a persecutory act.

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<sup>356</sup> *Tadi* Trial Chamber Judgement, para. 717.

<sup>357</sup> *Kupre{ki}* Trial Chamber Judgement, para. 631.

<sup>358</sup> *Bla{ki}* Trial Chamber Judgement, para. 234, *Kordi* Trial Chamber Judgement, para. 205.

<sup>359</sup> *Kordi* Trial Chamber Judgement, para. 203.

<sup>360</sup> *Kordi* Trial Chamber Judgement, para. 204.

<sup>361</sup> *Kordi* Trial Chamber Judgement, para. 206.

<sup>362</sup> *Krsti* Trial Chamber Judgement, paras 617-618. In this case, even though rape crimes were not necessarily systematic as they were considered incidental, they were still found to have been a foreseeable consequence of the persecution committed as part of a joint criminal enterprise.

<sup>363</sup> See, e.g., *U.S. v. Ernst von Weizsaker*, vol. XIV, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10, p 471 [hereinafter *Ministeries Case*].

<sup>364</sup> *Kordi* Trial Chamber Judgement, para. 192.

190. The Trial Chamber now turns to examining harassment, humiliation, and psychological abuse. These acts are not explicitly listed under Article 5 nor do they appear as specific offences under other Articles of the Statute. In order to constitute persecution, harassment, humiliation, and psychological abuse must occupy the same level of seriousness as other listed or recognized crimes against humanity, or together with other crimes cognizable under Article 5, they must form part of a course of conduct which satisfies the criteria for persecution. The conditions of detention prevailing in the camp – gross overcrowding in small rooms without ventilation, requiring the detainees to beg for water, and forcing them to relieve bodily functions in their clothes – were themselves a form of abuse, and were intended to harass, humiliate, and inflict mental harm on the detainees. The constant berating, demoralizing, and threatening of detainees, including the guards' coercive demands for money from detainees, and the housing of detainees in lice-infected and cramped facilities were calculated by participants in the operation of the camp to inflict psychological harm upon detainees. Just as rape and forced nudity are recognized as crimes against humanity or genocide if they form part of an attack directed against a civilian population or if used as an instrument of the genocide,<sup>365</sup> humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution.

191. The Trial Chamber is also satisfied that the horrendous conditions of detention and the demoralizing treatment of detainees in Omarska camp were sufficiently degrading and traumatizing to constitute *per se* an outrage upon personal dignity, which qualifies as persecution since it was clearly committed on discriminatory grounds.

192. In addition to the harassment, humiliation, and psychological trauma endured by the detainees as part of their daily life in the camp, psychological abuse was also inflicted upon them through having to see and hear torturous interrogations and random brutality perpetrated on fellow inmates. The Trial Chamber is satisfied that the harassment, humiliation, and psychological abuses fall under the *actus reus* of persecution.

193. The Trial Chamber will now consider the requisite *mens rea* involved in establishing persecution as a crime against humanity under the terms of the Statute.

(i) Mens rea for persecution

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<sup>365</sup> *Akayesu* Trial Chamber Judgement, para. 732. In this case, the Trial Chamber explicitly recognized forced nudity and rape as constituting sexual violence as part of the genocide and crimes against humanity committed in Rwanda. It found that sexual violence "was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself."



194. Discrimination is the main feature that distinguishes the crime of persecution from other crimes against humanity. Any crime against humanity under the other sub-clauses of Article 5 that also meets the additional requirement of discrimination would qualify as persecution. Discrimination in the context of persecution under Article 5(h) must be on political, racial, or religious grounds. In other words, the discriminatory intent necessary for the crime must be characterizable in terms of politics, race, and religion.

195. The *Tadić* Trial Chamber Judgement indicated that the discriminatory act could result from the application of positive or negative criteria. It found that an attack “conducted against only the non-Serb portion of the population because they were non-Serbs” was indicative of the necessary discriminatory intent.<sup>366</sup> In this case, the detainees in Omarska camp were selected on the basis of political, ethnic, or religious criteria; their specific attributes differing from those, and being defined in distinction to those, of their Bosnian Serb captors and abusers. When all the detainees are non-Serbs or those suspected of sympathizing with non-Serbs, and all abusers are Serbs or Serb sympathizers, it is disingenuous to contend that religion, politics, and ethnicity did not define the group targeted for attack. Indeed, the Trial Chamber notes that persons suspected of being members of these groups are also covered as possible victims of discrimination. For example, if a Bosnian Serb was targeted on suspicion of sympathizing with Bosnian Muslims, that attack could be classified as persecutory.<sup>367</sup> Additionally, if a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate.

196. The Amended Indictment in the present case defines the group targeted for persecution as “the Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area.”<sup>368</sup> The Amended Indictment also asserts generally that the attack was directed against “Bosnian Muslims, Bosnian Croats and some other non-Serbs”<sup>369</sup> or “the Bosnian Muslim and the Bosnian Croat populations of the Prijedor municipality.”<sup>370</sup> Following the finding of the *Tadić* Trial Chamber Judgement on this point,<sup>371</sup> a finding cited in both the *Blaskić*<sup>372</sup> and *Jelisić*<sup>373</sup> Trial Chamber Judgements and in

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<sup>366</sup> *Tadić* Trial Chamber Judgement, para. 652; see also *Blaskić* Trial Chamber Judgement, para. 236; and *Jelisić* Trial Chamber Judgement, para. 71.

<sup>367</sup> This is consistent with the ICTR’s interpretation of crimes against humanity in adjudicating crimes committed on “national, political, ethnic, racial or religious grounds.” For example, Akayesu, a Hutu, was held responsible for committing crimes against humanity against members of the Tutsi group, as well as against Hutu moderates or persons suspected of being Tutsi sympathizers. See *Akayesu* Trial Chamber Judgement, crimes against humanity convictions.

<sup>368</sup> Amended Indictment, paras 24-33.

<sup>369</sup> Amended Indictment, paras 5, 6.

<sup>370</sup> Amended Indictment, para. 15.

<sup>371</sup> *Tadić* Trial Chamber Judgement, para. 714.

<sup>372</sup> *Blaskić* Trial Chamber Judgement, para. 236.

<sup>373</sup> *Jelisić* Trial Chamber Judgement, para. 71.

accordance with the language adopted in the *Todorovi* Sentencing Judgement,<sup>374</sup> this Trial Chamber is satisfied that intentionally directing attacks exclusively against non-Serbs detained in Omarska camp (or their sympathizers), on the basis of their being (or supporting) non-Serbs, constitutes discrimination within the meaning of persecution.

197. In relation to the facts at hand, the Trial Chamber first notes that virtually all the offences alleged were committed against non-Serb detainees of the camps. The victims were targeted for attack on discriminatory grounds. While discriminatory grounds form the requisite criteria, not membership in a particular group, the discriminatory grounds in this case are founded upon exclusion from membership in a particular group, the Serb group. Based on the totality of the evidence, it is clear that murder, torture, rape, beatings and other forms of physical and mental violence were strategically and systematically committed against non-Serbs in Omarska. Most of these atrocities appear to have been committed with a premeditated intent to create an atmosphere of violence and terror and to persecute those imprisoned. In addition, the facilities and the conditions prevailing in Omarska were such that the prisoners who survived their interrogations were forced to endure grossly inadequate living conditions, sustenance, and medical treatment. The ethnic slurs, forcing Muslim and Croat detainees to sing Serbian songs or slap each other, causing the detainees to relieve bodily functions in their clothes because of inadequate toilet facilities, selectively targeting only non-Serbs for physical, mental, or sexual violence – these are all examples of discriminatory and demoralizing treatment designed to persecute. In the oppressive heat, whether outside on the scalding pavement of the pista or crammed into unventilated rooms in the buildings, the non-Serb victims imprisoned in Omarska camp were denied their fundamental rights to life, liberty, property, and bodily and mental integrity, rights synonymous with or reaching the same level of gravity as the specific acts prohibited under Article 5 of the Statute. This denial of fundamental rights has been proved beyond a reasonable doubt. In addition, it was undisputed that participants in the camp operations targeted only non-Serbs and a small group of Serbs suspected of sympathizing with the opposing groups, for the abusive attacks and conditions, leading inevitably to the conclusion that the acts or omissions were committed on discriminatory grounds. The Trial Chamber finds that the elements of persecution as a crime against humanity have been satisfied.

198. There is no doubt that the attacks specifically targeted the non-Serb population of Prijedor and purported to drive this population out of the territory or to subjugate those remaining. The

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<sup>374</sup> The designation “Bosnian Muslim, Bosnian Croat and other non-Serb civilians” is used extensively in *Todorovi*. For example, *Todorovi* accepts the designation “non-Serb group” with regard to its findings on the crime of persecution in that case. *Todorovi* Sentencing Judgement, para. 12.

Trnopolje and Keraterm camps appear to have been each established as part of a common plan to effectuate this goal, and the Omarska camp was clearly established to effectuate this goal.

(ii) Inferring Discriminatory Intent from a "Knowing Participation" in a Criminal Enterprise

199. A secondary issue arises over whether the discriminatory intent of the perpetrator or co-perpetrator of an underlying offence or of a joint criminal enterprise can be inferred from a knowing participation in the discriminatory attack or the criminal enterprise.

200. In the case of persecution, in addition to the intent to commit the underlying act, an additional intent is required,<sup>375</sup> namely the specific intent to discriminate on political, racial, or religious grounds. This specific intent to discriminate is thus additional to the intent to commit the underlying act (murder, rape, torture, etc.) and to the *mens rea* required for crimes against humanity (knowledge of act committed within the context of a widespread or systematic attack directed against a civilian population).<sup>376</sup> The *Kupreški* Trial Chamber emphasized that the *mens rea* required for persecution "is higher than for ordinary crimes against humanity, although lower than genocide."<sup>377</sup> *Kupreški* summarized the elements required to sustain a charge of persecution: "(a) those elements required for all crimes against humanity under the Statute; (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5; and (c) discriminatory grounds."<sup>378</sup>

201. The *Kordi* Trial Chamber found that to possess the heightened *mens rea* for the crime of persecution, "the accused must have shared the aim of the discriminatory policy."<sup>379</sup> The Trial Chambers have repeatedly inferred discriminatory intent from the perpetrator's wilful or knowing participation in a campaign of systematic abuse against a specific ethnic, religious, or political group. The *Jelisi* Trial Chamber Judgement considered that discriminatory intent of the accused could be inferred from the fact that the accused "knowingly act[ed] against the backdrop of the widespread and systematic violence being committed against only one specific group".<sup>380</sup> In the *Kupreški* Trial Chamber Judgement, four accused were found to have shared the discriminatory intent on the basis of their collaborative participation in certain events that took place in central Bosnia from October 1992 until 16 April 1993.<sup>381</sup> The *Kordi* Judgement inferred the discriminatory intent of the accused from their active participation in the common criminal

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<sup>375</sup> *Kordi* Trial Chamber Judgement, para. 212 (emphasis in original).

<sup>376</sup> See *Kordi* Trial Chamber Judgement, paras 211-212.

<sup>377</sup> *Kupreški* Trial Chamber Judgement, para. 636.

<sup>378</sup> *Kupreški* Trial Chamber Judgement, para. 627.

<sup>379</sup> *Kordi* Trial Chamber Judgement, para. 220.

<sup>380</sup> *Jelisi* Trial Chamber Judgement, para. 73.

design.<sup>382</sup> The Trial Chamber in *Kordi* thus concludes that discriminatory intent of a perpetrator can be inferred from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds.

202. The Trial Chamber finds that all of the acts enumerated under count 1 of the Amended Indictment were committed in Omarska camp; the acts or omissions were committed both systematically and randomly by those acting according to their given roles within the camp structure and those responding spontaneously and opportunistically to the condonation of violence this structure afforded, with an intent to discriminate against and ultimately subjugate the non-Serbs detained in the camp.

203. The Trial Chamber notes that there may be particular incidents alleged against an accused where a persecutory nature of the acts remains to be determined. For example, while the Trial Chamber is fully confident that beatings were committed in Omarska camp with an intent to discriminate against non-Serbs, there may be beatings of certain victims which were not committed on discriminatory grounds, but for purely personal reasons.<sup>383</sup> In instances in which an accused has raised a question as to whether an act was committed on discriminatory grounds or without the knowing or wilful participation of the accused, the Trial Chamber will consider whether the Prosecution has established that the grounds were discriminatory.<sup>384</sup>

204. The Trial Chamber is satisfied that participants in the operation of Omarska camp committed persecution within the meaning of Article 5(h) of the Statute. Whether the accused incur criminal liability for the persecution is a separate issue to be subsequently addressed.

205. The Trial Chamber also takes note of the Plea Agreements reached in the *Keraterm* camp case, in which the accused and the Prosecution agreed upon the basis of convictions of three former employees of the camp (Sikirica, Došen, and Kolundžija), for persecution as a crime against humanity.<sup>385</sup> The agreements explicitly state that two of the accused did not physically perpetrate or condone crimes committed in Keraterm (Došen and Kolundžija), and that they even attempted to halt or prevent certain crimes and improve conditions in the camp. Trial Chamber III accepted the

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<sup>381</sup> *Kupre{ki}* Trial Chamber Judgement, paras 780, 790, 814 and 828.

<sup>382</sup> *Kordi* Trial Chamber Judgement, paras 829 and 831.

<sup>383</sup> The Trial Chamber notes that it is settled jurisprudence in the Tribunal that crimes against humanity can be committed for purely personal reasons. See, e.g., *Tadi* Appeals Chamber Judgement, paras 248 *et seq.*

<sup>384</sup> See, e.g., *Tali* Decision on Form of Amended Indictment, para. 48.

<sup>385</sup> Joint Submission of the Prosecution and the Accused Dragan Kolundžija of a Plea Agreement, 30 August 2001; Admitted Facts Relevant to the Plea Agreement for Dragan Kolundžija, 4 September 2001; Joint Submission of the Prosecution and the Accused Duško Sikirica and Admitted Facts, 6 September 2001; Joint Submission of the Prosecution and the Accused Damir Došen and Admitted Facts, 6 September 2001. Sikirica was Commander of Security, and Došen and Kolundžija were guard shift leaders in the Keraterm camp.

Plea Agreements, finding that a factual basis existed for holding the accused guilty of persecution as a crime against humanity.<sup>386</sup> This decision supports a finding that those who do not physically perpetrate crimes and who are relatively low level participants can be found guilty of persecution as a crime against humanity under Article 5 of the Statute. The defendant's guilty pleas were apparently based on the fact that they knew crimes were rampant in the Keraterm camp and they nonetheless remained in their assigned positions and continued participating in the functioning of the camp.<sup>387</sup>

(g) Inhumane Acts

206. Article 5(i) of the Statute is a residual clause. It applies to acts that do not fall within any other sub-clause of Article 5 and which present the same degree of gravity as the other enumerated crimes.<sup>388</sup> Relying on the definition given in the *Bla{ki}* Judgement,<sup>389</sup> the *Kordi}* Judgement considered that "inhumane acts" are characterized by intentionally inflicted serious bodily or mental harm upon the victim, with the degree of severity assessed on a case-by-case basis.<sup>390</sup>

207. The *Kupre{ki}* Judgement referred to international standards of human rights in order to identify prohibited inhumane acts. It particularly mentioned the prohibition of inhuman or degrading treatment under the International Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights (Article 3), and the Inter-American Convention on Human Rights (Article 5).<sup>391</sup> The Trial Chamber notes that the African Charter on Human and Peoples' Rights (Article 5)<sup>392</sup> similarly prohibits inhuman treatment.

208. Mutilation and other types of severe bodily harm, beatings and other acts of violence,<sup>393</sup> serious physical and mental injury,<sup>394</sup> forcible transfer,<sup>395</sup> inhumane and degrading treatment,<sup>396</sup>

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<sup>386</sup> Oral Decision regarding plea agreement for the accused Dragan Kolundžija, 4 September 2001; Oral Decision regarding plea agreement for the accused Duško Sikirica and Damir Došen, 19 September 2001.

<sup>387</sup> For example, Kolundžija's Plea Agreement notes that while there was no evidence that Kolundžija committed or condoned the mistreatment of detainees, "there is ample evidence that mistreatment regularly occurred in the Keraterm Camp and that the accused was employed as a shift leader at the Keraterm Camp for a portion of the time relevant to the Indictment." Further, in the Admitted Facts Relevant to the Plea Agreement for Kolundžija, it is accepted that "*despite being aware of the inhumane camp conditions, he accepts responsibility for continuing as a shift leader*". (para. 5) (emphasis added). In the Admitted Facts of Došen's Plea Agreement, para. 13 notes that "There is evidence that beatings occurred during periods of time when the accused Došen's shift was on duty and that at times he was aware of these beatings."

<sup>388</sup> *Tadi}* Trial Chamber Judgement, para. 729, *Kupre{ki}* Trial Chamber Judgement, para. 566.

<sup>389</sup> *Bla{ki}* Trial Chamber Judgement, para. 243.

<sup>390</sup> *Kordi}* Trial Chamber Judgement, paras 271, 272.

<sup>391</sup> *Kupre{ki}* Trial Chamber Judgement, para. 566.

<sup>392</sup> African Charter on Human and Peoples' Rights, adopted on 27 June 1981, Article 5.

<sup>393</sup> *Tadi}* Trial Chamber Judgement, para. 730.

<sup>394</sup> *Bla{ki}* Trial Chamber Judgement, para. 239.

<sup>395</sup> *Kupre{ki}* Trial Chamber Judgement, para. 566, *Krsti}* Trial Chamber Judgement, para. 523.

<sup>396</sup> *Kupre{ki}* Trial Chamber Judgement, para. 566.

forced prostitution,<sup>397</sup> and forced disappearance<sup>398</sup> are listed in the jurisprudence of the Tribunal as falling under this category.

209. The Trial Chamber finds that inhumane acts falling within the meaning of Article 5 (inhumane acts and persecution) of the Statute were committed in Omarska camp. Evidence discloses that detainees were subjected to serious bodily or mental harm through such means as beatings, torture, sexual violence, humiliation, harassment, psychological abuses, and confinement in inhumane conditions.

210. Whether responsibility for inhumane acts can be attributed to the accused is a separate issue to be subsequently addressed.

211. Due to of the cumulative nature of some of the charges based on the same underlying facts, the Trial Chamber next considers the issue of cumulative convictions.

## **B. CUMULATIVE CONVICTIONS**

212. In the present case, the question of cumulative convictions arises with regard to many of the same crimes charged under different Articles of the Statute (for example, murder as a violation of Article 3 of the Statute and murder as a violation of Article 5 of the Statute), as well as for the same or similar crimes charged for the same acts under different subsections of the same Article of the Statute (for example, murder charged under Article 5 of the Statute as constituting murder, persecution, and inhumane acts). The jurisprudence of the Tribunals on this issue will be discussed below. The Trial Chamber must decide in each case under which charge(s) it is permissible to enter a conviction(s) punishing the same criminal act.

### 1. The Applicable Law

213. The Appeals Chamber in the *^eleb}i* case pronounced on the issue of cumulative convictions of war crimes charged under Article 2 (grave breaches of the Geneva Conventions) and Article 3 (violations of the laws or customs of war) of the Statute. It articulated a two-prong test, which has been subsequently applied by Trial Chambers considering cumulative convictions under Articles 3 and 5 of the Statute.<sup>399</sup> In addition, the Appeals Chamber in the *Jelisi}* case adopted the

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<sup>397</sup> *Kupre{ki}* Trial Chamber Judgement, para. 566.

<sup>398</sup> *Kupre{ki}* Trial Chamber Judgement, para. 566.

<sup>399</sup> *Kordi}* Trial Chamber Judgement, paras 820-825 (Articles 2, 3, and 5), *Kunara}* Trial Chamber Judgement, paras 556-557 (Articles 3 and 5), *Krsti}* Trial Chamber Judgement, para. 674 (Articles 3 and 5).

same approach as in the *Jelisi* Appeals Chamber in relation to charges brought under Articles 3 and 5 of the Statute.<sup>400</sup>

214. Under the test set out by the *Jelisi* Appeals Chamber ("Test"), it is permissible to enter cumulative convictions under different statutory provisions to punish the same criminal act if "each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other".<sup>401</sup> If the criminal acts satisfy the criteria for more than one crime but the offenses do not each contain materially distinct elements, and thus cumulative convictions are impermissible, then the Trial Chamber must decide for which offence it will enter a conviction. This selection should be made based on the principle that "the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision".<sup>402</sup>

215. In accordance with this Test, the Trial Chamber will determine the materially distinct elements of each crime charged. If the application of this first prong of the Test requires that the Trial Chamber render only one conviction, the Trial Chamber will, in accordance with the second prong of the Test, select the most specific applicable criminal provision.

## 2. The Application of the Test to the Concurrent Offences Specified in the Amended Indictment

### (a) The Concurrent Offences Characterizing the Murders

216. The Trial Chamber has found that murders were committed in the Omarska and Keraterm camps during the time period covered by the Amended Indictment. These murders are cumulatively characterized in the Amended Indictment as persecutions committed through murders under Article 5(h) (count 1), inhumane acts committed through murder under Article 5(i) (count 2), outrages upon personal dignity committed through murder under Article 3(1)(c) (count 3), murder under Article 3(1)(a) (counts 5 and 7), and murder under Article 5(a) (counts 4 and 6).

217. The Trial Chamber has found that it is not appropriate to charge murder as an outrage upon personal dignity under Article 3(1)(c) of the 1949 Geneva Conventions. Thus, the issue of improper cumulative conviction does not arise with respect to the relationship between this offence and the other offences characterizing the murders. The Trial Chamber also recalls the subsidiary nature of

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<sup>400</sup> *Jelisi* Appeals Chamber Judgement, para. 82.

<sup>401</sup> *Jelisi* Appeals Chamber Judgement, para. 412.

<sup>402</sup> *Jelisi* Appeals Chamber Judgement, para. 413.

the charge of other inhumane acts as a crime against humanity and concludes that if the persecution charge is sustained, the inhumane acts more appropriately fall under the persecution count.

218. The Trial Chamber will first consider cumulative convictions under Articles 3 and 5 of the Statute when the crimes are based on the same set of facts. It will then consider the appropriateness of cumulative convictions for two or more crimes under the same Article of the Statute based on the same set of facts.

219. According to the *Jelisić* Appeals Chamber Judgement, Article 3 crimes and Article 5 crimes each contain "a special ingredient not possessed by the other".<sup>403</sup> Crimes charged under Article 3 require proof of "a close link between the acts of the accused and the armed conflict", whereas Article 5 crimes require proof "that the act occurred as part of a widespread or systematic attack against a civilian population".<sup>404</sup> Murder and other crimes charged under both Articles 3 and 5 are thus allowed, as each offence requires a materially distinct element not demanded by the other.<sup>405</sup>

220. As to the relationship between murders charged cumulatively under Article 5(a)(murder) and Article 5(h)(persecution), this Trial Chamber has previously determined in the *Krstić* Judgement that the offence of persecution committed through murder under Article 5(h) contains a materially distinct element in the discriminatory intent, which is not required by the offence of murder under Article 5(a). Murder under Article 5(a) does not contain a unique element not subsumed within murder captured by Article 5(h). In the event of convictions under both Articles for this crime, the offence of persecution, as the more specific offense, must be selected over the offence of murder under Article 5(a) in accordance with the second prong of the Test.

221. Consequently, to convict an accused of murder for which he is found to be criminally liable, the Trial Chamber may enter convictions under both Article 3, murder as a violation of the laws or customs of war (counts 5 and 7), and either Article 5(h), persecution committed through murder (count 1) or Article 5 (a) (counts 4 and 6). However, if the murder is found to form part of a persecution conviction, the murder charges brought as a crime against humanity must be dismissed.

(b) The Concurrent Offences Characterizing the Acts of Torture

222. The Trial Chamber has found that acts of torture alleged in the Amended Indictment were committed in the Omarska camp. These acts are cumulatively charged as persecutions committed

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<sup>403</sup> *Jelisić* Appeals Chamber Judgement, para. 82.

<sup>404</sup> *Jelisić* Appeals Chamber Judgement, para. 82.

<sup>405</sup> *Jelisić* Appeals Chamber Judgement, para. 82.



through torture under Article 5(h) (count 1) of the Statute, other inhumane acts under Article 5(i) (count 2) of the Statute, outrages upon personal dignity under Article 3(1)(c) of the Geneva Conventions (count 3), torture under Article 5(f) of the Statute (counts 8 and 11), torture under Article 3(1)(a) (counts 9 and 12) and cruel treatment under Article 3(1)(a) of the Geneva Conventions (counts 10 and 13).

223. The Test is applied first with a view to determining whether cumulative convictions under Articles 3 and 5 of the Statute are permissible. The Trial Chamber will then consider whether cumulative convictions under different underlying offences contained in the same Article can be entered to punish the same criminal act.

(i) Relationship Between Offences Under Different Articles (Articles 3 and 5)

224. With respect to the relationship between Article 3 and 5 offences, and as discussed above, it is now settled in the Tribunal that it is permissible to enter cumulative convictions under both Articles 3 and 5 of the Statute, as they each contain materially distinct elements.

(ii) Relationship Between Offences Under the Same Article (Article 3)

225. With respect to the relationship between torture under Article 3(1)(a), cruel treatment under Article 3(1)(a) and outrages upon personal dignity under Article 3(1)(c) of the Geneva Conventions, the Trial Chamber must first determine which of these offences contains a unique materially distinct element not required by the other offences. Offences charged under Article 3 of the Statute in violation of Common Article 3 of the Geneva Conventions require that the crimes be committed against a person taking no active part in the hostilities and must be closely connected to the armed conflict. Torture has been defined as any intentional act or omission that causes severe physical or mental pain or suffering and which is motivated, in whole or in part, by a prohibited purpose. Cruel treatment is defined as any intentional act or omission, which causes serious physical or mental pain or suffering or constitutes a serious attack on human dignity.<sup>406</sup> Outrages upon personal dignity are defined as any intentional act or omission that would generally be considered to cause serious humiliation, degradation, or otherwise be a serious attack on human dignity.<sup>407</sup>

226. The requirement of a prohibited purpose which is characteristic of the offence of torture, is a materially distinct element that is not required in the offences of cruel treatment or outrages upon personal dignity. All of these offences involve physical or mental abuse. The Trial Chamber

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<sup>406</sup> *^elebi}i* Trial Chamber Judgement, paras 542 *et seq.*

<sup>407</sup> *Aleksovski* Trial Chamber Judgement, paras 49 *et seq.*; *Kunara* Trial Chamber Judgement, para. 514.

previously indicated that the threshold of pain or suffering required for torture is higher than for cruel treatment. The gravity of the pain inflicted in case of torture thus constitutes a further unique materially distinct element and makes the offence of torture more specific. Consequently, the Trial Chamber cannot enter cumulative convictions under torture, cruel treatment, and outrages upon personal dignity to punish the same act. The Trial Chamber must select the most specific offence in accordance with the second prong of the Test. The offence of torture is more specifically defined than the offences of cruel treatment and outrages upon personal dignity. Thus, the offence of torture under Article 3(1)(a) must be preferred and the offences of cruel treatment under Article 3(1)(a) and outrages upon personal dignity under Article 3(1)(c) must be dismissed.

(iii) Relationship Between Offences Under the Same Article (Article 5)

227. With respect to the relationship between torture under Article 5(f) and persecution committed through torture under Article 5(h), persecution contains a materially distinct element not required by torture, in that persecution requires discrimination on political, racial or religious grounds. In accordance with the first prong of the Test, it is not permissible to enter cumulative convictions under both Article 5(f) and Article 5(h) for the same act and the most specific offence, i.e., persecutions, must be selected in accordance with the second prong of the Test. If the Trial Chamber finds that torture was committed as part of a persecution, the offence of torture under Article 5(f) must be dismissed.

228. Regarding the relationship between other inhumane acts under Article 5(i) and persecution under Article 5(h), the Trial Chamber previously noted that inhumane acts have a subsidiary nature, and thus if any inhumane acts fall within a persecution conviction, the inhumane acts charged under Article 5(i) must be dismissed. Again, according to the Test, if criminal acts satisfy the criteria for more than one crime but the offenses do not each contain materially distinct elements, and thus cumulative convictions are impermissible, then the Trial Chamber must decide for which offence it will enter a conviction. This selection should be made based on the principle that the provision governing facts requiring a materially distinct element is the appropriate offense upon which to base the conviction.

(c) The Concurrent Offences Characterizing the Acts of Rape/Sexual Assaults

229. The Trial Chamber has found that rape and other forms of sexual violence were committed in the Omarska camp. The rapes and sexual assaults are cumulatively charged in the Amended Indictment as persecution committed through rape and sexual assaults under Article 5(h) (count 1), torture under Article 5(f) (count 14), rape under Article 5(g) (count 15), other inhumane acts under

Article 5(i) (count 2), outrages upon personal dignity under Article 3(1)(c) (counts 3 and 17), and torture under Article 3(1)(a) (count 16).

(i) Relationship Between Offences Under Different Articles (Articles 3 and 5)

230. The Trial Chamber has already found that offences charged under both Articles 3 and 5 may both be upheld, as the Tribunal is allowed to enter cumulative convictions under both Articles for the same criminal act.

(ii) Relationship Between Offences Under the Same Article (Article 3)

231. As discussed above, it is not permissible to enter cumulative convictions under both charges of outrages upon personal dignity under Article 3(1)(c) and torture under Article 3(1)(a); if torture is established it must be preferred over the offence of outrages upon personal dignity.

(iii) Relationship Between Offences Under the Same Article (Article 5)

232. The Trial Chamber previously found that if a persecution charge is upheld, the charge of other inhumane acts on the basis of the same acts must be dismissed.

233. The Trial Chamber now turns to the relationship between persecution under Article 5(h), torture under Article 5(f), and rape under Article 5(g). The offence of rape requires sexual penetration, while the offence of torture requires the infliction of severe pain or suffering for a prohibited purpose. Thus, consistent with the analysis in the *Kunara* case, convictions for both are allowed if the requirements of each are met.<sup>408</sup> Nonetheless, the Trial Chamber previously indicated that the crime of persecution requires a materially distinct element, namely the discriminatory intent, vis-à-vis the crime of torture; this same intent also distinguishes persecution from elements of rape. Therefore, in instances where the same act qualifies as rape, torture, and persecution under Article 5 of the Statute, the Trial Chamber may convict the accused for persecution only.

234. To summarize, if the same act qualifies as rape, torture, and persecution, the Trial Chamber may only enter convictions of torture and rape as violations of the laws or customs of war (Article 3(1)(a) and (c) of the Geneva Conventions)<sup>409</sup> and persecution as a crime against humanity (Article 5(h) of the Statute). The other charges covering the same act must be dismissed.

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<sup>408</sup> See *Kunara* Trial Chamber Judgement, para. 557.

<sup>409</sup> The Trial Chamber notes that, under Article 3 of the Statute, violations of the laws or customs of war, rape is also a crime explicitly protected against by Article 27 of the Fourth Geneva Convention, Article 76(1) of Additional Protocol

(d) The Concurrent Offences Characterizing the Acts of Harassment, Humiliation, and Psychological Abuse and Confinement Under Inhumane Conditions

235. The Trial Chamber has found that detainees in the Omarska camp were harassed, humiliated, and otherwise psychologically abused and confined under inhumane conditions. These acts are cumulatively charged in the Amended Indictment as persecution under Article 5(h) (count 1) and other inhumane acts under Article 5(i) (count 2) of the Statute, as well as outrages upon personal dignity under Article 3(1)(c) (count 3) of the Geneva Conventions.

236. The Trial Chamber has already found that offences charged under both Articles 3 and 5 may both stand, so that the Trial Chamber is allowed to enter cumulative convictions under both Articles to punish the same criminal act.

237. As previously indicated, the charges based on Article 5(i) (other inhumane acts) are to be dismissed if they are based upon the same crimes subsumed within a persecution conviction.

238. Based on the foregoing discussion, if the Trial Chamber finds the accused responsible for multiple crimes based on the same acts of harassment, humiliation, and psychological abuse and confinement under inhumane treatment, it may only enter convictions of outrages upon personal dignity as a war crime (Article 3) and persecution as a crime against humanity (Article 5(h)).

239. The Trial Chamber notes that it is axiomatic that when the same underlying act is not involved the issue of cumulative convictions does not arise.

### **C. THEORIES OF RESPONSIBILITY**

#### **1. Introduction**

240. Article 7 of the Statute of the Tribunal authorizes the Tribunal to impose individual and superior responsibility on persons on the following basis:

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

(2) . . .

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I, and Article 4(2)(e) of Additional Protocol II. Rape is a war crime under these provisions as well, and not solely under Common Article 3 of the Conventions.

- (3) The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

241. The Amended Indictment charges all accused with having “participated” in the crimes alleged under Article 7(1) of the Statute. It alternatively or additionally charges Kvočka, Prcac, Kos, and Radic with superior responsibility under Article 7(3) of the Statute for the crimes alleged in counts 1-5 and 8-10. In addition, Žigic is alleged to have directly participated in the beatings cited in counts 6-7 and 11-13 of the Amended Indictment under Article 7(1) of the Statute, and Radic is similarly charged with having physically committed the rapes and sexual assaults charged in counts 14-17 of the Amended Indictment pursuant to Article 7(1) of the Statute.

## 2. Individual Responsibility Under Article 7(1)

242. The accused are each charged under Article 7(1) of the Statute with having “participated” in the crimes alleged in the Amended Indictment. The Amended Indictment states that the term “participated” as used in each count is intended to incorporate “planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of any acts or omission.”<sup>410</sup> Despite this caveat, most paragraphs of the Amended Indictment allege that the accused “instigated, committed or otherwise aided and abetted” the crimes enumerated. Hence, “participation” is generally used in a broad sense.<sup>411</sup>

243. In the jurisprudence of the Tribunals, “instigating” has been defined to mean “prompting another to commit an offence”.<sup>412</sup> “Committing” a crime “covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law”.<sup>413</sup> “Aiding and abetting” means “rendering a substantial contribution to the commission of a crime”.<sup>414</sup>

244. In addition, “joint criminal enterprise” liability is a form of criminal responsibility that the Appeals Chamber found to be implicitly included within Article 7(1) of the Statute. It entails

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<sup>410</sup> Amended Indictment, para. 16.

<sup>411</sup> In *^elebi}i*, the Appeals Chamber found “it is clear that Article 7(1) of the Statute encompasses various modes of participation, some more direct than others. The word “participation” here is a broad enough term to encompass all forms of responsibility which are included within Article 7(1) of the Statute.” *^elebi}i* Appeals Chamber Judgement, para. 351.

<sup>412</sup> *Krsti} Trial Chamber Judgement*, para. 601; *Akayesu Trial Chamber Judgement*, para. 482; *Blaski} Trial Chamber Judgement*, para. 280; *Kordi} Trial Chamber Judgement*, para. 387.

<sup>413</sup> *Krsti} Trial Chamber Judgement*, para. 601; *Tadi} Appeals Chamber Judgement*, para. 188; *Kunara} Trial Chamber Judgement*, para. 390.

<sup>414</sup> *Krsti} Trial Chamber Judgement*, para. 601; *Aleksovski Appeals Chamber Judgement*, paras 162-164.

individual responsibility for participating, in a broad sense, in a joint criminal enterprise to commit a crime within the jurisdiction of the Tribunal.<sup>415</sup>

245. The Prosecution argues for the application of the joint criminal enterprise theory as set out by the Appeals Chamber in the *Tadić* case<sup>416</sup> under Article 7(1) of the Statute, and asserts that the accused acted in pursuance of a common criminal enterprise.<sup>417</sup>

246. The Defense of Kvočka objects to the introduction of the joint criminal enterprise theory of liability by the Prosecution in its Pre-trial brief, which it views as an attempt to expand the responsibility of the accused as alleged in the Amended Indictment, and maintains that “the Prosecution should and had to be limited to prove the counts from the indictment during its case”.<sup>418</sup> The Trial Chamber agrees that the Amended Indictment must frame the Prosecution case in a recognizable fashion and be sufficiently clear in its charges to enable the accused to mount an effective defense, and that the Prosecution is certainly limited in its case to the charges set out in the Amended Indictment.<sup>419</sup> However, the Trial Chamber agrees that participation in a crime under a theory of joint criminal enterprise liability is included within the scope of Article 7(1) of the Statute, as elaborated by the Appeals Chamber in the *Tadić* case, and as articulated by the Prosecution in its Amended Indictment. By reference both to the nature of international crimes and to the object and purpose of the Statute of the Tribunal, the Appeals Chamber found that:

it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common criminal purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.<sup>420</sup>

247. In the *Krstić* case, this Trial Chamber rejected the Defense contention that because “joint criminal enterprise” had not been explicitly pleaded in the Amended Indictment, the Trial Chamber was not open to apply this doctrine.<sup>421</sup> Here again, the Trial Chamber emphasizes that the charges in the Amended Indictment that the accused “instigated, committed or otherwise aided and abetted” crimes may include responsibility for participating in a joint criminal enterprise designed to accomplish such crimes. In this regard, the Trial Chamber notes with agreement the finding of the Appeals Chamber in the *Ćelebići* case:

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<sup>415</sup> *Tadić* Appeals Chamber Judgement, paras 185-229. The Appeals Chamber interchangeably used several other terms, such as “common purpose” to denote the same form of participation.

<sup>416</sup> *Tadić* Appeals Chamber Judgement, paras 185-229.

<sup>417</sup> Prosecution Pre-Trial Brief, para. 216.

<sup>418</sup> Kvočka Final Trial Brief, para. 56.

<sup>419</sup> See especially *Kupreški* Appeals Chamber Judgement, para. 124.

<sup>420</sup> *Tadić* Appeals Chamber Judgement, para. 190.

<sup>421</sup> *Krstić* Trial Chamber Judgement, para. 602.

Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the 'nature and cause of the charge against him'.<sup>422</sup>

248. The Trial Chamber notes that all of the evidence against four of the accused relates to crimes committed within the confines of the Omarska camp. Crimes alleged against @igi} involve not only Omarska, but also Keraterm and Trnopolje camps. The Trial Chamber considers it within its discretion to characterize the form of participation of the accused, if any, according to the theory of responsibility it deems most appropriate, within the limits of the Amended Indictment and insofar as the evidence permits.<sup>423</sup>

249. The Trial Chamber will now outline the legal characteristics of a) instigating and committing crimes; b) aiding or abetting crimes; and c) joint criminal enterprise liability, each of which is alleged in this case and justiciable under Article 7(1) of the Statute. The Trial Chamber also considers that it is possible to co-perpetrate and aid or abet a joint criminal enterprise, depending primarily on whether the level of participation rises to that of sharing the intent of the criminal enterprise. An aider or abettor of a joint criminal enterprise, whose acts originally assist or otherwise facilitate the criminal endeavor, may become so involved in its operations that he may graduate to the status of a co-perpetrator of that enterprise.

#### (a) Instigating or Committing Crimes

250. There is no controversy as to the legal elements required for "committing" a crime within the jurisdiction of the Tribunal. The Appeals Chamber in the *Tadi}* case found that Article 7(1) "covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."<sup>424</sup>

251. The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute, through positive acts or omissions,<sup>425</sup> whether individually or jointly with others. The requisite *mens rea* is that, as in other forms of criminal participation under Article 7(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.<sup>426</sup>

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<sup>422</sup> *^elebi}* Appeals Chamber Judgement para. 351, with reference to Article 21(4)(a) of the Statute.

<sup>423</sup> See also on this point *Furundzija* Trial Chamber Judgement para. 189; *Kupre{ki}* Trial Chamber Judgement, para. 746; *Kunara}* Trial Chamber Judgement para. 388.

<sup>424</sup> *Tadi}* Appeals Chamber Judgement, para. 188; see also *Kunara}* Trial Chamber Judgement, para. 390.

<sup>425</sup> *Kordi}* Trial Chamber Judgement, para. 376.

<sup>426</sup> *Tadi}* Trial Chamber Judgement, para. 688; *^elebi}* Trial Chamber Judgement, para. 327.

252. The *actus reus* required for “instigating” a crime is any conduct by the accused prompting another person to act in a particular way.<sup>427</sup> This element is satisfied if it is shown that the conduct of the accused was a clear contributing factor to the conduct of the other person(s).<sup>428</sup> It is not necessary to demonstrate that the crime would not have occurred without the accused’s involvement.<sup>429</sup> The required *mens rea* is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.<sup>430</sup>

(b) Aiding or Abetting

253. Aiding and abetting are forms of accessory or accomplice liability.<sup>431</sup> The *actus reus* of aiding and abetting consists of providing practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the crime.<sup>432</sup> The *mens rea* required is the knowledge that these acts assist or facilitate the commission of the offence.<sup>433</sup>

254. The *Akayesu* Trial Chamber Judgement emphasized that aiding and abetting, “which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto.”<sup>434</sup>

255. There is no requirement that the aider or abettor have a causal effect on the act of the principal.<sup>435</sup> But the aider or abettor must have intended to assist or facilitate, or at least have accepted that such a commission of a crime would be a possible and foreseeable consequence of his conduct.<sup>436</sup> Further, it is not necessary that the aider or abettor know the precise crime that was intended or which was actually committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to assist or facilitate the commission of that crime and is guilty as an aider or abettor.<sup>437</sup> In the *Aleksovski* case,

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<sup>427</sup> *Akayesu* Trial Chamber Judgement, para. 482; *Blaski*} Trial Chamber Judgement, para. 280.

<sup>428</sup> *Kordi*} Trial Chamber Judgement, para. 387.

<sup>429</sup> *Kordi*} Trial Chamber Judgement, para. 387.

<sup>430</sup> *Akayesu* Trial Chamber Judgement, para. 482.

<sup>431</sup> *Kunara*} Trial Chamber Judgement, para. 393.

<sup>432</sup> *Furundzija* Trial Chamber Judgement, para. 249; *Kunara*} Trial Chamber Judgement, para. 391.

<sup>433</sup> *Furund`ija* Trial Chamber Judgement, para. 249. See also *Tadi*} Appeals Chamber Judgement, para. 229.

<sup>434</sup> *Akayesu* Trial Chamber Judgement, para. 484.

<sup>435</sup> *Furund`ija* Trial Chamber Judgement, para. 233; *Aleksovski* Trial Chamber Judgement, para. 61.

<sup>436</sup> *Tadi*} Trial Chamber Judgement, para. 674; *^elebi}i* Trial Chamber Judgement, para. 326; *Aleksovski* Trial Chamber Judgement, para. 61.

<sup>437</sup> *Furund`ija* Trial Chamber Judgement, para. 246.



the Appeals Chamber stated that, in order to have the necessary *mens rea*, the aider and abettor must be aware of the essential elements of the crime ultimately committed by the principal.<sup>438</sup>

256. Aiding or abetting may consist of an act or an omission and may take place before, during, or after the commission of a crime perpetrated by another and be geographically separated therefrom.<sup>439</sup> To aid or abet by omission, the failure to act must have had a significant effect on the commission of the crime.<sup>440</sup>

257. Presence alone at the scene of the crime is not conclusive of aiding or abetting, unless it is shown to have a significant legitimizing or encouraging effect on the principal.<sup>441</sup> Presence, particularly when coupled with a position of authority, is therefore a probative, but not determinative, indication that an accused encouraged or supported the perpetrators of the crime.<sup>442</sup>

258. For example, in the *Aleksovski* case, the Trial Chamber found that, in the absence of any objection by the accused, his presence during the systematic mistreatment of detainees created a necessary inference that the accused was aware that such tacit approval would be construed as a sign of his support and encouragement. Under the circumstances, the Trial Chamber found that Aleksovski contributed substantially to the mistreatment of detainees.<sup>443</sup> Furthermore, the Trial Chamber concluded that he aided and abetted the repetitious brutality suffered by two detainees even when he was absent. The Trial Chamber found that abuse of this kind was committed near the accused's office so often that he must have been aware of it. Yet he did not oppose or stop the crimes, as his superior position demanded, and his silence could only be interpreted as a sign of approval. This silence was held to evince a culpable intent of aiding and abetting such acts as contemplated under Article 7(1) of the Statute.<sup>444</sup>

259. The *Tadić* Trial Chamber considered that the presence of the accused when crimes were committed by a group was sufficient to entail his responsibility if he had previously played an active role in similar acts committed by the same group and had not expressly spoken against the conduct of the group.<sup>445</sup> This holding is particularly notable because the defendant was a low level

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<sup>438</sup> *Aleksovski* Appeals Chamber Judgement, para. 162.

<sup>439</sup> *Aleksovski* Trial Chamber Judgement, para. 62.

<sup>440</sup> *Blaškić* Trial Chamber Judgement, para. 284. Examples are given in *Tadić* Trial Chamber Judgement, para. 686; *Elebić* Trial Chamber Judgement, para. 842; *Akayesu* Trial Chamber Judgement, para. 705.

<sup>441</sup> *Kunara* Trial Chamber Judgement, para. 393; see also *Tadić* Trial Chamber Judgement, para. 689; *Aleksovski* Trial Chamber Judgement, para. 64.

<sup>442</sup> *Aleksovski* Trial Chamber Judgement, para. 65; *Akayesu* Trial Chamber Judgement, para. 693.

<sup>443</sup> *Aleksovski* Trial Chamber Judgement, para. 87.

<sup>444</sup> *Aleksovski* Trial Chamber Judgement, para. 88.

<sup>445</sup> *Tadić* Trial Chamber Judgement, para. 690.

actor, a person without any official authority who entered camps, including Omarska, to beat and otherwise abuse detainees.

260. In the *Akayesu* case, an ICTR Trial Chamber held that the defendant had previously provided verbal encouragement for the commission of crimes, and that his status as “bourgemeister” conferred upon him a position of authority. His subsequent silence was a signal in the face of crimes of violence committed nearby of official tolerance for the crimes.<sup>446</sup>

261. In the *Furund`ija* case, the defendant was convicted of rape because he participated in an interrogation while the person being verbally interrogated by the defendant was raped and otherwise abused by another participant in the interrogation. The Trial Chamber found that the presence of the accused and his role in the interrogation facilitated and otherwise aided and abetted the crimes committed by the physical perpetrator.<sup>447</sup>

262. The aider or abettor of persecution, as a “special intent” crime, must not only have knowledge of the crime he is assisting or facilitating. He must also be aware that the crimes being assisted or supported are committed with a discriminatory intent. The aider or abettor of persecution does not need to share the discriminatory intent, but must be aware of the broader discriminatory context and know that his acts of assistance or encouragement have a significant effect on the commission of the crimes. Each and every act of discrimination need not be known or intended by the aider or abettor. The aider or abettor of persecution will thus be held responsible for discriminatory acts committed by others that were a reasonably foreseeable consequence of their assistance or encouragement.

263. In the *Kordi}* case, the Trial Chamber Judgement treated “aiding and abetting and participation in a common purpose or design” together because the *Tadi}* Appeals Chamber, “in setting out the elements of the latter, compared it to aiding and abetting.”<sup>448</sup> The Trial Chamber subsequently found that “the unlawful confinement and detention of the Bosnian Muslims was part of the common design to subjugate them. . . . This happened with such regularity that it could have been the result of nothing except a common plan.”<sup>449</sup>

264. The “common purpose doctrine”, also referred to as “joint criminal enterprise” theory, will be examined next.

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<sup>446</sup> *Akayesu* Trial Chamber Judgement, para. 693.

<sup>447</sup> *Furundzija* Trial Chamber Judgement, para. 274.

<sup>448</sup> *Kordi}* Trial Chamber Judgement, note 536.

<sup>449</sup> *Kordi}* Trial Chamber Judgement, para. 802.

(c) The Joint Criminal Enterprise Theory

265. The Appeals Chamber, in the *Tadić* case, set out three versions of joint criminal enterprise liability discernible in customary international law, and which it considered to be implied within the terms of Article 7(1) of the Statute.

266. According to the Appeals Chamber, for joint criminal enterprise liability to arise, there must be proof of:

- (i) A plurality of persons;
- (ii) The existence of a common plan, which amounts to or involves the commission of a crime provided for in the Statute; the Appeals Chamber specified that

There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.<sup>450</sup>

- (iii) Participation of the accused in the execution of the common plan.<sup>451</sup>

267. After reviewing post-World War II caselaw, the *Tadić* Appeals Chamber found that cases comprising the notion of joint criminal enterprise could generally be separated into three groups and that the *mens rea* differs according to which category is applicable: 1) those where all participants act pursuant to a common design and possess the same criminal intent; 2) those where the accused have personal knowledge of a system of ill-treatment and an intent to further the common system of ill-treatment; and 3) those where there is a common design to pursue a course of conduct but an act is committed outside the common design which is nonetheless a natural and foreseeable consequence of the common purpose.<sup>452</sup>

268. Although the first two categories enunciated by *Tadić* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war "concentration camp" cases,<sup>453</sup> best resonates with the facts of this case and is the one upon which the Trial Chamber will focus most of its attention. The Trial Chamber will examine and elaborate

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<sup>450</sup> *Tadić* Appeals Chamber Judgement, para. 227(ii). The Appeals Chamber reaffirmed this statement in the *Furundžija* Appeal Chamber Judgement, para. 119.

<sup>451</sup> *Tadić* Appeals Chamber Judgement, para. 227.

<sup>452</sup> *Tadić* Appeals Chamber Judgement, paras 196-204.

<sup>453</sup> *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15 November –13 December 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by his Majesty's Stationary Office, London, 1947 ("UNWCC"), vol. XI, p 5 (hereinafter *Dachau Concentration Camp*); see also *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17 September –17 November 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by his Majesty's Stationary Office, London, 1947 ("UNWCC"), vol. II, p 1 (hereinafter *Belsen*).

upon the standards to be applied in assessing criminal liability of participants in a detention facility which operates as a joint criminal enterprise.

269. In the *Dachau* and *Belsen* concentration camp cases, “the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes”.<sup>454</sup> The position of authority was often, especially in *Belsen*, one of *de facto* influence, with individuals having influence even when not formally or officially prescribed. For example, even concentration camp inmates who were given some position of authority over other inmates, such as moderator or spy, were convicted, along with camp cooks, guards, maintenance workers, doctors and others performing particular functions within the camp. Most of those convicted in *Belsen*, particularly those at the lowest levels of the prison hierarchy, physically beat, killed, or otherwise abused the prisoners in the camps.

270. Drawing on the Judge Advocate’s summary in the *Belsen* case, the Appeals Chamber in *Tadić* described the three requirements identified by the Military Prosecutor as necessary to establish guilt in the concentration camp cases: “(i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused’s awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e. encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.”<sup>455</sup> The Appeals Chamber noted that the convictions of several of the defendants in the concentration camp cases appeared to have been expressly based upon these criteria.<sup>456</sup>

271. With respect to the threshold for assessing liability pursuant to the joint criminal enterprise theory, we turn first to the required *mens rea*. World War II jurisprudence, as well as the summary in the *Tadić* Appeal, reveals that liability on the basis of a joint criminal enterprise requires a knowing assistance or encouragement for an aider or abettor and an intent to advance the goal of the enterprise in the case of a co-perpetrator. The shared intent may, and often will, be inferred from knowledge of the plan and participation in its advancement. Acting with such intent – express or inferred – is usually referred to as acting *in pursuance of* the common criminal design. Indeed, the commentary to the *Dachau Concentration Camp* case notes that in the camp, there was

a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this

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<sup>454</sup> *Tadić* Appeals Chamber Judgement, para. 202.

<sup>455</sup> *Tadić* Appeals Chamber Judgement, para. 202 (citing to *Dachau Concentration Camp*, p 14 and *Belsen*, p 121).

<sup>456</sup> *Tadić* Appeals Chamber Judgement, para. 202 (citing *Belsen*, p 121).

case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'.<sup>457</sup>

272. The *Tadić* Judgement stressed that, in the concentration camp cases, the *mens rea* element comprised: "(i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat the inmates".<sup>458</sup> It further noted that this intent can be inferred from the circumstances. Indeed, *Tadić* stated that "intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy."<sup>459</sup>

273. It must be conceded that the *Tadić* formula for joint criminal enterprise responsibility appears to contain an inherent contradiction. On the one hand, it expressly allows for contribution to the commission of the crime through aiding or abetting which, as we have discussed, require only knowledge, not shared intent. At other times, *Tadić* defines participation in terms of shared intent and it is not clear that this is limited to co-perpetrators. The Trial Chamber believes that the Nuremberg jurisprudence and its progeny allow for "aiding and abetting" in its traditional form to exist in relation to a joint criminal enterprise and in the case of such an aider or abettor, knowledge plus substantial contribution to the enterprise is sufficient to maintain liability. Once the evidence indicates that the participant shares the intent of the criminal enterprise, he graduates to the level of a co-perpetrator of the enterprise. It is on this premise that we will evaluate the roles of the accused.

274. The level of participation of either a co-perpetrator or an aider and abettor will logically differ with each accused, and "[t]he participation need not involve commission of a specific crime ... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."<sup>460</sup> According to the Appeals Chamber, "it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose."<sup>461</sup>

275. In the Tribunal jurisprudence, the contribution of persons convicted of participation in a joint criminal enterprise has to date been direct and significant: those convicted have committed crimes or have been actively involved in assisting or facilitating crimes. Duško Tadić was convicted on appeal for his responsibility in the killing of five men from the village of Jaskići, even though he did not physically kill the men, because their death was a foreseeable consequence of his participation in the broader attack.<sup>462</sup> The Appeals Chamber found that Tadić "actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population by committing

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<sup>457</sup> *Dachau Concentration Camp*, p 14.

<sup>458</sup> *Tadić* Appeals Chamber Judgement, para. 203.

<sup>459</sup> *Tadić* Appeals Chamber Judgement, para. 220.

<sup>460</sup> *Tadić* Appeals Chamber Judgement, para. 227.

<sup>461</sup> *Tadić* Appeals Chamber Judgement, para. 229 (iii).

<sup>462</sup> He had previously been convicted of a number of crimes at trial as either a perpetrator or an aider and abettor. The conviction on appeal here referred to resulted from the Prosecution appeal against an acquittal by the Trial Chamber.

inhumane acts” and, more particularly, that he “was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaski}i ... The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaski}i”.<sup>463</sup> Tadi} was considered to be a co-perpetrator of the joint criminal enterprise. In the *Kupreški}* case, some of the defendants were originally convicted as co-perpetrators of persecution on the basis of a joint criminal enterprise theory. The joint criminal enterprise involved a “common plan for the execution of the cleansing campaign in the village” of Ahmi}i.<sup>464</sup> Four of the defendants were found to have been directly involved in attacks upon one or more Bosnian Muslim homes resulting in killings and expulsions, a participation explicitly amounting to co-perpetration of the criminal enterprise for two defendants. A fifth was found guilty of aiding and abetting the enterprise because he stood by, ready to lend assistance, but did not participate directly in the attack.<sup>465</sup>

276. In the *Dachau Concentration Camp* case, which was expressly based on a theory of joint criminal enterprise (referred to as “common design” by the US Prosecutor), the Law Reports summarise the required participation of the accused in the criminal enterprise as follows:

(a) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or,

(b) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner.<sup>466</sup>

277. The Prosecution in *Dachau* had argued that any person engaged in any administrative or supervisory capacity in the camp, in which group it included anyone who was appointed by and took orders from the SS, was guilty of “participation” in the common design. The Prosecution and the Defense differed over whether guards and prisoner functionaries, who were the lowest in the hierarchy of those on trial, could fall into this group. By convicting the three guards and the three prisoner functionaries concerned, the Court appeared to accept the proposition that they were indeed engaged in an administrative or protective capacity. The Prosecution explained the criminal participation of the guards as “the men who stood in readiness to prevent any prisoner from extricating himself from this camp. They were thus aiding and abetting in the execution of the common design.”<sup>467</sup>

278. The concentration camp cases seemingly establish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes

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<sup>463</sup> *Tadi}* Appeals Chamber Judgement, paras 231-232.

<sup>464</sup> *Kupreški}* Trial Chamber Judgement, para. 782. See also para. 814 with respect to Drago Josipovi} and para. 828 with respect to Vladimir Santi}.

<sup>465</sup> *Kupreški}* Trial Chamber Judgement, para. 803.

<sup>466</sup> *Dachau Concentration Camp*, p 13.

<sup>467</sup> *Dachau Concentration Camp*, p 13.

committed therein. An intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp's functioning.<sup>468</sup>

279. A similar approach can be discerned in the judgement of the US Military Tribunal in the *Einsatzgruppen* case, involving the notorious special extermination units of the Third Reich, and in which the U.S. Military Tribunal considered liability for participating in a joint criminal enterprise. The Prosecution argued that only a low threshold of participation was required. With respect to four of the lower level defendants, the Prosecution maintained that

[e]ven though these men were not in command, they cannot escape the fact that they were members of *Einsatz* units whose express mission, well known to all the members, was to carry out a large scale programme of murder. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass.<sup>469</sup>

280. However, the Military Tribunal apparently did not accept the Prosecution submission that any participation was sufficient, regardless of how low the accused was in the hierarchy of the enterprise. Thus, two of the four lowest level members of the unit who also did not physically commit crimes were acquitted of the most serious charges against them for atrocities committed by the *Einsatz* unit; they were not acquitted, however, of being members of a criminal organization.<sup>470</sup>

281. The *Einsatzgruppen* Judgement stands for the proposition that mere membership in a criminal organisation would not amount to co-perpetrating or aiding and abetting in the criminal endeavor implemented by that organization, despite knowledge of its criminal purpose. For liability to attach, it must be shown that either (1) the accused participated in some significant way, or (2) the accused held such a position of responsibility – for example commander of a sub-unit – that participation could be presumed.<sup>471</sup> In *Einsatzgruppen*, significant participation included acts such as obtaining ammunition for the forces and arranging vehicles in preparation for a "liquidation", with knowledge of their intended use.

282. It is possible, then, to trace in the jurisprudence of the concentration camp cases a theory in which criminal liability will attach to staff members of the camps who have knowledge of the crimes being committed there, unless their role is not "administrative" or "supervisory" or

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<sup>468</sup> *Dachau Concentration Camp* pp 15-16 (citation omitted).

<sup>469</sup> *The United States of America v. Otto Ohlenforf et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No.10, Vol. IV, p 373 (hereafter "*Einsatzgruppen*"). The defendants were Von Radetzky, Ruehl, Schubert, and Graf.

<sup>470</sup> See *Einsatzgruppen*, pp 581 and 587.

<sup>471</sup> For example, with regard to imputing knowledge from an accused's status in the organization, the Tribunal remarked that: "[i]f it were established that Ruehl really served as commander of the unit even for brief periods during such times as the Kommando was engaged in liquidating operations, guilt under counts one and two would be conclusive." *Einsatzgruppen*, p 579.

“interwoven with illegality” or, unless despite having a significant status, their actual contribution to the enterprise was insignificant. The *Einsatzgruppen* case also distinguished between significant and insignificant contributions to the joint criminal enterprise and took into account the nature of the duties performed and whether the accused was in a position to protest or influence the criminal activities. Once participation was deemed significant enough to incur criminal liability, the level of participation and degree of moral culpability was reflected in sentencing. The case did not formally or expressly assign liability between co-perpetrating and aiding or abetting in the functioning of the camp.

283. The *Tadić* Appeals Chamber delineated the distinction between aiding and abetting a crime and acting in pursuance of a joint criminal enterprise.<sup>472</sup> But, despite acknowledging the possibility that one could aid and abet a criminal enterprise, it did not explain how.

284. In the Trial Chamber’s view, a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise; an aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise. An aider or abettor need not necessarily share the intent of the co-perpetrators. In the case of a continuing crime such as those alleged in this case, the shared intent of an accused participating in a criminal enterprise may be inferred from knowledge of the criminal enterprise and continued participation, if the participation is significant in position or effect. Eventually, an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint

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<sup>472</sup> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

*Tadić* Appeals Chamber Judgement, para. 229.



criminal enterprise, the aider or abettor becomes a co-perpetrator. The Trial Chamber acknowledges that it may sometimes be difficult to draw distinctions between an aider or abettor and a co-perpetrator, particularly when mid-level accused are involved who do not physically perpetrate crimes. When, however, an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator.

285. For example, an accused may play no role in establishing a joint criminal enterprise and arrive at the enterprise and participate in its functioning for a short period without knowledge of its criminal nature. Eventually, however, the criminal nature of the enterprise is learned, and thereafter participation in the enterprise is engaged in knowingly. Depending on the level and nature of participation, the accused is either an aider and abettor or a co-perpetrator of the criminal enterprise. Once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator. For instance, an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if it was also shown that the accountant detested child pornography, criminal liability would still attach.

286. At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator. The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be sufficiently significant in the enterprise.

287. The level of participation necessary to render someone a participant in a joint criminal enterprise is less than the level of participation necessary to graduate an aider or abettor to a co-perpetrator of that enterprise. Accordingly, the Trial Chamber must first determine the level of participation necessary for criminal liability to attach, and then whether the mode of participation by the accused constitutes aiding or abetting or co-perpetration.

288. Where the crime requires special intent, such as the crime of persecution charged in count 1 of the Amended Indictment, the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-

perpetrator. However, if he is an aider or abettor, he need only have knowledge of the perpetrator's shared intent. This shared knowledge too can be inferred from the circumstances. If the criminal enterprise entails random killing for financial profit, for instance, that would not necessarily demonstrate an intent to discriminate on "political, racial or religious grounds". If the criminal enterprise entails killing members of a particular ethnic group, and members of that ethnic group were of a differing religion, race, or political group than the co-perpetrators, that would demonstrate an intent to discriminate on political, racial, or religious grounds. Thus a knowing and continued participation in this enterprise could evince an intent to persecute members of the targeted ethnic group.

289. The assistance or facilitation provided by the aider or abettor must of course have a substantial effect on the crime committed by a co-perpetrator. The precise threshold of participation in joint criminal enterprise has not been settled, but the participation must be "in some way ... directed to the furthering of the common plan or purpose".<sup>473</sup> Below, the Trial Chamber examines the requisite level of participation necessary to establish criminal liability for participating in a joint criminal enterprise. The Trial Chamber emphasizes, however, that it has tailored the discussion to the facts in the case at hand and is thus not intended to be exhaustive. Due to the fact that none of the accused before the Trial Chamber is alleged to have ordered or organized the camps or orchestrated the campaign of violence inflicted therein, the discussion focuses on the participation of lower level actors in a criminal enterprise.

(i) Participating in a joint criminal enterprise

290. A number of cases assist the Trial Chamber in its assessment of the level of participation required to incur criminal responsibility as either a co-perpetrator or an aider and abettor in a criminal endeavor in which several participants are involved.

291. In the *Br/anim and Tali}* case, the Trial Chamber noted that, in the concentration camp cases, "the role of the accused . . . is enforcing the plan by aiding and abetting the perpetrator."<sup>474</sup> In the post World War II *Dachau Concentration Camp* case, the guards of the camp were defined as "the men who stood in readiness to prevent any prisoner from extricating himself from this camp. They were thus aiding and abetting in the execution of the common design."<sup>475</sup> This analysis gives support to the proposition that persons who assist or facilitate a criminal endeavor, particularly when lower down on the hierarchical ladder of the enterprise, act as aiders or abettors of the joint criminal enterprise.

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<sup>473</sup> *Tadi}* Appeals Chamber Judgement, para. 229 (iii).

<sup>474</sup> *Tali}* Decision on Amended Indictment, para 27.

<sup>475</sup> *Dachau Concentration Camp*, p 13.

292. In the *Krstić* case, this Trial Chamber found Krstić guilty as a co-perpetrator of a joint criminal enterprise because his “participation is of an extremely significant nature and at the leadership level.”<sup>476</sup> The Judgement emphasized that “General Krstić did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign.”<sup>477</sup> The Trial Chamber considered whether a “participant in the criminal enterprise may be more accurately characterised as a direct or principal perpetrator or as a secondary figure in the traditional role of an accomplice”<sup>478</sup> and determined that, because of the high position of authority he held, his knowledge of the genocidal campaign and his participation in the criminal enterprise, he must be considered “a principal perpetrator of these crimes.”<sup>479</sup>

293. In addition to the cases examined in the previous section and those contained in the *Tadić* Appeals Chamber discussion of the common purpose doctrine, there are other post World War II cases that shed light on whether persons holding mid-level positions who do not individually commit crimes should be held accountable for crimes committed collectively, particularly when the roles they play or functions they perform are simply part of their assigned jobs. In the cases discussed below, the language “common purpose” or “criminal enterprise” is often used. Each of the cases involve a plurality of persons, a criminal plan or order imposed upon the accused and participation of the accused (usually by providing assistance) in furtherance of the plan.

294. The post World War II trials conducted by the Allies in Europe and Asia convicted people ranging from those acting at the highest levels of authority to those at the bottom merely following orders, including top political and military leaders as well as ordinary civilians or common soldiers, even concentration camp inmates who acquired positions of authority in the camps by spying on or mistreating other inmates on behalf of the captors. In many cases, mid and lower level accused were simply performing their jobs and often did not physically perpetrate crimes on their own, but their acts or omissions assisted or facilitated in the commission of crimes. In several instances, civilians performing tasks within the course of their employment were charged with and convicted of war crimes or crimes against humanity. Judges who passed unjustified sentences or rendered unlawful convictions upon members of Allied forces,<sup>480</sup> medical personnel deemed responsible for

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<sup>476</sup> *Krstić* Trial Chamber Judgement, para. 642.

<sup>477</sup> *Krstić* Trial Chamber Judgement, para. 644.

<sup>478</sup> *Krstić* Trial Chamber Judgement, para. 643.

<sup>479</sup> *Krstić* Trial Chamber Judgement, para. 644.

<sup>480</sup> See *Trial of Robert Wagner and Six Others*, Permanent Military Tribunal in Strasbourg, Strasbourg, France, 23<sup>rd</sup> April-3<sup>rd</sup> May, 1946, and Court of Appeal, 24<sup>th</sup> July, 1946, UNWCC, vol. III, pp 23-55; *Trial of Josef Altstoetter et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 17<sup>th</sup> February-4<sup>th</sup> December, 1947, UNWCC, vol. III, pp 1-110.

the death of Russian and Polish patients sent to their sanatorium<sup>481</sup> and industrialists who supplied poison gas to concentration camps<sup>482</sup> were found to have the requisite criminal intent to unlawfully imprison, to murder, or to exterminate, even when they were simply following orders of their superiors or trying to make a profit. As the cases below suggest, the criminal intent of persons who establish or design a criminal enterprise does not necessarily have to be shared by all who knowingly participate in its execution, although it can often be inferred from continued participation.

295. In the *Stalag Luft III* case,<sup>483</sup> after eighty Allied prisoners of war escaped a prisoner of war camp, axis forces ordered that half those recaptured be shot in order to discourage future escapes, although the official explanation for the shootings was that the prisoners were shot trying to escape or resisting arrest. In bringing charges against 18 persons accused before a British Military Court of carrying out the executions, the Prosecution alleged that regardless of whether a participant was a driver or an executioner, each accused was “concerned in the killing of prisoners of war who had escaped” and all accused were “acting for a common purpose.”<sup>484</sup> According to the Prosecution, the commanding officer of the area where the prisoners of war escaped knew of the illegal orders and “knew that the handing over of any one of the prisoners to the Gestapo was tantamount to handing them to their executioner.” Nevertheless, 27 out of 36 were handed over.<sup>485</sup>

296. The Defense vehemently denied that the accused participated in a common criminal plan.<sup>486</sup> The Defense position was that the accused were primarily low level actors merely following orders and that they would be seriously punished if the orders were not carried out. Nonetheless, they were held to be “concerned in the killing” and thus criminally responsible if the function they performed satisfied the following criteria: “[T]he persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid.”<sup>487</sup> Thus, the standard was not

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<sup>481</sup> See *Trial of Alfons Klein and Six Others*, U.S. Military Commission Appointed by the Commanding General Western Military District, USFFT, Weisbaden, Germany, 8<sup>th</sup>-15<sup>th</sup> October, 1945, UNWCC, vol. I, pp 46-54 (hereinafter “*Hadamer Trial*”).

<sup>482</sup> *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, Germany, 1<sup>st</sup>-8<sup>th</sup> March, 1946, UNWCC, vol. I, pp 93-103 (hereinafter “*Zyklon B*”).

<sup>483</sup> *Trial of Max Wielen and 17 others*, British Military Court, Hamburg, Germany, 1<sup>st</sup> July-3<sup>rd</sup> September, 1947, UNWCC, vol. XI, pp 31-53 (1947), (hereinafter “*Stalag Luft III*”).

<sup>484</sup> *Stalag Luft III*, pp 34-35.

<sup>485</sup> *Stalag Luft III*, p 36.

<sup>486</sup> The Defense asserted: “The accused prepared nothing, planned nothing, plotted nothing. They had no consultations among themselves . . . nor with their superiors. . . . Every factor was lacking from which collaboration and participation in a common plan or conspiracy could be deduced which would bear out the prosecution’s contention that they were together concerned or that they were aiding or abetting the commission of the alleged crimes.” *Stalag Luft III*, pp 37-38.

<sup>487</sup> *Stalag Luft III*, p 46 (emphasis added).

that the crimes would not have taken place – it was essentially whether the accused’s participation made the crimes easier, more efficient to commit.<sup>488</sup>

297. The *Almelo* case, a trial held before a British Military Court following World War II, dealt with the killing of a British prisoner of war. Collective responsibility was imposed on all who followed the orders to kill him, with the accused ranging from the executioner to the two guards who stood watch to prevent strangers from disturbing the executioners. The Court held: “If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law.”<sup>489</sup> Each accused in the case knew the prisoner of war would be killed and performed the role required of him in order for the execution to take place.

298. A similar conclusion was reached in the *Kiel Gestapo* case, in which two drivers who had participated in an execution committed by members of the Gestapo asserted in defense that “they were conscripted into the Gestapo and were not members of it, and that they had nothing to do with the whole affair and were merely driving their cars.”<sup>490</sup> The drivers thus asserted they were not participants in the criminal endeavor. However, the Judge Advocate insisted: “If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary”.<sup>491</sup> Again, knowledge that a crime was being committed and participation, despite this knowledge, was sufficient to attribute liability. Other defendants have also been held responsible for deaths and mistreatment committed as part of a joint endeavor while carrying out orders or performing the tasks entrusted to them during the course of war.<sup>492</sup>

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<sup>488</sup> Further it was noted in the Law Reports that the various roles the accused play along the continuum of culpability is reflected not in the guilt phase, but in the sentencing phase: “The degree of participation may vary . . . . Whereas all participants were found guilty whether they had given the order or fired the fatal shot themselves or acted as an escort or kept off the public, the prominence of the part they played found expression in the sentences.” *Stalag Luft III*, p 46. Accordingly, the commander who gave the orders, the men who fired the shots, and those who acted as escorts were given death sentences, whereas the two drivers were sentenced to 10 years imprisonment. Wielen was sentence to life imprisonment, despite the claim of the Defense that “even by sacrificing his life” he could not have prevented the crimes from being committed. p 39.

<sup>489</sup> *Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24<sup>th</sup>-26<sup>th</sup> November, 1945, UNWCC, vol. I, pp 35, 43. The Law Reports concluded that this holding was “in accordance with the established rules of criminal law of civilized countries, according to which not only the immediate perpetrators but also aiders and abettors, accessories, etc. are criminally liable.” p 43.

<sup>490</sup> See UNWCC, vol. XI, pp 42-43 (excerpting *The Kiel Gestapo Case*).

<sup>491</sup> *The Kiel Gestapo Case*, pp 43-44.

<sup>492</sup> See, e.g., *Trial of Lieutenant-General Baba Masao*, Australian Military Court, Rabaul, 28<sup>th</sup> May-2<sup>nd</sup> June, 1947, UNWCC, vol. XI, pp 56-61.

299. In the *Jaluit Atoll* case, three US airmen taken as prisoners of war were executed by Japanese soldiers acting on orders.<sup>493</sup> The custodian of the prisoners of war was among the ones on trial for the part he played in the death of the airmen. He arranged for the airmen to be handed over to the soldiers, despite knowing they were to be executed.<sup>494</sup> The Defense claimed that the custodian had no criminal intent – he had no choice but to hand them over and was merely performing his job. Nevertheless, the custodian was convicted and sentenced to 10 years imprisonment, which was a lighter sentence than that of the executioners because of his “brief, passive and mechanical participation” in the crime.<sup>495</sup>

300. In the *Velpke Children’s Home* trial held by a British Military Court,<sup>496</sup> low and mid level civilians were charged with war crimes as a result of the way they performed assigned jobs. The accused were charged with wilfully neglecting children in a home established for infant children “compulsorily separated” from their Polish mothers in order to enable their mothers to work on food farms instead of tending their babies. Gerike was ordered by his superiors to establish the home to take care of the babies. Bilien was a former teacher conscripted against her will to run the home. Demmerick, a doctor, without being ordered to do so, began visiting the home and tending to sick infants. Subsequently, he and Bilien decided it was best if he only tended the children she brought to him. Bilien claimed that because he had such a large practice, he had no time to complain to the proper authorities or to visit the babies. Hessling, who was appointed administrator of the home, claimed his only duty was to manage the finances, but he apparently had some authority to improve conditions at the home and the treatment of the babies, and he “knew of the death-rate” of the dying babies but took only one measure to alleviate the conditions which was to raise the entry age for children from 8-10 days to 4-6 weeks.<sup>497</sup> One witness testified that Bilien had sent some of the children back to their mothers to nurse because they were dying and in need of their mothers’ milk. Hessling, on discovering this, forbade it.

301. Many infants died as a result of neglect. The conditions in the facility – “a corrugated iron hut, without running water, light, telephone or facilities for dealing with sickness” – were terrible. None of the accused was charged with physically abusing the children, nor was there any indication

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<sup>493</sup> *Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy*, U.S. Military Commission, United States Naval Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7<sup>th</sup>-13<sup>th</sup> December, 1945, UNWCC, vol. I, pp 71 *et seq.* (“*Jaluit Atoll* case”).

<sup>494</sup> *Jaluit Atoll*, p 73.

<sup>495</sup> *Jaluit Atoll*, p 76. See also *Trial of Willy Zuehlke*, Netherlands Special Court in Amsterdam and the Netherlands Special Court of Cassation, Amsterdam, 3<sup>rd</sup> August, 1948 and 6<sup>th</sup> December, 1948, UNWCC, vol. XIV, pp 139-151, 1948, in which a prison warder was convicted of persecuting Jews by keeping them illegally detained. The Law Reports note that this case demonstrates that those who play a role which is “purely instrumental are none the less held responsible as accomplices.”

<sup>496</sup> *Trial of Heinrick Gerike and Seven Others*, British Military Court, Brunswick, 20<sup>th</sup> March-3<sup>rd</sup> April, 1946, UNWCC, vol. VII, pp 76-81 (hereinafter “*Velpke Children’s Home*”).

<sup>497</sup> *Velpke Children’s Home*, pp 76-77.

that any of them had control over whether the home was established or that they wanted or intended the infants to die. Even so, none made sufficient efforts to ensure that the helpless infants received adequate food or medical attention, and as a result in a 6 month period over 80 infants died of "general weakness, dysentery, and . . . catarrh of the intestines."<sup>498</sup> For their "omissions," Bilien was sentenced to 15 years imprisonment, Demmerick to 10 years, and Hessling and Gerike to death.<sup>499</sup>

302. The *Hadamar* case, tried by a US Military Commission, has many parallels to the present case, and the accused were convicted of aiding and abetting a common criminal enterprise.<sup>500</sup> The evidence established that a decision had been made by government authorities to send over 400 Polish and Russian nationals to a small sanatorium in Hadamar, Germany, a facility for the care of mentally ill persons. These victims were killed in the sanatorium after the individuals working there were told to use injections or medication to bring about their deaths. There was considerable evidence that all accused were told that the victims had tuberculosis and were incurably ill (although autopsies indicated that not all victims suffered from the disease.) Additionally, there was evidence that the accused "had been told and believed that the Poles and Russians came under the provisions of the German law or decree which required such disposition of German insane"<sup>501</sup>, thus they may have believed they were not only legally entitled but actually required to put the patients to death.

303. An accused Klein, the chief administrative officer of the institution, knew of the deaths because he had received the orders to put the patients to death and had transmitted these orders to personnel.<sup>502</sup> He said that he had protested upon hearing that "incurable tubercular labourers" were to be sent to Hadamar and that they were to be killed, but that he had no authority to change these orders and, if he had disobeyed them, he would be sent to a concentration camp.<sup>503</sup> Klein admitted that he knew that the killings were "wrong". However, he stated that because the patients were suffering and in danger of infecting others, it would have been more cruel to let them live.<sup>504</sup> Wahlmann was the psychiatrist at the institution. He determined the appropriate dosage, requisitioned the drugs, and signed the death certificates. Huber was the chief female nurse who

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<sup>498</sup> *Velpke Children's Home*, p 77.

<sup>499</sup> *Velpke Children's Home*, pp 76-77. The doctor was said to have assumed some responsibility for the babies by showing up on occasion to treat them.

<sup>500</sup> *Hadamar Trial*, pp 46-54. The civilian staff of a sanatorium were charged with "acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich . . . [as they did] wilfully, deliberately and wrongfully, aid, abet, and participate in the killing of human beings of Polish and Russian nationality". *Hadamar Trial*, p 47.

<sup>501</sup> *Hadamar Trial*, p 48.

<sup>502</sup> *Hadamar Trial*, p 48.

<sup>503</sup> *Hadamar Trial*, p 49.

oversaw the duties of 7 subordinates who may have given some injections and she was “present on at least one occasion when fatal injections or dosages” were administered. Merkle was the institution’s bookkeeper who “knowingly made false entries as to the dates and causes of death.” Although a nurse testified that Merkle was familiar with “what went on” at the institution, Merkle “steadfastly denied that he knew the true state of affairs” or saw any dead bodies. He said he believed the persons died of tuberculosis or pneumonia.<sup>505</sup> Blum was chief caretaker of the cemetery for about a month during the time when the fatal injections were administered. He said that “only the first batch of Poles and Russians arrived during his presence at Hadamar.” Still, he admitted that he had full knowledge that the Polish and Russian patients were to be killed and it was clear that he would be expected to bury them, which he did.<sup>506</sup> Ruoff and Willig were male nurses who administered the fatal injections.<sup>507</sup> Ruoff began working at the institution about two months after the executions began. He testified that he “made several efforts to leave Hadamar, but his requests were always refused.” Both Ruoff and Willig were reportedly told that if they complained about their tasks, they would be sent to concentration camps.<sup>508</sup> Willig stated that he believed that the patients were “incurably tubercular, had been told that there was a law which provided for their deaths and had attempted unsuccessfully to leave Hadamar.”<sup>509</sup> Most of the staff apparently did believe that the victims were ill because of “diagnoses of the doctors” and “because of their appearances”.

304. All of the accused were found guilty of “violations of international law” for participating in the common plan. Klein, who gave the orders despite disagreeing with them, and Ruoff and Willig, who administered the injections even under duress, were sentenced to death. Wahlmann, the psychiatrist, received life imprisonment. Merkle, Blum and Huber were sentenced to 35, 30 and 25 years respectively. All accused were civilians employed in a mental health facility simply going about their jobs during the war when their institution received Polish and Soviet patients who had probably been deported for labour into Germany. There is no indication that the accused shared a criminal intent to murder the Polish and Soviet nationals. Nonetheless they all performed tasks, from bookkeeper to nurse to undertaker, that maintained the functioning of the institution and by

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<sup>504</sup> *Hadamar Trial*, p 49. He stated that in the beginning the personnel were free to leave but that because he was an “official” and not an “employee”, he was not free to leave; eventually even employees could not leave due to a personnel shortage.

<sup>505</sup> *Hadamar Trial*, p 51.

<sup>506</sup> *Hadamar Trial*, p 51. When Blum left the facility, Willig took over supervising the burials.

<sup>507</sup> *Hadamar Trial*, p 48. “The victims were induced to receive the injections and take the drugs by assurances that they were being treated for the disease from which they allegedly suffered or that they were being inoculated against communicable diseases.”

<sup>508</sup> *Hadamar Trial*, p 50.

<sup>509</sup> *Hadamar Trial*, p 50-51. However, in Willig’s pretrial statement, he said he had never been threatened, but that he had once requested a transfer, which was refused, and that he “could not ask to be dismissed because he would have lost his pension and would probably have been imprisoned.”



showing up for work daily and performing the tasks assigned to them, they substantially assisted and facilitated the killings.

305. The International Military Tribunal for the Far East ("IMTFE") convicted Foreign Minister Shigemitsu for failing to take effective measures to investigate crimes he suspected were being committed. The Judgement insisted that because he bore primary responsibility for the welfare of prisoners, whom he suspected were being mistreated, he "should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged."<sup>510</sup> While the conviction was technically of superior and not individual responsibility, individuals also incurred criminal responsibility for their own acts or omissions and if the evidence supported a finding that Shigemitsu's derelictions implicitly condoned or permitted the crimes to occur or continue, the International Military Tribunal he would incur individual responsibility.<sup>511</sup> The IMTFE also found Akira Muto incurred individual and superior responsibility for atrocities committed by Japanese troops once he was in a "position to influence policy," because he failed to take any measures to improve the conditions or treatment of civilians and prisoners of war.<sup>512</sup>

306. These cases make clear that when a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor, depending upon his position in the organizational hierarchy and the degree of his participation.

#### (ii) Joint Criminal Enterprise

307. A joint criminal enterprise can exist whenever two or more people participate in a common criminal endeavor. This criminal endeavor can range anywhere along a continuum from two persons conspiring to rob a bank to the systematic slaughter of millions during a vast criminal regime comprising thousands of participants. Within a joint criminal enterprise there may be other subsidiary criminal enterprises. For example, were the entire Nazi regime to be considered a joint criminal enterprise, that would not preclude a finding that Dachau Concentration Camp functioned

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<sup>510</sup> The Tokyo Judgement, the International Military Tribunal for the Far East, 29 April 1946-12 November 1948, Chapter X (Roling & Ruter eds.), 1977, p 458 (hereinafter "IMTFE Judgement").

<sup>511</sup> IMTFE Judgement, pp 457-458. At this time, Muto was Chief-of-Staff to General Yamashita. The Judgement notes that "the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been." In this instance it was the lack of sufficient information in reports that made him suspicious. If he had received reports of crimes and failed to halt them knowing they were being committed, and his subordinates knew he'd received the reports but did not order the crimes to cease, and reasonably concluded that he condoned the crimes, he could incur both 7(1) and 7(3) responsibility.

as a subsidiary of the larger joint criminal enterprise, despite the fact that it was established with the intent to further the larger criminal enterprise. Within some subsidiaries of the larger criminal enterprise, the criminal purpose may be more particularized: one subset may be established for purposes of forced labor, another for purposes of systematic rape for forced impregnation, another for purposes of extermination, etc.

308. The Trial Chamber considers that persons who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal endeavor, and their acts or omissions significantly assist or facilitate the commission of the crimes.

309. The Trial Chamber wishes to stress that this does not mean that anyone who works in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise. The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any "body" could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents. The Trial Chamber notes, however, that much of the post World War II caselaw discussed above did attribute criminal liability to mere drivers or ordinary soldiers made to stand guard while others performed an execution. In addition, many of the post war cases did not entail repeated participation in a system of criminality, as the accused typically participated on an isolated occasion only. Domestic laws too hold individuals accountable for directly or indirectly participating in a single joint criminal endeavor.<sup>513</sup>

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<sup>512</sup> IMTFE Judgement, p 455.

<sup>513</sup> The Supreme Court of South Africa in *S v Sefatsa* vividly articulated the common purpose principle as applied in South African courts. The Court convicted six of eight defendants of murder for participating in a mob attack which led to the death of an individual. The Court found that the defendants' conduct ranged from preparing incendiary materials, actually holding the victim for others, exhorting the crowd to kill him, throwing stones and, forming part of the crowd that attacked him. The Court based the convictions on the doctrine of common purpose. The Court rejected the defendants' assertions that they could not be found guilty in the absence of any proof that their individual participation or conduct contributed directly to the death. The Court found that the "acts of each of the six accused

310. In situations of armed conflict or mass violence, it is all too easy for individuals to get caught up in the violence or hatred. During such violent periods, law abiding citizens commit crimes they would ordinarily never have committed. Nonetheless, the presence of mass violence or conflict cannot be used to shield or excuse persons who commit, assist or facilitate or otherwise participate in crimes from incurring liability. Whether the joint criminal enterprise is broadly defined, such as the Nazi persecution of millions of Jews, or it is limited to a specific time and location, such as the three month operation of Omarska camp, a participant in the criminal enterprise must make a substantial contribution to the enterprise's functioning or endeavors before he or she may be held criminally liable.

311. The Trial Chamber finds that during periods of war or mass violence, the threshold required to impute criminal responsibility to a mid or low level participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion. The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of

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convicted of murder manifested an active association with the acts of the mob which caused the death of the deceased. These accused shared a common purpose with the crowd to kill the deceased and each of them had the requisite *dolus* in respect of his death. Consequently the acts of the the mob which caused the deceased's death must be imputed to each of these accused" *S v Safatsa and Others*, 1988 (1) SA 868 (A), p. 901, *digested version reprinted in*, Juta, The South African Law Reports, 868, 899(March 1988). The Court also, reviewing its jurisprudence, quoted favorably the proposition that:

'Association in a common illegal purpose constitutes the participation—the *actus reus*. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all . . . Moreover, it is not necessary to show that there was a causal link between the conduct of each body to the common purpose and the unlawful consequence.'

*Id.* at 899 (quoting *S v Maxaba en Andere* 1981 (1) SA 1148 (A), at 1155E-G and footnotes). This concept is not foreign to civil law systems. In Austria, it is established case law that an accomplice is someone who contributes to the commission of an offense carried out by another person by facilitating the commission or supporting it "in any way whatsoever". OGH 10.11. 1992 14Os 122/92; 15 Os 119/92 in JBI 1994, 268. This facilitation may take the form of physical or psychological support, advice or encouragement. While Austria distinguishes between co-perpetration and accomplice liability, the inference of shared intent for acts committed by different individuals in the group is common to both theories. A person may be convicted, for example, of arson as a principal actor or co-perpetrator by virtue of her involvement at the scene of this crime together with other co-perpetrators even if she herself did not carry out the *actus reus* of arson but was part of a group with the shared intent to commit arson and which did carry out the crime. She may be held liable as a co-perpetrator, thus, for being a lookout, or for providing materials. OGH 15.9. 1999 12 Os 74/99. The Portuguese Criminal Code metes out the identical punishment for a person who founds a criminal enterprise as for a person who assists the criminal enterprise. Portuguese Criminal Code, Art. 299.2 (punishing these crimes with one to five years of imprisonment). In the United States, federal drug laws provide that "the relationship requirement for showing a common criminal enterprise is flexible, such that a defendant's relationship with other individuals need not exist at the same moment, those individuals need not have a relationship with one another and they may have different roles in the criminal enterprise." *U.S. v. Long*, 190 F.3d 471, 475 (6<sup>th</sup> Cir. 1999). Thus a broker or courier, someone who stores drugs, or one who collects or launders drug proceeds, would have a sufficient relationship with the common criminal enterprise to establish liability. *Id.*

the crimes committed and the efficiency, zealotry or gratuitous cruelty exhibited in performing the actor's function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavor, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime. Perhaps the most important factor to examine is the role the accused played vis-à-vis the seriousness and scope of the crimes committed: even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape.

312. In sum, an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.

### 3. Superior Responsibility Under Article 7(3)

313. Article 7(3) of the Statute imposes liability upon a superior for the criminal acts of his subordinates if the superior had reason to know that the subordinate was about to commit a crime and failed to prevent it or, knowing that a crime had been committed, failed to take steps to punish the subordinate for the crime.<sup>514</sup> Fulfilling the first obligation does not preclude incurring liability for failing to fulfil the second. The superior is also responsible if he or she fails to halt or suppress crimes that are being committed if the superior knew or had reason to know of their commission.

314. The caselaw of the Tribunal establishes that three elements must be proved before a person may be held responsible as a superior for the crimes committed by subordinates: (1) the existence of a superior-subordinate relationship between the accused and perpetrator(s) of the underlying offence; (2) knowledge of the superior that his or her subordinate had committed, was committing,

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<sup>514</sup> This reflects the position under customary international law. The Kvočka Final Trial Brief also makes reference to the equivalent of this provision in the "Regulations concerning the application of the international law to the armed forces of the SFRJ", 1988: Kvočka Final Trial Brief, para. 92.

or was about to commit, a crime; and (3) failure of the superior to prevent or halt the commission of the crime and to punish the perpetrators.<sup>515</sup>

315. The Appeals Chamber elaborated upon this standard most recently in the *elebi* Judgement.<sup>516</sup> This Judgement accepted that a civilian leader may incur responsibility in the same way as a military commander, provided that the civilian has effective control over subordinates.<sup>517</sup> Effective control necessarily involves “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.”<sup>518</sup> Effective control means “the material ability to prevent or punish criminal conduct, however that control is exercised.”<sup>519</sup> The requirement that control must be effective makes clear that *de jure* authority alone is insufficient. The Prosecution must show that the superior had the ability to prevent, halt, or punish the crime.<sup>520</sup>

316. The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process. In the *Blaski* case, for example, a Trial Chamber held that the material ability to punish, which is key to incurring liability as a commander for crimes committed by subordinates, may simply entail such things as “submitting reports to the competent authorities in order for proper measures to be taken”.<sup>521</sup>

317. Action is required on the part of the superior from the point at which he “knew or had reason to know” of the crimes committed or about to be committed by subordinates. The Appeals Chamber in the *elebi* case found that Article 7(3) does not impose a duty upon a superior to go out of his way to obtain information about crimes committed by subordinates, unless he is in some way put on notice that criminal activity is afoot.<sup>522</sup>

318. The *elebi* Appeals Chamber upheld the Trial Chamber’s interpretation of “had reason to know”, concluding that the superior is responsible if information was available which would have put the superior on notice of crimes committed by subordinates.<sup>523</sup> The information available to the superior may be written or oral. It need not be explicit or specific, but it must be information – or the

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<sup>515</sup> *elebi* Trial Chamber Judgement, para. 346; *Aleksovski* Trial Chamber Judgement, para. 69; *Kordi* Trial Chamber Judgement, para. 401; *Blaski* Trial Chamber Judgement, para. 294; *Kunara* Trial Chamber Judgement, para. 395.

<sup>516</sup> *elebi* Appeals Chamber Judgement, paras 182 *et seq.* See also *Aleksovski* Appeals Chamber Judgement, para. 76.

<sup>517</sup> *elebi* Appeals Chamber Judgement, para. 196.

<sup>518</sup> *elebi* Appeals Chamber Judgement, para. 192.

<sup>519</sup> *elebi* Appeals Chamber Judgement, para. 256.

<sup>520</sup> The Appeals Chamber has said that “In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a Court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced”, *elebi* Appeals Chamber Judgement, para. 197.

<sup>521</sup> *Blaski* Trial Chamber Judgement, para. 302.

<sup>522</sup> *elebi* Appeals Chamber Judgement, para. 226.

<sup>523</sup> *elebi* Appeals Chamber Judgement, para. 241.

absence of information -- that would suggest the need to inquire further.<sup>524</sup> Information that would make a superior suspicious that crimes might be committed includes past behavior of subordinates or a history of mistreatment: "For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."<sup>525</sup> Similarly, if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.

#### 4. Conclusion – Omarska Camp – A Joint Criminal Enterprise

319. The Prosecution alleges that the Omarska, Keraterm, and Trnopolje camps, as well as the municipal government of Prijedor, functioned as a joint criminal enterprise.<sup>526</sup> However, the Trial Chamber does not have sufficient evidence on which to determine whether Keraterm and Trnopolje camps, or the municipality of Prijedor, functioned individually or collectively as a joint criminal enterprise. It does, however, have an enormous amount of evidence on which to conclude beyond a reasonable doubt that Omarska camp functioned as a joint criminal enterprise. The crimes committed in Omarska were not atrocities committed in the heat of battle; they consisted of a broad mixture of serious crimes committed intentionally, maliciously, selectively, and in some instances sadistically against the non-Serbs detained in the camp.

320. Crimes in the Omarska camp were committed by a plurality of persons. Indeed, they could only have been committed by a plurality of persons, as the establishment, organization, and functioning of the camp required the participation of many individuals playing a variety of roles and performing different functions of greater or lesser degrees of importance. The joint criminal enterprise pervading the camp was the intent to persecute and subjugate non-Serb detainees. The persecution was committed through crimes such as murder, torture, and rape and by various means, such as mental and physical violence and inhumane conditions of detention.

321. The Trial Chamber will next determine whether the accused have incurred criminal responsibility for the crimes committed in Omarska camp, a joint criminal enterprise. The Trial Chamber will also evaluate the role of @igi} in alleged crimes committed in the Keraterm and Trnopolje camps.

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<sup>524</sup> ^elebi}i Appeals Chamber Judgement, para. 238; ^elebi}i Trial Chamber Judgement, para. 393.

<sup>525</sup> ^elebi}i Appeals Chamber Judgement, para. 238.

<sup>526</sup> Prosecution Pre-Trial Brief, paras 109 and 112. The Trnopolje camp is not mentioned in these paragraphs.

#### IV. CRIMINAL RESPONSIBILITY OF THE ACCUSED

322. In determining the role of the accused, the Trial Chamber will keep at the forefront of its consideration the presumption of innocence embodied in Article 21 of the Statute, which means that the Trial Chamber will find an accused guilty only if it is convinced of the accused's guilt beyond a reasonable doubt. It also will be mindful of the principle that the case against each accused is to be considered separately, even though more than one accused has been tried jointly.

323. The Trial Chamber has already found the following:

- (a) that the prerequisites necessary to sustain a charge under Articles 3 and 5 of the Statute have been satisfied;
- (b) that each of the crimes alleged in the Amended Indictment, in particular murder, torture, outrages upon personal dignity, inhumane acts, cruel treatment, and persecution were committed in Omarska camp;
- (c) that Omarska camp was a joint criminal enterprise, a facility used to interrogate, discriminate against, and otherwise abuse non-Serbs from Prijedor and which functioned as a means to rid the territory of or subjugate non-Serbs; and
- (d) that the primary means of sustaining and furthering the purpose of the criminal enterprise was by persecuting Muslims, Croats, and other non-Serbs held in Omarska camp through various forms of physical, mental, and sexual violence.<sup>527</sup>

324. The Trial Chamber has also emphasized that anyone regularly working in or visiting Omarska camp would have had to know that crimes were widespread throughout the camp. Knowledge of the joint criminal enterprise can be inferred from such indicia as the position held by the accused, the amount of time spent in the camp, the function he performs, his movement throughout the camp, and any contact he has with detainees, staff personnel, or outsiders visiting the camp. Knowledge of the abuses could also be gained through ordinary senses. Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be *seen* by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of detainees, as well as by observing the cramped facilities or the bloodstained walls. Evidence of abuses could be *heard* from the screams of pain and cries of suffering, from the sounds of the detainees begging for food and water and beseeching their tormentors not to beat or kill them, and

from the gunshots heard everywhere in the camp. Evidence of the abusive conditions in the camp could also be *smelled* as a result of the deteriorating corpses, the urine and feces soiling the detainees clothes, the broken and overflowing toilets, the dysentery afflicting the detainees, and the inability of detainees to wash or bathe for weeks or months.

325. The Trial Chamber notes that the accused were not responsible for the general conditions of detention in the camp (such as food supplies or amount of available space), as their roles were primarily related to security of the camp. In this capacity, the accused played a role in keeping the detainees in the camp.

326. The Trial Chamber also wishes to emphasize that crimes committed in furtherance of the joint criminal enterprise that were natural or foreseeable consequences of the enterprise can be attributed to any who knowingly participated in a significant way in the enterprise. As this Trial Chamber found in the *Krstić* Judgement: "The Trial Chamber is not . . . convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection."<sup>528</sup>

327. Similarly, any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise. In Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as

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<sup>527</sup> Including by murder, torture and beatings, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions, as alleged in count 1 of the indictment.

<sup>528</sup> *Krstić* Trial Chamber Judgement, para. 616.



violence and humiliation. Liability for foreseeable crimes flows to aiders and abettors as well as co-perpetrators of the criminal enterprise.

328. The Trial Chamber will now, based upon the factual findings, the applicable law, and the individual circumstances of each accused, examine the evidence against each in order to determine whether the time he spent and the role he performed in the camp is sufficient to find he participated in the joint criminal enterprise. If so, it will then determine whether the level of his participation rendered him a co-perpetrator in the enterprise or an aider or abettor. Although that line will not always be easy to draw, in general the Trial Chamber will look for evidence that the accused actively entered into the criminal enterprise, either through committing violations of human rights in his own right or through the pervasiveness of his influence in many facets of the camp's functioning. Those features would incline the Trial Chamber toward viewing him as a co-perpetrator, sharing the intent of the camp's evil goals. On the other hand, limited participation confined to doing only his job, the discrete nature of that job, and his refusal to commit any violations on his own, or his playing an active role in attempting to alleviate the detainee's plight would incline the Trial Chamber toward viewing him as an aider or abettor. This appears to be the line drawn in many of the post World War II cases.

## **A. MIROSLAV KVO^KA**

### **1. Introduction**

329. Miroslav Kvo-ka is charged with individual responsibility in counts 1-3, 4-5, and 8-10 of the Amended Indictment as a participant in persecution,<sup>529</sup> murder, torture, inhumane acts, cruel treatment, and outrages upon personal dignity charged under Article 7(1) of the Statute, as violations of Articles 3 (laws or customs of war) and 5 (crimes against humanity) of the Statute. He is also or alternatively charged with superior responsibility for crimes committed by subordinates pursuant to Article 7(3) of the Statute.

330. The Prosecution insists that Kvo-ka played an active role in the Omarska camp from 27 May to at least 30 June 1992,<sup>530</sup> as commander and then as deputy commander of the camp. The Defense asserts that the accused held no position of authority in the camp other than as an ordinary guard and that he had no responsibility for the detention and conditions of detention of persons incarcerated in Omarska camp during the short time he was actually present in the camp. In its

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<sup>529</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats, and other non-Serbs detained in Omarska camp.

<sup>530</sup> Prosecution Final Trial Brief, para. 179.

findings on the official role held by Kvo-ka in the camp, the Trial Chamber relies predominantly on the testimony of the accused himself.

## 2. Personal Background of Kvo-ka

331. Kvo-ka was born on 1 January 1957, in the village of Mari}ka, and is of Serb ethnicity. In 1992, he lived with his Muslim wife and their two children in Omarska village, not far from the Omarska mining complex that became Omarska camp. Many Defense witnesses described him as a good neighbour and a person with a wide circle of friends and acquaintances, which included and continues to include many people of Muslim ethnicity.<sup>531</sup> Kvo-ka testified that his family socialized before, during, and after the war with persons of Muslim ethnicity, offered shelter to Muslim relatives in his apartment, delivered parcels to detainees in the camp, and assisted his wife's relatives living in the village of Alisici when it was under Serb attack.<sup>532</sup> Kvo-ka testified as well that he was never a member of a nationalist party as he instead supported the moderate Reformist Party of Ante Markovi-.<sup>533</sup>

332. Kvo-ka was also described by many Defense witnesses as a competent professional.<sup>534</sup> He was a police officer in the Omarska police station department, which was attached to the Public Security Service of the municipality of Prijedor. Kvo-ka testified that he was assigned to the Omarska police station until June 1992 and, after July 1, to the Tukovi reserve police station until September 1992.<sup>535</sup> Kvo-ka also testified that he had many Muslim colleagues in the police force and that many commanders of police stations were Muslims.<sup>536</sup> During the conflict, when Muslim funerals became difficult to hold, he provided security to such ceremonies at the request of the local Muslim clergy.<sup>537</sup>

### (a) Kvo-ka's Position of Authority in the Police Force

333. Kvo-ka submits that, since he occupied no position of authority in the police force, it is inconceivable that he would have been appointed commander or deputy commander in the Omarska

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<sup>531</sup> See, e.g., Witness DA/2, T. 7736-7741; Jasminka Kvo-ka, T. 7916-7918; 7920-7921.

<sup>532</sup> Miroslav Kvo-ka, T. 698-707.

<sup>533</sup> Miroslav Kvo-ka, T. 721-722.

<sup>534</sup> "Miroslav Kvo-ka was the first generation that graduated from regular police academy. He was an excellent pupil and a highly conscientious, responsible and good policeman. He performed all his assignments very well and on time. He cooperated very closely with the local people of his area, so it was not difficult for him to discover any offence or address any problem. He was highly communicative and he was very popular among the locals. I can also say, in support of this, that I think it was in the 1980s or even before, that Kvo-ka, as an excellent policeman, was proposed and appointed to position in our embassy in France". Milutin Buji}, T. 7840-7841. See also Lazar Basrak, T. 7094.

<sup>535</sup> Following his stint at the Tukovi station, Kvo-ka transferred to the police station of Prijedor. After a year, he became shift leader of a patrol at the Prijedor police station.

<sup>536</sup> Miroslav Kvo-ka, T. 686.

<sup>537</sup> Miroslav Kvo-ka, T. 727-728.

camp. The Prosecution contends that Kvo-ka was commander or deputy commander in the Omarska police station department and that his role in the police station was “essentially transplanted to the Omarska detention camp in May 1992”.<sup>538</sup> However, according to the Defense, there was no position of deputy commander in the Omarska police station at the relevant time. It submits that while the function of deputy commander existed within the authority structure of the police station, there is no such position in its sub-division, the police station department.<sup>539</sup>

(i) The Command Structure of the Police Force

334. As described in Part II above, the security of the local populace was entrusted to the police division of the Public Security Service, which was attached to the Ministry of Interior and was separate from the State Public Security Service.<sup>540</sup> At the regional level, each police division was divided into police stations, which in turn were sub-divided into police station departments. Kvo-ka worked in the lowest level of the police division in the Prijedor municipality, the Omarska police station department, in charge of ensuring the security of the several thousands of inhabitants of the area of Omarska, which comprised several villages.<sup>541</sup> The police station department was divided into three sectors.<sup>542</sup>

335. When Kvo-ka started to work at the police station department of Omarska, it was indeed a department. Later in 1981, it grew to become a police station and the command structure changed.<sup>543</sup> In 1990, the police station was again reduced to a police station department and the command structure changed once more.<sup>544</sup> The command structure of the sub-divisions of the police division varied according to their size. While a police station was headed by a commander assisted by a deputy commander and assistant commanders, a police station department was headed solely by a commander and it had no deputy commander or assistant commanders.<sup>545</sup>

336. In 1992, before the take-over of Prijedor, the police station department of Omarska was staffed with a commander, three patrol leaders, and policemen. There were no deputy commanders or assistant commanders. The commander of the police station before the take-over was @eljko Meaki}, who replaced Milutin Buji} when he retired in April 1992. Kvo-ka testified that he was the leader of one of the three sector patrols in the Omarska police station department, together with Mom-ilo Gruban and @eljko Meaki}. According to Kvo-ka, in theory, there was no hierarchy

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<sup>538</sup> Prosecution Final Trial Brief, para. 142.

<sup>539</sup> Kvo-ka Final Trial Brief, paras 154 *et seq.*

<sup>540</sup> The Public Security Service is divided in police stations, themselves subdivided in police departments, e.g. the Omarska police station department. T. 742-745.

<sup>541</sup> Milutin Buji}, T. 7822-7823.

<sup>542</sup> Milutin Buji}, T. 7822-7823.

<sup>543</sup> Miroslav Kvo-ka, T. 748.

<sup>544</sup> Miroslav Kvo-ka, T. 749.

between the patrol leaders of the three sectors and the other policemen, although he also stated that there was a slight difference in authority between a sector leader and the other policemen.<sup>546</sup>

337. In addition to the active duty police officers, thirty reserve police officers were assigned to the Omarska police station department. They were called on in case of major events, such as a natural disaster or armed conflict. Kvo-ka testified that before the war, the reserve police were usually assigned to work under the supervision of an active police officer.<sup>547</sup> Around the time of the Serb take-over of Prijedor, other reserve police officers were mobilized to assist the Omarska police station department,<sup>548</sup> which because of its increased staff (it now had fifty to sixty-five reserve police officers) became a police station.<sup>549</sup> In April 1992, when @eljko Meaki} replaced Milutin Buji} as commander of the Omarska police station, ordinarily this transfer of authority would have been accompanied by the assignment of a new deputy commander and assistant commanders. However, there were none available and so the positions were not filled.<sup>550</sup> After the take-over, other changes occurred in the command structure of the police force in the Prijedor municipality: commanders of Muslim ethnicity were replaced with commanders of Serb ethnicity.<sup>551</sup>

338. The Trial Chamber finds that, based on the evidence before it, the Omarska police station department grew to the status of a police station in April 1992, before the Prijedor take-over by the Serb authorities, but that no formal appointment was made to fill the positions of deputy-commander and assistant commanders, despite the fact that it was statutorily required.

(ii) Kvo-ka's Duties and Position in the Police Station

339. Milutin Buji}, a former commander of Kvo-ka, said that in the course of his duties, a sector leader was required:

to go out in the field, to meet the people, the locals, to check on the situation out there in the field, to try and prevent the commission of crimes, to see to the law and order in the area, and to collect all the necessary information and everything else in accordance with the rules and regulations.<sup>552</sup>

340. He also confirmed that Kvo-ka was "trained and knew, had the knowledge, had the experience, to see, to prevent crime and to take steps when crime was being committed during the time that he served as a policeman".<sup>553</sup>

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<sup>545</sup> Miroslav Kvo-ka, T. 746-747.

<sup>546</sup> Exhibit 3/203, p 3.

<sup>547</sup> Miroslav Kvo-ka, T. 754-755.

<sup>548</sup> Miroslav Kvo-ka, T. 759-763.

<sup>549</sup> Exhibit P 3/203, p 7.

<sup>550</sup> Miroslav Kvo-ka, T. 8090-8091.

<sup>551</sup> Miroslav Kvo-ka, T. 759-760, 8118-8119.

<sup>552</sup> Milutin Buji}, T. 7859.

341. Kvo-ka testified that there was no subsequent change in his duties after the take-over of Prijedor by the Serbs on 30 April 1992.<sup>554</sup> To this effect, Milutin Buji} added that the rules and regulations applicable in normal times also apply in case of an emergency or war situation.<sup>555</sup>

342. After the Bosnian Serb take-over, Kvo-ka continued to work as a patrol leader for a sector comprising four small villages.<sup>556</sup> In his interview with the Prosecution, he added that because the staffing of the Omarska police station was insufficient in that there were only 4-5 active policemen and the rest were all reserve, most of whom were new recruits. In addition, there was no formal appointment of a deputy commander or assistant commander from the Minister, @eljko Meaki} asked him (as well as another colleague, Ljuban Grahovac, who left the police station of Omarska shortly after for Lamovita), "to help him as senior officer".<sup>557</sup>

343. Kvo-ka insisted that he was not formally appointed to any position of authority, he was simply a senior police officer who had been asked to help out the commander.<sup>558</sup> He added that official rankings, such as lieutenant, were not introduced until 1996, just before he stopped working for the police.<sup>559</sup> When the Prosecution asked Kvo-ka whether it would be fair to say that he and Ljuban Grahova} were *de facto* deputy commander and assistant commander, Kvo-ka said that "looking from the outside, one could assume that because part of the job that we were doing could have been fulfilled by the deputy or the assistant".<sup>560</sup> He thus acknowledged the possibility that the new recruits could perceive @eljko Meaki}, Ljuban Grahova}, and himself as the policemen in authority. Kvo-ka added that such a *de facto* situation was rather common in the former Yugoslavia and that "[t]his used to be the practice in the police in Yugoslavia in general that for a time you would help your supervisor in a certain job but you would not have an official appointment or a salary or anything and it would just be for a brief period of time".<sup>561</sup> He also said that it was

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<sup>553</sup> Milutin Buji}, T. 7860.

<sup>554</sup> Miroslav Kvo-ka, T. 769-770.

<sup>555</sup> Milutin Buji}, T. 7843, 7869.

<sup>556</sup> Kvo-ka was appointed to this position on 21 March 1990 and two decisions of 17 June 1992 signed by Stojan Zupljanin, head of the Security Centre in Banja Luka and of 27 October 1993 signed by the Ministry of Interior continued his appointment as a patrol sector leader. On 1 September 1992, he was appointed as a shift leader in Prijedor police station by the Ministry of Internal Affairs of Republika Srpska. Kvo-ka left his employment in November 1996 as a result of being indicted by the Tribunal. Kvo-ka states in his interview with the Prosecution that, with regard to ranks, there was a "small difference between a policeman who was in charge of a village for instance, or a district, than those who were not." Exhibit P 3/203, p 3.

<sup>557</sup> Exhibit P 3/203, p 6.

<sup>558</sup> Miroslav Kvo-ka, T. 8179.

<sup>559</sup> Exhibit P 3/203, p 2.

<sup>560</sup> Exhibit P 3/203, p 21.

<sup>561</sup> Exhibit P 3/203, p 21.

common for one to have a formal position in accordance with the command structure in place and at the same time to hold a different *de facto* position because of one's abilities.<sup>562</sup>

344. The Trial Chamber finds that shortly after @eljko Meaki} was appointed commander of the police station, Kvo-ka was elevated to a *de facto* position of authority and influence in the Omarska police station. This position paralleled the function of a deputy commander or assistant commander, a slot that was justified by the increase in size of the station and which was not formally filled at that time. Thus, his argument that it was impossible for him to be considered as deputy commander in the Omarska camp because he held no such a position in the Omarska police station is not convincing.

### 3. Kvo-ka's Arrival in the Omarska Camp

345. Kvo-ka gave extensive evidence about his arrival in the Omarska camp and the Trial Chamber finds this testimony credible. He testified that he was on duty at the Omarska police station with two reserve police officers on the night of the 28 or 29 May 1992, when he received a radio call from Du{an Jankovi} at 0200 or 0300 hours asking him to report immediately to the Omarska mines complex.<sup>563</sup> When Kvo-ka arrived there, he saw Du{an Jankovi} and Milutin Ca|o sitting in an official vehicle in front of the main administration building. There were about ten buses parked inside the complex, some full of detainees and some empty. This was corroborated by witnesses who testified that the first detainees arrived in the Omarska camp on 28 May 1992.<sup>564</sup> Du{an Jankovi} asked Kvo-ka to activate the reserve police force, to bring the reserve officers to the camp and to find @eljko Meaki}.<sup>565</sup>

346. Kvo-ka returned to the Omarska police station and, at 0600 hours, he gathered approximately twenty men of the police force in front of the police department and they all left for the camp in two groups. At 0700 hours, @eljko Meaki} arrived in the camp with a group of policemen.<sup>566</sup> When Kvo-ka and the twenty reservists arrived, Du{an Jankovi} and Milutin Ca|o had already gone and buses were no longer there. Instead, men wearing police uniforms, different from those of the Omarska police force, were deployed in the camp.<sup>567</sup> One of those men told Kvo-ka that they came from the police station of Banja Luka and that they would leave the camp once the Omarska police force took over camp operations.<sup>568</sup> Kvo-ka testified that neither he nor @eljko Meaki} were aware of what was going on or of the identity of the detainees, but they

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<sup>562</sup> Miroslav Kvo-ka, T. 8285.

<sup>563</sup> Miroslav Kvo-ka, T. 849.

<sup>564</sup> Fadil Avdagi}, T. 3421-3422; Witness AQ, T. 5660; Kvo-ka, T. 849, 858-860.

<sup>565</sup> Miroslav Kvo-ka, T. 850-856.

<sup>566</sup> Miroslav Kvo-ka, T. 857-858 and 8062.

<sup>567</sup> Miroslav Kvo-ka, T. 860-861.

followed an order given to them by Du{an Jankovi} and Milutin Ca|o to organize the internal security of the camp.<sup>569</sup>

347. In the evening of his first day in the camp, another team arrived with @eljko Meaki} and Kvo-ka went home.<sup>570</sup> Kvo-ka returned the next day, the day of the Serb attack on Prijedor, 30 May 1992. Late in the afternoon, several more buses of detainees were driven into the camp escorted by active duty police officers from Prijedor and some military police.<sup>571</sup> The escorts assigned the detainees to various buildings in the camp, with the assistance of the Omarska police officers on duty in the camp.<sup>572</sup>

348. The Trial Chamber finds that Kvo-ka, as duty officer in the Omarska police station, was delegated the authority to activate the reserve police force in order to serve as guards in the camp.

#### 4. The Duration of Kvo-ka's Stay in Omarska Camp

349. The Trial Chamber decided in its Decision on Defense Motions for Acquittal that an accused "will not be found responsible for the crimes committed before the date of his arrival" in the camp.<sup>573</sup> This holding also applies to crimes committed after an accused left the camp. The Prosecution's contention is that Kvo-ka held a position in the Omarska camp from 27 May 1992 until at least 30 June 1992.<sup>574</sup> Kvo-ka denied that he was in the camp until 30 June 1992 and gave evidence regarding the sequence of events from May 1992 until his departure.

350. Kvo-ka testified that he arrived in Omarska camp around 28 or 29 May 1992, that he spent four or five nights in the camp, and that he was absent from the camp twice during this time for sick leave (from 2 to 5 or 6 June 1992 and from 16 to 19 June 1992). On his first day in the camp, while receiving new detainees, Kvo-ka recognized his two brothers-in-law. He pulled them aside and drove them back to his parents' home in Omarska. Kvo-ka said he was removed from the camp around 22-23 of June 1992 as a consequence of having taken his brothers-in-law out of the camp.<sup>575</sup> Kvo-ka was obliged to return his brothers-in-law to the camp on 24 June 1992, the day after he left the camp and that day he stayed between forty minutes to an hour and did not talk to any

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<sup>568</sup> Miroslav Kvo-ka, T. 860-861.

<sup>569</sup> Miroslav Kvo-ka, T. 862-864.

<sup>570</sup> Miroslav Kvo-ka, T. 881.

<sup>571</sup> Miroslav Kvo-ka, T. 882-887.

<sup>572</sup> Miroslav Kvo-ka, T. 888.

<sup>573</sup> Decision on Defense Motions for Acquittal, para. 61.

<sup>574</sup> Kvo-ka Final Trial Brief, para. 179.

<sup>575</sup> Miroslav Kvo-ka, T. 888-89, T. 8289. See also Exhibit D23/1, medical certificate for a sick leave to Kvo-ka from 16 to 19 June 1992 issued by Dr. Ivi}.

detainees.<sup>576</sup> Kvo-ka added that he did not thereafter return to the camp, except once seven to ten days after his departure to visit his brothers-in-law.<sup>577</sup>

351. Kvo-ka testified that after he left Omarska camp on 22 or 23 June 1992, he attempted to consult Du{an Jankovi} about his future in the police force and managed to see him towards the end of June 1992. Du{an Jankovi} told Kvo-ka then that he was being assigned to the Tukovi police station located in the suburb of Prijedor.<sup>578</sup>

352. The most substantial evidence of Kvo-ka's service at Tukovi police station consists of a letter sent from the Ministry of Internal Affairs to the Kvo-ka Defense team dated 12 August 1998, which states that Kvo-ka left the Omarska camp on 23 June 1992 and reported for duty in Tukovi police station on 30 June 1992.<sup>579</sup> Further, Defense witness Lazar Basrak, a policeman assigned to the Tukovi police station on 29 April 1992, testified that on 1 July 1992 he met Kvo-ka in the Tukovi police station, where Kvo-ka was doing some paperwork.<sup>580</sup>

353. Most witnesses agreed that Kvo-ka was not in Omarska camp for the entirety of its existence.<sup>581</sup> Many witnesses saw Kvo-ka in the camp wearing a regular police uniform, carrying a standard police pistol and an automatic rifle,<sup>582</sup> and said that Kvo-ka was in the camp rather regularly "for the first month or so."<sup>583</sup> He was forced to leave the camp at the end of June purportedly because he had taken his wife's brothers out of the camp<sup>584</sup> and he came back in the camp thereafter only to visit his brothers-in-law.<sup>585</sup>

354. There is no evidence to contradict the absences of Kvo-ka from the camp on two occasions, from 2 to 5-6 June 1992 and from 16 to 19 June 1992.<sup>586</sup>

355. Kvo-ka convincingly explained his presence in the camp on 24 June 1992. As mentioned above, he said that Du{an Jankovi} obliged him to return his brothers-in-law to the camp that day. Kvo-ka also said that he visited his brothers-in-law again on one more occasion.<sup>587</sup> This may

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<sup>576</sup> Exhibit P 3/203, p 128.

<sup>577</sup> Exhibit P 3/203, p 127.

<sup>578</sup> Miroslav Kvo-ka, T. 956.

<sup>579</sup> Exhibit D13/1.

<sup>580</sup> Lazar Ba{rak, T. 7092-7093.

<sup>581</sup> Ljuban Andzi}, T. 7545; Nada Markovska, T. 7770-7771.

<sup>582</sup> Nusret Siva}, T. 3984; Kerim Mesanovi}, T. 5179. Kvo-ka testified however that he would usually not carry the automatic rifle assigned to him and that he would leave his weapon in the police office or in the official vehicle, T. 876-877. Witness AK indicated that Kvo-ka wore a pistol and carried a rifle, but that he carried the rifle only during his first few days in the camp. T. 2013.

<sup>583</sup> Azedin Oklop-i}, T. 1758; Witness AI, T. 2125; Witness AK, T. 2017; Sifeta Su{i}, T. 3007.

<sup>584</sup> Witness AK, T. 2046; Witness K, T. 5015.

<sup>585</sup> Kerim Mesanovi}, T. 5181 and 5201.

<sup>586</sup> Kerim Mesanovi}, T. 5180; Zlata Cikota, T 3309-3312 and 3313; Sifeta Su{i}, T. 3017. Sifeta Su{i} said that she talked to Kvo-ka on the day of her arrival in the camp on 24 June 1992, and on several occasions afterwards.

<sup>587</sup> Exhibit 3/203, p 127.



explain why several witnesses saw him in the camp after 24 June 1992. It is also the opinion of the Trial Chamber that the fact that witnesses saw Kvo-ka in the camp after 24 June 1992 is not sufficient evidence to draw a conclusion that his duties there continued.

356. The Trial Chamber finds that Kvo-ka held a position in the camp during the period from about 29 May to 23 June 1992, and that he was absent from the camp on official leave from 2 to 6 June 1992 and from 16 to 19 June 1992. Kvo-ka thus spent approximately 17 days in Omarska camp.

357. The Trial Chamber turns now to examine Kvo-ka's duties and position in Omarska camp.

##### 5. Kvo-ka's Duties and Position in the Camp

358. The Defense argued vigorously that Kvo-ka was only a simple guard in the Omarska camp and not an officer or supervisor of any kind. To this effect, the Defense produced a letter sent by Marko Denadija, the head of the Public Security Centre Prijedor, Ministry of Internal Affairs, to the Defense of Kvo-ka, dated 12 August 1998, stating that during 1992, Kvo-ka was not in any position of authority.<sup>588</sup> The Defense also produced a certificate signed on 22 February 2000 by the assistant Minister of Defense, Radoslav Banduka, stating that the code attributed to Kvo-ka as a military conscript (reserve member of the military police) shows that he had the rank of a private or common soldier.<sup>589</sup> However, by the accused's own admission, his position in the camp was not one of a simple guard, his "duties had rather to do with what his police commander, @eljko Meaki}, told him to do". He added that he was, in effect, an aide of @eljko Meaki}.<sup>590</sup> In its Final Brief, the Kvo-ka Defense stated that he performed the tasks of a permanent duty officer in the Omarska camp.<sup>591</sup>

359. According to Kvo-ka, @eljko Meaki} told him on the first day that he would be the duty officer in Omarska camp and he should work out of the duty room on the first floor of the administration building. Kvo-ka indicated in his interview that he was instructed to be in the camp when @eljko Meaki} was not.<sup>592</sup> The duty officer was the critical link between the commander and the policemen serving as guards. Kvo-ka explained:

The duty officer, as I have already indicated, is a link between the guards and the commander of the department. The duty officer has to transmit the information he has had access to the commander of the police station department. That constitutes the task of the duty officer. In

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<sup>588</sup> Exhibit D13/1; Exhibit D53/1.

<sup>589</sup> Exhibit D15/1.

<sup>590</sup> Miroslav Kvo-ka, T. 8079.

<sup>591</sup> Kvo-ka Final Trial Brief, para. 181.

<sup>592</sup> Exhibit P 3/203, p 52 and 53.

addition to what I have already said, that he had to be on duty at the telephone, at the radio, and so on and so forth.<sup>593</sup>

He also stated that the duty officer was required to consult with the shift leader about matters of import arising during a shift because the shift leader had wider authority.<sup>594</sup>

360. Kvo-ka testified that his duties included the supervision of the many reserve police officers within the guard units in @eljko Meaki}'s absence. This duty entailed that Kvo-ka oversee the "conduct" of the officers, to "use" his experience to suggest corrective action, and to report any problems with police behavior to @eljko Meaki}'.<sup>595</sup> He added that his years of experience in the police force qualified him for this task.<sup>596</sup> With regard to how a guard should properly behave towards camp inmates, Kvo-ka stated that it was understood that a guard had to protect a detainee, that he should not attack or assault a detainee, because the police had to protect any citizen from any other citizen.<sup>597</sup> By his own admission, guards and police were not only required to refrain from mistreating detainees themselves, but they also had a clear duty to protect detainees from mistreatment by others.<sup>598</sup>

361. The Trial Chamber finds that Kvo-ka, a duty officer, was the direct subordinate of @eljko Meaki}', tasked to carry out his orders and to supervise the conduct of the guards.

362. The Prosecution submits that the hierarchy in the camp was established in conformity with the hierarchy that existed in a police station.<sup>599</sup> The commander had authority over his deputy, who, in turn, had authority over shift leaders and guards. Kvo-ka, who claims that he was a permanent duty officer in the camp, argues that he had no effective power or control over shift leaders and other guards.

363. Kvo-ka initially acknowledged that there were shift leaders in the camp. In answer to the question whether there was somebody below him or @eljko Meaki}' and above the other police guards, for instance, a "shift leader", Kvo-ka said: "I know the term. I think that Meaki}' appointed three people to be shift leader."<sup>600</sup>

364. Kvo-ka said that some three days after the establishment of the camp, @eljko Meaki}' informed him that there was an even larger number of detainees expected and that he needed a few

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<sup>593</sup> Miroslav Kvo-ka, T. 8401.

<sup>594</sup> Miroslav Kvo-ka, T. 8408.

<sup>595</sup> Exhibit P 3/203, p 39; Miroslav Kvo-ka, T. 8285.

<sup>596</sup> Exhibit P 3/203, p 39; Miroslav Kvo-ka, T. 8285.

<sup>597</sup> Miroslav Kvo-ka, T. 8124-8126.

<sup>598</sup> Miroslav Kvo-ka, T. 8121. Kvo-ka stated in particular: "Every policeman who was involved in regular police work knew about it, and Zeljko emphasised it as well, that one of the duties of the police was to prevent escape, which implied also preventing, if possible and necessary, any attack on the prisoners".

<sup>599</sup> Prosecution Final Trial Brief, para. 112.

trusted men to use the phone and to inform him about the events in the camp, so consequently three shift leaders were appointed:<sup>601</sup> Kos (Krle), Gruban (Ckalija), and Radi} (Krkan).<sup>602</sup> Kvo-ka testified that he was not involved in the selection of the shift-leaders, but that @eljko Meaki} appointed the three “duty service” leaders with his approval.<sup>603</sup> Later, however, Kvo-ka contradicted himself and said that there were no shift leaders in the camp.<sup>604</sup>

365. In any event, Kvo-ka rejected the proposition that a duty officer was superior to a shift leader. He testified as to the difference between a duty officer and a shift leader in a police station:

As regards shift leaders, they have a wider scope of duties. He is not a managerial type of position. He is in charge of drafting a daily schedule which is decided upon by the department commander. As regards the profession itself, his position is to be a more professional one than that of the duty officer, because the duty officer must consult the shift leader in the station, and the shift leader has wider authority as regards certain orders that he can issue to police officers. For example, he can call on the radio, he can call policemen from one particular area and tell him that something is happening in another street, that he should go there and check on what is going on. This is the kind of authority that he has while he's on duty. [...] There is a difference. It's very difficult to measure it, but there is a big difference between a shift leader and a duty officer.<sup>605</sup>

366. The Trial Chamber finds that @eljko Meaki} modelled the leadership structure in Omarska camp essentially after the command structure of the police station of Prijedor, as submitted by the Prosecution. As commander, @eljko Meakic designated individuals to perform the functions of deputy commander and shift leaders.<sup>606</sup>

367. Kvo-ka vigorously denied that he was in a position of authority. He said that he was not authorized to supervise guards or to order them to do or not to do anything,<sup>607</sup> despite his admission that @eljko Meaki} instructed him to “be there for them [the reserve police force] so that they don't do something wrong”<sup>608</sup> and his acknowledgement that the general impression in the camp might well be that he was the commander when @eljko Meaki} was absent.<sup>609</sup>

368. The Trial Chamber is persuaded by the large number of witnesses who testified that Kvo-ka occupied a position of authority and influence within the camp. Their evidence included the details described hereafter:

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<sup>600</sup> Exhibit P 3/203, p 59.

<sup>601</sup> Miroslav Kvo-ka, T. 8156.

<sup>602</sup> Exhibit P 3/203, p 59.

<sup>603</sup> Miroslav Kvo-ka, T. 969-970.

<sup>604</sup> Miroslav Kvo-ka, T. 8155.

<sup>605</sup> Miroslav Kvo-ka, T. 8408-8409.

<sup>606</sup> Exhibit D43/1 (Chart 3).

<sup>607</sup> Miroslav Kvo-ka, T. 8387.

<sup>608</sup> Miroslav Kvo-ka also stated that “when @eljko Meaki} was absent, no one could give orders”. He added that the duty officers rotated. Kvo-ka said that there would be several equal duty officers, so that if Mla|o Radi} and himself were in the same shift, @eljko Meaki} might leave instructions to Mla|o Radi}. Kvo-ka was then left with nothing to do. Miroslav Kvo-ka, T. 8399-8401.

(a) Mirsad Ali{i}, a former car mechanic of the Ljubija mines in Tomasica, was on the pista when he saw Kvo-ka, whom he knew well. He testified that Kvo-ka addressed the detainees on the pista and said that he was the camp commander.<sup>610</sup>

(b) Witness A, who knew Kvo-ka from before the war, assumed that Kvo-ka was a superior because of how guards treated him:

my assumption is that they (Kvo-ka, Radi, Meaki) were some sort of superiors. All the guards would address him (Kvo-ka), or if a woman needed something from a guard, the guard would tell us to talk to them.<sup>611</sup>

(c) Witness AJ said that he thought that Kvo-ka was deputy commander because Kvo-ka authorized a change in the location in which Witness AJ was held:

When I left the interrogation, I can't remember which guard was at the door, but I asked whether I could go into Mujo's room and he said, no, the "green house," that is to say, the pista. And I said, "Well, could I go there?" and he said, "Well, there's Kvo-ka and Kvo-ka can say whether you can or not." So for me, Kvo-ka was the person in charge at the time, and he (Kvo-ka) gave me this chit, piece of paper, which allowed me to go to Mujo's room.<sup>612</sup>

(d) Sifeta Susi}, a former colleague, testified that Kvo-ka had been the deputy commander in the Omarska police station<sup>613</sup> and that he was the deputy of @eljko Meaki} in the Omarska camp.<sup>614</sup>

(e) Azedin Oklop-i}, who knew Kvo-ka before the war, believed that Kvo-ka and @eljko Meaki} had a particular status because they alternated 24 hour shifts, while the guards and the shift leaders took 12 hour shifts.<sup>615</sup>

(f) Witness AI testified that Kvo-ka introduced himself as the person responsible for the detainees:

After a certain time had elapsed, we went inside and Kvo-ka addressed us, and he introduced himself, said he was responsible for us, something along those lines, that everything would be fine, that there were no problems, that we would be questioned, and then that we would be returned home.<sup>616</sup>

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<sup>609</sup> Miroslav Kvo-ka, T. 8381.

<sup>610</sup> Mirsad Ali{i}, T. 2538.

<sup>611</sup> Witness A, T. 5469.

<sup>612</sup> Witness AJ, T. 1647.

<sup>613</sup> Sifeta Su{i}, T. 2978.

<sup>614</sup> Sifeta Su{i}, T. 3007.

<sup>615</sup> Azedin Okop-i}, T. 1758-1759.

<sup>616</sup> Witness AI, T. 2106.

369. During trial, Kvo-ka attempted to refute the general impression that he was deputy commander. He said that he did not talk to the detainees as this was forbidden by @eljko Meaki}, but that some detainees would nonetheless address him rather than his colleagues not because he was a superior but because they preferred him over “those from the reserve police force or if the detainees had bad experiences with guards”.<sup>617</sup> Kvo-ka further explained the fact that detainees thought he was deputy commander by stating that witnesses’ personal impressions came from his very visible presence in the camp and his routine of walking around the camp,<sup>618</sup> and because he was, therefore, a prominent figure.<sup>619</sup> He explained that he “was not trying to hide” himself or trying to “perform duties in secret”.<sup>620</sup>

370. Additional evidence concerning Kvo-ka’s authority over guards was provided by witnesses who testified that they saw or heard Kvo-ka give the guards orders, which the guards followed:

(a) When a group of new detainees arrived at Omarska from the Keraterm camp on 10 June 1992, “Krle” (Kos) gave the list of their names to Kvo-ka. The list included the name of Nusret Siva} who was in the group of new arrivals. The guards were beating the new detainees when Kvo-ka interrupted the guards and asked why Nusret Siva} was brought to the camp instead of Nusreta Siva}, a judge in Prijedor and the intended target of arrest and detention. When a guard asked Kvo-ka what to do, Kvo-ka went to see Ranko Miji}, one of the investigation coordinators.<sup>621</sup> When he came back, he ordered the guard to return Nusret Siva} to Prijedor. Nusret Siva} testified that during the incident, Kvo-ka behaved like a deputy commander.<sup>622</sup>

(b) When Sifeta Susi} arrived in the camp by bus, Kvo-ka ordered an individual dressed like Kvo-ka, whom she later learned was called Kole or Krle, to immediately return her ID and led her to the eating hall; the other new arrivals however were ordered to lean against the wall whereupon they were beaten by guards in front of Kvo-ka.<sup>623</sup>

(c) Witness J testified that she heard Kvo-ka giving instructions to guards. Asked to comment on Witness J’s statement, Kvo-ka testified that it was possible that the detainee saw him passing along instructions, which came from @eljko Meaki}.<sup>624</sup>

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<sup>617</sup> Miroslav Kvo-ka, T. 8413.

<sup>618</sup> Miroslav Kvo-ka, T. 8179.

<sup>619</sup> Exhibit 3/302, p 16-17.

<sup>620</sup> Miroslav Kvo-ka, T. 8181.

<sup>621</sup> Nusret Siva}, T. 3974.

<sup>622</sup> Nusret Siva}, T. 3973-3975.

<sup>623</sup> Sifeta Su{i}, T. 2997-2998.

<sup>624</sup> Witness J, T. 4845.

(d) Kerim Mesanovi} stated that Kvo-ka would often issue orders to guards, especially with regard to where they should be positioned.<sup>625</sup>

371. Finally, several detainee witnesses said that the atmosphere in the camp was generally "better" when Kvo-ka was present.<sup>626</sup> Kvo-ka himself acknowledged that it was possible that during his duty things were better<sup>627</sup> and recognized that he had some authority or influence when he said that "it seems I stopped [specific incidents] more, because of my presence. I was there".<sup>628</sup>

372. Although denying that he was @eljko Meaki}'s deputy, Kvo-ka admits that his role in the camp command structure included service as a backup to @eljko Meaki}, and involved the transmittal of @eljko Meaki}'s orders to subordinates, and replacing him in his absence. Having considered all the evidence on this subject, the Trial Chamber finds that Kvo-ka participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service and that he had some degree of authority over the guards.

373. The Trial Chamber now turns to examine the evidence concerning Kvo-ka's knowledge of the abusive conditions and treatment of detainees in the camp and his ability or attempts to prevent crimes or alleviate suffering.

#### 6. Kvo-ka's Knowledge of Camp Conditions and Abusive Treatment During His Time in the Camp

374. The Prosecution submits that Kvo-ka was fully aware of the terrible conditions in which detainees lived in Omarska camp. There is no dispute in this regard. Kvo-ka admitted that he observed mistreatment of detainees in the camp, sometimes directly but sometimes indirectly from physical injuries he observed upon the detainees and that he also learned of abuses from reports of detainees and guards.

375. Kvo-ka said that Milojica Kos, Mla|o Radi}, Mom-ilo Gruban, and @eljko Meaki} expressed concern about the conditions of life in the camp.<sup>629</sup> There were around 2000-2500 detainees in the camp<sup>630</sup> and the sanitary conditions and food supply for detainees were "below an acceptable level".<sup>631</sup>

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<sup>625</sup> Kerim Mesanovi}, T. 5190-5191.

<sup>626</sup> See, e.g., Witness AK, T. 2071-2072.

<sup>627</sup> Miroslav Kvo-ka, T. 8387.

<sup>628</sup> Exhibit P 3/203, p 108.

<sup>629</sup> Exhibit P 3/203, p 60.

<sup>630</sup> Miroslav Kvo-ka, T. 980.

<sup>631</sup> Miroslav Kvo-ka, T. 984.

376. Kvo-ka emphasized that the security personnel of the camp were not disciplined. He observed that in the haste of mobilizing them, there was not the usual screening of reserve police officers for good character. New reserve police officers were not given the usual training, many had a criminal background, and they were allowed to carry their own personal weapons.<sup>632</sup>

377. Kvo-ka testified that during the first few weeks of operation, there was also a police contingent from Banja Luka in the camp, whose members were totally out of control. Kvo-ka said that after his return to the camp from a short absence around 5 June 1992, he noticed some changes in the camp security. New reserve police officers had come, as well as members of the territorial defense. @eljko Meaki} told him that they came to help out the police forces from Omarska and Banja Luka. Another change occurred six or seven days later. The thirty or so members of the special police unit from Banja Luka were replaced by another special police unit from Banja Luka, headed by a man with the surname Stra`ivuk.<sup>633</sup> Kvo-ka said that the replacement resulted from reports of detainees being abused and having their money and jewelry confiscated by members of the first special unit police from Banja Luka.<sup>634</sup>

378. Kvo-ka stated that many of the soldiers from the military unit in charge of security had access to the center.<sup>635</sup> However, he testified that once when he was in the duty room, he received a call from a guard at the front gate because four inebriated soldiers wanted to be let into the compound. Kvo-ka went to the gate and managed to make the men leave.<sup>636</sup> On another occasion, Kvo-ka was in the cafeteria when he saw through the window that a man named Vlado Sredi}, called Djor|e, whom he recognized as a criminal-type from Omarska, was entering the camp. The man was intoxicated, carrying a weapon and yelling at the detainees. Without hesitation, Kvo-ka ran up to him and removed him forcefully from the compound.<sup>637</sup> @eljko Meaki} was informed of this incident and said that the military police had taken charge of the man and were investigating the matter.<sup>638</sup>

379. Kvo-ka also observed or heard about other specific incidents of mistreatment:

(a) During the morning of 29 May 1992, when @eljko Meaki} and Kvo-ka arrived in the camp they saw three or four dead bodies on the grass. Kvo-ka testified that the guards on duty told them that

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<sup>632</sup> Miroslav Kvo-ka, T. 773-778 and 7843.

<sup>633</sup> Miroslav Kvo-ka, T. 913-918.

<sup>634</sup> Miroslav Kvo-ka, T. 919.

<sup>635</sup> Miroslav Kvo-ka, T. 1002.

<sup>636</sup> Miroslav Kvo-ka, T. 973.

<sup>637</sup> Miroslav Kvo-ka, T. 972.

<sup>638</sup> Miroslav Kvo-ka, T. 8146.

the bodies belonged to people who attempted to escape during the night. After two days, a van came and removed the corpses.<sup>639</sup>

(b) Kvo-ka stated that on 29 and 30 May 1992 people were brought to the camp in buses and the police and military escorts disembarked first and stood on each side of the doors of the buses. Kvo-ka observed that when the detainees got off, they were forced to sing Serb nationalistic songs and, at times, slap each other for the guards' entertainment.<sup>640</sup>

(c) Kvo-ka testified that he observed people with bruises, suggesting that they had been beaten.<sup>641</sup> On one occasion, he saw a man who had been obviously beaten being interrogated in one of the interrogation rooms.<sup>642</sup> On another occasion, Kvo-ka saw about fifty men lying on the pista on their stomachs, in the scorching heat.<sup>643</sup>

(d) During the morning of 10 June 1992, Kvo-ka was told by @eljko Meaki} that a detainee named Alija Alisi} had been shot while trying to escape. Kvo-ka knew that the guard who shot the detainee was on leave for several days but did not know whether the man was disciplined for the shooting.<sup>644</sup>

(e) Kvo-ka admitted hearing that detainees were beaten on their way to the toilet. He also heard stories among guards about people coming in from outside the camp at night to abuse detainees. Kvo-ka said however that he also heard that this kind of abuse was not frequent and that investigations into such incidents were conducted by the military police. He explained that the abuse by outsiders was due to a general confusion at the beginning as to who was authorized to enter the camp. Every one with a uniform was allowed entry at first.<sup>645</sup> Later, the guards directly posted near the buildings of the camp were specifically told by @eljko Meaki} to prevent entry by unauthorized persons.

(f) Mirsad Ali{i} testified that when a detainee called Nasi} was killed in the eating hall, Kvo-ka was standing next to the guard who shot Nasi}:

A. While Nasi} was standing, he said that it was unbearable, that we couldn't -- he couldn't take it any more, that those of us who had been persecuted couldn't take it any more. But we saw -- I saw at the end of the restaurant, that is to say, outside here, I saw a guard. I saw Plavsic and he was called Cvitan. . . . I saw standing next to that guard Miroslav Kvocka; he stood right next to the guard.

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<sup>639</sup> Miroslav Kvo-ka, T. 868-869.

<sup>640</sup> Miroslav Kvo-ka, T. 8277.

<sup>641</sup> Miroslav Kvo-ka, T. 975.

<sup>642</sup> Miroslav Kvo-ka, T. 937-938.

<sup>643</sup> Miroslav Kvo-ka, T. 8114.

<sup>644</sup> Miroslav Kvo-ka, T. 974-975.

<sup>645</sup> Miroslav Kvo-ka, T. 1000-1001.



Q. Could you say what happened when Nasi} was standing and-- when he was standing.

A. The guard shot a burst of gunfire and he killed Nasi} straight away. He fell down. There were cries and screams, and there were other people who were wounded. Afterwards, Kvo-ka came up right to this corner where I was standing and he said, "Why don't you make him keep quiet? Why didn't you stop him from saying what he said?" And afterwards the three young men who had been wounded were taken out.<sup>646</sup>

Kvo-ka acknowledged that he was aware of this incident, which he reported to @eljko Meaki}.<sup>647</sup>

380. Many witnesses stated that no one present in the camp could have been unaware of the horrendous ways in which detainees were abused in the camp. Everyone could hear loud screams and pitiful moans of people being mistreated. People covered with blood were lying neglected in the camp. Kvo-ka said that "several times" during his "time in the interrogation centre," he visited "every guard post, every place where the policemen were situated"<sup>648</sup> and that he spent most of his shift outside his office in the administration building.<sup>649</sup>

381. Mirsad Ali{i} recalled an episode which demonstrated Kvo-ka's awareness of the abusive conditions of detention in the camp. Mirsad Ali{i} testified that when he was transferred to the pista, he saw what he thought were bodies covered in blood. A yellow truck known as a Zuco went to the spot where he saw the bodies. A machine gun and ammunition were unloaded from the truck and put on the roof of the administration building and dead bodies were loaded into the truck. He testified further that Kvo-ka was there, by the truck, when the loading took place.<sup>650</sup>

382. Witness AI also testified that he was on the pista when he heard someone calling "Kiki" to come out of the eating hall, and he saw that Kvo-ka was not far away. Witness AI then saw some detainees, including Witness AK, leaving the eating hall to go to the white house. Kvo-ka was also in a position to see this. He then heard terrible sounds of abuse and suffering coming from the white house. Everybody could hear the screams.<sup>651</sup> Kvo-ka admitted later that he saw that "Kiki" and Rezak Hukanovi} and perhaps a third person had been beaten and the asked them what happened but they refused to tell him.<sup>652</sup>

383. Kvo-ka admitted that he was afraid that his brothers-in-law would be injured or killed in the camp. He testified that when he was obliged to return them to the camp, he asked Kos and Gruban to take care of his brothers-in-law, to see that they were put in the glass house (adjacent to the

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<sup>646</sup> Mirsad Ali{i}, T. 2485-2486.

<sup>647</sup> Exhibit P 3/203, p 35-36.

<sup>648</sup> Exhibit P 3/203, p 39.

<sup>649</sup> Exhibit P 3/203, p 109.

<sup>650</sup> Mirsad Ali{i}, T.2479-2481; see also Witness AK, T. 2010.

<sup>651</sup> Witness AI, T.2151-2154.

<sup>652</sup> Exhibit 3/203, p 45.

administration building, near the cafeteria), given some food and protected against mistreatment so that “nothing stupid happened to them”.<sup>653</sup>

384. While it is not clear that Kvo-ka had direct knowledge of each and every form of abuse committed in the camp, nevertheless he undoubtedly knew that a wide variety of crimes were being committed and that physical and mental violence was systematically used to threaten and terrorize the detainees in the camp.

385. Thus, the evidence demonstrates that Kvo-ka had extensive knowledge of the abusive practices and conditions and knew that serious crimes were regularly committed in Omarska camp.

#### 7. Kvo-ka’s Ability and Attempts to Prevent Crimes or Alleviate Suffering

386. The Prosecution submits that Kvo-ka, as the deputy to @eljko Meaki}, had the authority to take necessary and reasonable measures to prevent abuses, to interfere if an abuse was being committed, and to report any abuse that had been committed. This submission is corroborated, in part, by Kvo-ka himself who admitted that if it was not possible for him to prevent abuses, it was possible for him to intervene if he actually witnessed an abuse incident in the camp,<sup>654</sup> and to report abuses to @eljko Meaki}.<sup>655</sup>

387. Kvo-ka described specific instances where he did intervene to stop abuses:

(a) Kvo-ka complained about the way body searches were conducted on newly arrived detainees, because they were being searched in a humiliating and improper way. He interfered and said to the military officer doing the search, “boy, this is not how it should be done. It should be done properly”. According to Kvo-ka, the searches were thereafter conducted properly.<sup>656</sup>

(b) On 30 May 1992, around 1700 hours, two or three buses full of detainees arrived. Kvo-ka testified that as detainees started embarking from the bus, a vehicle stopped beside the buses and an inebriated man got out and started shooting at the detainees. Kvo-ka, whose version of the incident was corroborated by several Defense witnesses,<sup>657</sup> said he stopped the attacker from further shooting. Some detainees were killed; other detainees and police officers were injured. Following this incident, on the morning of 1 June 1992, Kvo-ka talked to @eljko Meaki} about his personal

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<sup>653</sup> Miroslav Kvo-ka, T. 8165-8166.

<sup>654</sup> Miroslav Kvo-ka, T. 8381-8382.

<sup>655</sup> Miroslav Kvo-ka, T. 8378-8379.

<sup>656</sup> Miroslav Kvo-ka, T. 975.

<sup>657</sup> Branko Rosi}, T. 7488-7491; Milenko Rosi}, T. 7509-7517; Ljuban Andi}, T. 7540-7548.

trauma resulting from the incident and @eljko Meaki} authorized him to take three or four days leave to rest.<sup>658</sup>

(c) Kvo-ka successfully dealt, on several occasions, with drunken men who tried to enter the camp through the front gate.<sup>659</sup> Kvo-ka said that, although he thought it was not his job to deny entry to unauthorized persons, since this was the job of the military police officers, he occasionally intervened because "sometimes to protect people you have to bypass the usual procedure".<sup>660</sup>

(d) Witness AK, who knew Kvo-ka well, testified that Kvo-ka walked by as he and other detainees were taken to the white house to be beaten.<sup>661</sup> Kvo-ka said to the individuals escorting him and the other detainees "bring them back here afterwards". According to Witness AK, Kvo-ka's admonition meant that he and the others "should be allowed to live".<sup>662</sup>

388. Kvo-ka admitted that there were some other occasions when he witnessed abuses but did not interfere. He justified his failure to act by saying that he could not intervene because he had no authority to do so.<sup>663</sup> He gave the two following examples:

(a) During the first days of his arrival in the camp, Kvo-ka observed from the window of the duty office that people getting off buses were made to sing nationalistic songs and ordered to slap each other. He did not interfere because he considered that detainees were under the jurisdiction of their escort until they were accommodated in "appropriate rooms" by guards. However, Kvo-ka added that he would have interfered if he had seen a really grave offence.<sup>664</sup>

(b) Kvo-ka noticed that there was insufficient food and toilet facilities,<sup>665</sup> but he did not attempt to improve these conditions because he said "it really wouldn't have been appropriate to interfere in

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<sup>658</sup> Miroslav Kvo-ka, T. 893-906.

<sup>659</sup> Miroslav Kvo-ka, T. 972-973.

<sup>660</sup> Miroslav Kvo-ka, T. 8389

<sup>661</sup> Witness AK, T. 2028-2029.

<sup>662</sup> Witness AK, T. 2072.

<sup>663</sup> Miroslav Kvo-ka, T. 8125.

<sup>664</sup> Miroslav Kvo-ka, T. 8124-8125. Kvo-ka stated in particular that: "In the system in which we lived, it was believed that the police simply could not attack citizens. Now, if this should happen, then in that case there are several possibilities. I spoke about that yesterday to a certain extent. If we interpret the rules literally, if such an incident should happen before my own eyes, if a policeman should attack a citizen, then I would intervene, of course. However, certain qualifications need to be made here. If a policeman should slap a citizen, in that case I should perhaps ask myself about the authority that I have to intervene or not. In that case, I think that I would have an obligation to report about that to my superiors. Second, if the violation of human rights in question is a drastic one, if it's an attempt of murder or some other kind of ill-treatment, then speaking for myself, I'm sure I would try to prevent it if, of course, it is happening before my eyes, in my physical presence. In that case, of course I would try to prevent it. In that case, I think I can intervene, that is, I think I will -- would intervene, although later on I run the risk of having problems with the policeman in question. Then you would probably have a conflict of interest. He would probably think that he has the right to do that and [had] authority to do that, and I will probably think that he does not have such an authority, and then we would probably have a conflict between the two of us. But personally, I think I would always intervene in cases of murder attempt, ill-treatment, and similar incidents."

<sup>665</sup> Miroslav Kvo-ka, T. 8195.

somebody else's responsibilities because there was a manager of the mine" who was responsible for these conditions.<sup>666</sup>

389. Kvo-ka's insistence that he could not prevent abuses because he did not have sufficient authority is contradicted by the evidence.

390. According to Kvo-ka's former commander, Milutin Buji}, it is standard police practice to request assistance from other police officers. He stated that the duties of a policeman in the position of Kvo-ka are indeed to prevent the commission of a crime by personal intervention, and if that is not possible, to call for assistance:

Q. For instance, if Mr. Kvocka, as a third sector leader, saw some crime being committed or was notified about crime, what would he have to do? What steps would he take as a sector leader, or even as a normal policeman?

A. It depends on the gravity of the criminal offence. If the crime in question is a theft, then perhaps he can do it himself. However, in cases of more serious offences, he would have to call the police, the crime department, who would then take the necessary steps.

Q. A basic, simple example. If Mr. Kvo-ka sees a person being beaten by another, he could prevent it and take steps against the person, the aggressor or the assailant? Could he do that?

A. Yes, if it is possible for him to intervene successfully.

Q. Mr. Buji, if -- going back to about the duties of a policeman, if he can not intervene -- you said if he can not intervene. Should he not report that crime or the act which has taken place?

A. If it is not possible for him to react, then he should call for assistance as soon as possible so that he can receive help in dealing with a case like that.<sup>667</sup>

391. Indeed, there were instances when Kvo-ka called for assistance when he felt he could not interfere directly:

(a) Kvo-ka stated that when Nusret Siva} arrived in the camp, the detainees were lined up against a wall and searched in a humiliating way. Kvo-ka said "he was helpless" to object and did not interfere, except to inquire why Nusret Siva} was arrested when it was Nusreta Siva} who should have been arrested, not her brother.<sup>668</sup> Nusret Siva} testified that Kvo-ka, after consulting with Ranko Miji}, one of the interrogators' coordinators, ordered his release.<sup>669</sup>

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<sup>666</sup> Miroslav Kvo-ka, T. 8194.

<sup>667</sup> Milutin Buji}, T. 7859-7860.

<sup>668</sup> Miroslav Kvo-ka, T. 8382.

<sup>669</sup> Nusret Siva}, T. 3973-3975.

(b) According to Sifeta Susi}, when she first asked Kvocka for assistance in obtaining hygienic supplies and antibiotics, he refused. Finally, Kvo-ka asked one of his neighbors, Fiketa Oklop-i}, for the supplies and Fiketa Oklop-i} gave him antibiotics for Sifeta Susi}.<sup>670</sup>

392. In respect of Kvo-ka's efforts to prevent future abuses, Kvo-ka stated that he took action to prevent future abuses when, before leaving the camp, he asked Kos and Gruban to take care of his brothers-in-law in order to prevent them from being mistreated in the camp.<sup>671</sup> The Trial Chamber considers, however, that this action may have been a personal request instead of a professional command, especially in view of the fact that he was leaving the camp and would no longer have authority over the guards remaining there. He took no steps to safeguard the detainees generally.

393. With regard to reporting abuses, Kvo-ka testified that when he came upon information about abuses, he considered it his duty to report the information to his superior, @eljko Meaki}, in accordance with the duties of a policeman.<sup>672</sup> Kvo-ka stated that upon finding evidence of a crime, a policeman's duty is to report the information to his superior. He added that a policeman has to protect the life and property of citizens even at the cost of his own life and that his obligation is to forward information gained to his supervisor and to prevent crimes. However, it was not his duty to investigate crimes unless ordered to do so. Such reporting to superiors was also expected from him in Omarska.<sup>673</sup> In the camp, although he was to report any incident he heard of in the camp involving possible misconduct of the guards, he was not to investigate the misconduct himself.<sup>674</sup> He testified that he reported to @eljko Meaki} that he had seen dead bodies in the camp. He said that he felt that his duty was to secure the area around the dead bodies and to preserve all traces of evidence in the area. However, he did not believe his duty included any investigation into the causes of the deaths.<sup>675</sup>

394. Further, Kvo-ka heard rumors from detainees and guards about abuses and said that he passed this information onto @eljko Meaki}. Each time, his superior would say that he was aware of it and that there was nothing to be done.<sup>676</sup> Kvo-ka also justified his non-action by noting the time that passed between the commission of an abuse and his knowledge of it. He said, "I don't know whether anyone was punished or that anyone should have been punished".<sup>677</sup>

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<sup>670</sup> Sifeta Su{i}, T. 3008.

<sup>671</sup> Miroslav Kvo-ka, T. 8165-8166.

<sup>672</sup> Miroslav Kvo-ka, T. 8125.

<sup>673</sup> Miroslav Kvo-ka, T. 8124-8126.

<sup>674</sup> Miroslav Kvo-ka, T. 8105-8106.

<sup>675</sup> Miroslav Kvo-ka, T. 8375.

<sup>676</sup> Miroslav Kvo-ka, T. 8111-8112.

<sup>677</sup> Exhibit 3/203, p 133.

395. The Trial Chamber believes that Kvo-ka did intervene on a few occasions and he took some steps to improve the situation of certain family members or friends. However, it finds he could have done far more to mitigate the terrible conditions in the camp. He could have, for example, taken steps within his designated authority to more actively prevent unauthorized outsiders from entering the camp and abusing detainees. He could have ensured more detainees received medical treatment. He could have prevented guards and other subordinates from beating or otherwise abusing detainees on arrival, in the dining facility, or enroute to the toilets.

396. The Trial Chamber finds that Kvo-ka was in a position of sufficient authority and influence to prevent or halt some of the abuses, either by intervening personally or by seeking assistance from others, and to report abuses committed against detainees in the camp. His position was gained primarily by years of experience in police work. Guards sought instructions from Kvo-ka, he gave them orders that they followed, and, on select occasions, he prevented crimes from being committed. As an active duty policeman, Kvo-ka may have had a duty to investigate crimes committed in the camp, although this duty was not adequately proven by the Prosecution.

397. The Trial Chamber does not have sufficient evidence to conclude that Kvo-ka himself physically perpetrated crimes against detainees in the camp.<sup>678</sup> It is nonetheless indisputable that he was present while crimes were committed and he was undoubtedly aware that crimes of extreme physical and mental violence were routinely inflicted upon the non-Serbs imprisoned in Omarska. Despite knowledge about the abusive treatment and conditions, Kvo-ka continued to work for at least 17 days in the camp, where he performed the tasks required of him skilfully, efficiently, and without complaint.

8. Was Kvočka's Participation in Omarska Camp, a Joint Criminal Enterprise, Significant Enough to Incur Criminal Responsibility?

398. Kvo-ka functioned as @eljko Meakic's deputy in Omarska camp, a joint criminal enterprise. He was an experienced and respected policeman and was one of the few active-duty policemen in the camp. He undoubtedly wielded considerable influence.

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<sup>678</sup> The Trial Chamber did hear evidence that Kvočka threatened detainees on two occasions, but does not find them a sufficient basis on which to conclude that he personally participated in abuses of detainees. Mirsad Ali{i} testified that when detainees in "Mujo's room" were ordered to go to the pista, he saw Kvo-ka on the way and Kvočka said that the detainees "should walk slowly, that we shouldn't go fast. If anybody made a quick movement of any kind, that he personally would kill him." T. 2478. Witness AW testified that he received a similar type of threat from Kvo-ka at the time Kvo-ka and Mom-ilo Gruban, said to be the third shift leader in the Omarska camp, stole gold and jewel from Witness AW's sister. Witness AW recounted the day when Kvo-ka threatened him and said that: "Kvočka was driving the car. And before that, the two of them (Gruban and Kvočka) talked about something. And he looked at his rear view mirror and he could see me sitting on the back seat, and he said, "If we don't find the gold and the money, someone's body might float down the river Sana." Witness AW, T.11952.

399. Kvo-ka estimated that he served a maximum of 20 shifts in the camp during his approximately 17 days working in Omarska. This amount of time is not insubstantial given the litany of crimes that were committed in the camp on a daily, indeed hourly, basis. The Trial Chamber notes additionally that Kvo-ka was present in Omarska during the first month of the camp's existence and he participated in its formation. Although he intimated that he was a reluctant participant in the camp,<sup>679</sup> he also expressly stated that, had he been given the choice, he would have continued working in the camp until its closure.<sup>680</sup>

400. Despite being reportedly distressed by the crimes committed in the camp, Kvocka remained on the job until removed by his superiors. Defense witnesses testified that the organisation in the camp was so lax that guards failed to show up for work without serious, or probably any, repercussions. According to reservist Branko Starkevi}, who was assigned a guard post inside the hangar, Kvo-ka had no commander at all,<sup>681</sup> and was under no obligation to report to a duty officer or equivalent when he arrived for his shift.<sup>682</sup>

401. Significantly, Witness DD/10 testified that he left Omarska camp around 25 July 1992, at his own initiative and even after confronting Simo Drlja-a about the conditions in the camp, he did not lose his employment.<sup>683</sup>

402. Kvo}ka had taken a number of steps to protect his Muslim brothers-in-law in Omarska camp. When he was relieved of his duties at Omarska in June because, by his account, he was not regarded as sufficiently anti-Muslim, he was simply re-assigned to another police station at Tukovi. There is no evidence before the Trial Chamber that indicates that Serbs who worked in the camp who assisted or tried to improve the situation of the non-Serb detainees were punished.

403. Even if a knowing participant in a criminal enterprise was unwilling to resign because it would prejudice his career, or he feared he would be sent to the front lines, imprisoned, or punished, the Trial Chamber emphasizes that this is not an excuse or a defense to liability for participating in war crimes or crimes against humanity. It is well established in the jurisprudence of this Tribunal

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<sup>679</sup> Kvocka's Defense team also produced records from the military court in Banja Luka showing that people were prosecuted and convicted for failing to respond to a draft order, evading military service, or for wilful abandonment and desertion of the armed forces, thus attempting to demonstrate that the accused had no option but to continue his duties in the camp. Exhibit D51/1. However, the Trial Chamber does not draw this conclusion from the documents exhibited. The circumstances of those convicted do not correspond to Kvocka's position. He did not fail to respond to a draft order, and it cannot be said that the only alternatives to continuing his duties in the camp were to desert his wartime obligation or be sent to the front lines.

<sup>680</sup> He said that he was a black sheep in within the circle of Serb personnel in the camp and wanted to leave it all but also wanted to stay for his relatives and friends and had no other place to live if he left the police. Miroslav Kvo-ka, T. 8405.

<sup>681</sup> Branko Starkevi}, T. 9266.

<sup>682</sup> Branko Starkevi}, T. 9289-9291.

<sup>683</sup> Witness DD/10, T. 10699-10700.

that duress is not a defense to committing war crimes or crimes against humanity.<sup>684</sup> The Trial Chamber notes additionally that Kvo-ka did not allege duress, nor plead it as a mitigating factor.

404. The evidence is sufficient to conclude that Kvo}ka's participation in the camp was not only knowing, it was willing. Even though criminal activity against the detainees was part and parcel of everyday life in Omarska, Kvo-ka continued to show up for work and actively participate in its functioning. This knowing and continued participation enabled the camp to continue its abusive policies and practices.

405. Kvocka's continued participation in Omarska camp sent a message of approval to other participants in the camp's operation, specifically guards in a subordinate position to him, and was a condonation of the abuses and deplorable conditions there.

406. The Trial Chamber finds that Kvocka's contribution to the functioning of Omarska camp was significant. He played a key role in the administration and functioning of the camp as @eljko Meakic's deputy and as an experienced police officer. He knew that the detainees subjected to the abusive treatment and conditions were of non-Serb origin and that their religion, political views, and ethnicity were the reasons they were detained and abused.

407. Kvocka's knowledge of the criminal nature of the camp system in which he worked, including its discriminatory practices, combined with his willingness to continue in a position of authority and influence, demonstrates that he was substantially involved in the common criminal enterprise. Kvo-ka was more than merely a passive or reluctant participant in the criminal enterprise. He actively contributed to the everyday functioning and maintenance of the camp and he remained culpably indifferent to the crimes committed therein. His participation enabled the camp to continue unabated its insidious policies and practices.

408. The Trial Chamber finds beyond reasonable doubt that Kvo-ka was aware of the context of persecution and ethnic violence prevalent in the camp and he knew that his work in the camp facilitated the commission of crimes. Kvo-ka is responsible for the crimes committed in Omarska camp, which was a joint criminal enterprise.

#### 9. Criminal Responsibility of Miroslav Kvo-ka

409. As noted above, Kvo-ka is charged under Article 7(1) of the Statute with individual responsibility for participating in the war crimes and crimes against humanity alleged in the Amended Indictment. These charges are brought as "committing, instigating, or otherwise aiding

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<sup>684</sup> See, e.g., *Erdemovi}* Appeals Chamber Judgement, para. 19.



and abetting" the crimes or as a participant in a joint criminal enterprise. Kvo-ka is also, or alternatively, charged under Article 7(3) of the Statute with superior responsibility for acts allegedly committed by subordinates that he failed to prevent, halt, or punish.

(a) Superior Responsibility Under Article 7(3) of the Statute

410. The Trial Chamber has found that Kvočka exercised authority in Omarska when @eljko Meakic was not in the camp and that he performed the role of deputy commander of the camp. He was also the duty officer and he passed on @eljko Meakic's orders to others. Detainees reported that Kvo-ka ordered the other guards to perform tasks on occasion. He clearly had broad authority and influence within the camp.

411. However, the evidence does not sufficiently demonstrate a superior-subordinate relationship between Kvo-ka and known perpetrators of the crimes, nor is there credible evidence that Kvo-ka exercised effective control over subordinates who committed crimes. The Trial Chamber heard testimony that the guard service was disorganized and acted without accountability. Witness AK, for example, testified that:

From this time distance, when I look back, it seems to me that they were absolutely out of control, that nobody obeyed anyone. Each of the soldiers or the guards -- when I say "soldier" it is difficult to tell who was a soldier, who was a policeman, and I don't think the uniforms people wore meant anything in those days. Anybody could kill anybody they liked at any time in any shift. It was sufficient for him to call him out, and very often certain personal accounts would be settled in that way from before.<sup>685</sup>

412. There was certainly a duty to train and control the guards in the camp, and to prevent and punish criminal conduct. However, it does not appear to the Trial Chamber that the Prosecution has fully established what crimes were committed by which of his subordinates during the time he was working in the camp. In any case, his participation in the joint criminal enterprise of Omarska camps renders him liable for crimes committed therein and arguably makes 7(3) liability duplicative. The Trial Chamber holds that Kvo-ka does not incur superior responsibility for failing to prevent or punish crimes committed by subordinates, pursuant to Article 7(3) of the Statute.

(b) Individual Responsibility Under Article 7(1) of Miroslav Kvočka for Crimes Proved at Trial

413. The Trial Chamber has found the following in regards to Kvo-ka:

(a) that he was aware of the abusive treatment and conditions endured by the non-Serbs detained in Omarska prison camp;

(b) that he continued working in the camp for approximately 17 days;

(c) that the crimes alleged against Kvo-ka in the Amended Indictment were committed in Omarska during the time that he was employed in the camp;<sup>686</sup>

(d) that Kvočka's participation as deputy commander in the functioning of the camp was significant, making him liable as a participant in the joint criminal enterprise of Omarska camp; and

(e) that Kvo-ka was aware of the persecutory nature of the crimes committed against non-Serbs detained in the camp and, based upon his knowing and substantial participation in the system of persecution pervading Omarska camp, Kvo-ka had the intent to discriminate against the non-Serbs detained in the camp.

414. Due to the high position Kvočka held in the camp, the authority and influence he had over the guard service in the camp, and his very limited attempts to prevent crimes or alleviate the suffering of detainees, as well as the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavor, the Trial Chamber finds Kvočka a co-perpetrator of the joint criminal enterprise of Omarska camp.

415. The Trial Chamber has previously found that murder, rape, torture, and inhumane acts within the meaning of Article 5 of the Statute were committed in Omarska camp. It also found that these crimes were committed with the intent to persecute non-Serbs detained therein. The Prosecution has charged other crimes, including those alleging violations of Article 5 of the Statute, using the same set of facts as those underlying the persecution count. The Trial Chamber has found Kvo-ka guilty of persecution as a crime against humanity based on the murder, torture, rape, and other inhumane acts charged in the Amended Indictment and committed as part of the joint criminal enterprise. As discussed *supra*, this conviction for persecution subsumes the other crimes against humanity charges, thus they cannot be the subject of separate convictions and must be dismissed.<sup>687</sup>

416. The Trial Chamber has previously found that the prerequisites for Article 3 crimes are satisfied. It has also found that the crimes for which Kvo-ka was indicted under Article 3 –

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<sup>685</sup> Witness AK, T. 2073-2074.

<sup>686</sup> See, e.g., evidence of torture, T. 2028-2029; evidence of murder, T. 2485-2486; evidence of sexual violence, T. 5385-5387. These crimes occurred during the time that Kvočka worked in the camp. It is not necessary to prove that each crime was committed in Kvočka's presence or that he had knowledge of each crime. For example, if there were dead bodies lying about during the period when Kvočka worked at the camp, that is sufficient to incur responsibility in light of his position and continued presence.

<sup>687</sup> In the *Celebici* Appeals Chamber Judgement, when considering the multiple convictions based on the same facts under Articles 2 and 3 of the Statute, which were not found to each have materially distinct elements, the Article 2 convictions were "upheld", and the Article 3 convictions were "dismissed".

outrages upon personal dignity, murder, torture, and cruel treatment – were committed in Omarska during the time that Kvo-ka was working at the camp.

417. These crimes charged under Articles 3 and 5 of the Statute in relation to Kvo-ka were based on the same set of facts. There is no crime charged under Article 3 in the Amended Indictment that did not form part of the persecution conviction or which was committed outside the joint criminal enterprise. The Trial Chamber has already established that crimes committed in Omarska were violations of international law, the crimes had a close nexus to the armed conflict, and the victims were taking no active part in hostilities. Hence, the crimes charged under Article 3 of the Statute have been shown to be attributable to the accused.

418. The Trial Chamber has already found that it is permissible to enter multiple convictions under Articles 3 and 5 of the Statute, even when the two types of crimes are based on the same acts. Further, since the Trial Chamber finds that the accused was responsible for persecution as a crime against humanity for the crimes charged in the Amended Indictment under Articles 3 and 5 of the Statute, and there is no crime charged under Article 3 that is not captured within the Article 5 persecution conviction, a guilty verdict is also rendered against Kvo-ka for those crimes.

419. In sum, the Trial Chamber finds Kvo-ka guilty of co-perpetrating the following crimes as part of the joint criminal enterprise: persecution (count 1) under Article 5 of the Statute<sup>688</sup> and murder (count 5) and torture (count 9) under Article 3 of the Statute.

420. For the reasons set forth above, the following crimes are dismissed: inhumane acts (count 2), murder (count 4), and torture (count 8), which were subsumed within the persecution conviction under Article 5 of the Statute; and outrages upon personal dignity (count 3) and cruel treatment (count 10) which were subsumed within the torture conviction under Article 3 of the Statute.

421. The Trial Chamber proceeds now to examine whether the accused Dragoljub Prca} participated in the joint criminal enterprise and, if so, if his participation was significant enough to incur liability, and whether his acts or omissions incur criminal responsibility for “committing, instigating, or aiding and abetting” crimes alleged in the Amended Indictment.

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<sup>688</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and other non-Serbs detained in Omarska camp.

## B. DRAGOLJUB PRCA}

### 1. Introduction

422. Dragoljub Prca} is charged with individual responsibility in counts 1-3, 4-5, and 8-10 of the Amended Indictment as a participant in persecution,<sup>689</sup> murder, torture, inhumane acts, cruel treatment, and outrages upon personal dignity under Article 7(1) of the Statute, as violations of Articles 3 (laws or customs of war) and 5 (crimes against humanity) of the Statute. He is also, or alternatively, charged with superior responsibility for crimes committed by subordinates, pursuant to Article 7(3) of the Statute.

423. The Prosecution maintains that Prca} played an active role in Omarska camp, from 30 June to 6 August 1992, and that he replaced Kvo-ka as deputy commander. By contrast, the Defense asserts that the accused held no position of authority in the camp other than that of an ordinary policeman, that he had no responsibility for the detention and conditions of detention of persons incarcerated in the Omarska camp during the time he was actually present in the camp, which it insists was from 15 July to 6 August 1992, and that he personally committed no crimes during his time there.

### 2. Personal Background of Prca}

424. Prca} was born in Omarska on 18 July 1937 and is of Serb ethnicity. From 1960 to 1968, he was employed as a policeman in Pula, Zagreb, and Brioni. From 1 January 1969 to 31 December 1984, the date of his retirement, Prca} worked as a crime technician in Pore~ and Prijedor. One of his colleagues described a crime technician as a person who "technically processes events, whether it's a robbery, a murder, a rape, any kind of crime, to collect material evidence".<sup>690</sup> The expert witness for the Defense, Du{an Lakcevi}, stated that a crime technician is not "trained for the duty of providing security, patrol or constabulary activities, for interrogation of person, etc."<sup>691</sup>

425. After his retirement and until the outbreak of the armed conflict in the municipality of Prijedor, Prca} lived on his pension and farmed together with his wife and three children. On 29 April 1992, Prca} was mobilized to work in the police station of Omarska as a crime technician. He

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<sup>689</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and other non-Serbs detained in Omarska camp.

<sup>690</sup> Gostimir Modi}, T. 11488.

<sup>691</sup> Du{an Lak-evi} Report, p 9. The expert added that a crime technician is a three to four year secondary school graduate with a completed course for crime laboratory technicians and with the final exam passed in Crime Photography, Finger and Trace Prints. p 6.

was demobilized on 31 December 1995. Witness DE/1 described him as man who is calm and withdrawn.<sup>692</sup>

### 3. Prca}'s Arrival and the Duration of His Stay in Omarska Camp

426. The first point of contention is the date of Prca}'s arrival in Omarska camp. As noted above, the Trial Chamber decided in its Decision on Defense Motions for Acquittal that incidents occurring outside the time period the accused was working in the camp may not to be attributed to him.<sup>693</sup> While the Prosecution argues that Prca} took up his duties as deputy commander of the camp on 1 July 1992, the Defense insists that Prca} arrived in Omarska camp on 15 July 1992. The Defense further submits that the dates of the murders, beatings, or tortures allegedly committed during Prca}'s presence in the camp could not be established with certainty.<sup>694</sup>

427. Prca} gave a statement about the time of his arrival in the Omarska camp. The Trial Chamber finds Prca}'s account of the date of his arrival in the camp credible. Prca} explained in his interview with the Prosecution that he was carrying out his duties as a crime technician in the Omarska police station on 14 July 1992, when @eljko Meaki} came to him and told him that Simo Drlja-a had ordered Prca} to serve in the Omarska camp.<sup>695</sup> The same day, @eljko Meaki} drove him to the Omarska camp and showed him the room where he would be on duty.<sup>696</sup> In the room there were two typists, Nada Markovski and Nevenka Sikman, and radio transmission material. @eljko Meaki} explained to Prca} what his duties would be, beginning the following day. Prca} contends that he did not want to go to the camp but that Drlja-a threatened him. During trial he insisted that he went to the camp "under duress".<sup>697</sup> Some Defense witnesses testified to this effect. Prca}'s son, Ljubisa Prca}, testified that his father told him that Simo Drlja-a threatened him "with the life of his children and the burning of his house".<sup>698</sup> Obrad Popovi}, one of the porters at Omarska camp, testified that he saw Simo Drlja-a conversing with Prca}, who later told him that Drlja-a had threatened him.<sup>699</sup> The Trial Chamber notes, however, that Prca} never mentioned any threats when he was interviewed by the Prosecution. The Trial Chamber is not convinced that these threats took place and does not accept his assertion that he worked at the camp under duress.

428. While the Prosecution submits that Prca} took up his duties in Omarska camp around the first of July 1992, the Trial Chamber is persuaded by the number of Defense and Prosecution

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<sup>692</sup> Witness DE/1, T. 11626.

<sup>693</sup> Decision on Defense Motions for Acquittal, para. 61.

<sup>694</sup> Prca} Final Trial Brief, paras 373 *et seq.*

<sup>695</sup> Exhibit P 3/167, p 8.

<sup>696</sup> Exhibit P 3/167, p 9.

<sup>697</sup> T. 11341 (opening statement of Defense counsel for Prca}).

<sup>698</sup> Ljubisa Prca}, T. 11365.

<sup>699</sup> Obrad Popovi}, T. 11560-61.

witnesses who confirmed Prca}'s statement that he started his duties in mid-July 1992. Many of the witnesses said that Prca} arrived in the camp well after Kvo-ka was removed, around the second half of July 1992.<sup>700</sup>

429. There is no disagreement between the parties about the date of Prca}'s departure from the camp. The Defense and the Prosecution agree that Prca} left the camp on 6 August 1992. Prca} stated that on that day between fifteen to twenty buses came to the Omarska camp and that all but 175 detainees were transported, in several trips, to Manjaca or to Trnopolje. Prca} assisted in the transfer, which was one of his last tasks. Prca} then returned to the Omarska police station and remained there until the end of the mobilization.

430. The Trial Chamber has weighed the evidence before it and concludes that the evidence establishes Prca}'s presence in the Omarska camp lasted approximately twenty-two days, from 15 July to 6 August 1992.

#### 4. Prca}'s Duties and Position in the Camp

431. A second point of contention concerns the position held by Prca} in Omarska camp. According to the Prosecution, Prca} was deputy to the commander of the camp, @eljko Meaki}, and simply by virtue of this position of superior authority must be held responsible for acts of his subordinates with respect to the crimes charged in the Amended Indictment.

432. The Prosecution relies on the fact that Prca} was an experienced professional policeman asked by Simo Drljaca, the head of the Prijedor police station, to serve in Omarska camp and on several witness' testimonies to establish that Prca} was deputy commander of the Omarska camp after Kvo-ka's departure. However, the Defense contends that Prca} was not in a position of authority as he had no subordinates, and that he was not an active policeman at the time of the outbreak of the conflict in Prijedor but instead only a crime technician. Essentially, the Defense claims that Prca} was merely an administrative aide to @eljko Meaki} in Omarska camp and that no evidence established that Prca} was a deputy commander.<sup>701</sup>

433. In the Defense brief, Prca}'s tasks in the camp are described as follows. His job was: (1) to maintain communications from the office, room B5, with the radio and telephone and to transmit messages received; (2) to check, upon the order of @eljko Meakic or an investigator, in which room

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<sup>700</sup> See *e.g.*, Witness J, T. 4902; Witness K, T. 5045; Kerim Mesanovi}, T. 5243; Nusret Siva}, T. 3995; Obrad Popovi}, T. 11559-11560; Dragan Velaula, T. 11598.

<sup>701</sup> Prca} Pre-Trial Brief, para. 8, 9, 16.

a specific detainee was situated; (3) to record the date of new arrivals, information which he later delivered to the investigators; and (4) to read the list of the detainees who were to be transferred.<sup>702</sup>

434. In his interview with the Prosecution, Prca} recalled in particular two instances towards the end of the camp's existence where 35 women were to be transferred to Trnopolje and 125 men were to be exchanged with the Bosnian authorities. Prca} had to call out the names of these persons and order them into the buses.<sup>703</sup>

435. Many Prosecution witnesses supported Prca}'s description of his administrative duties in the camp and testified that they saw Prca} moving around the camp carrying lists. However, they also ascribed more responsibility or influence to Prca} than he acknowledged:

(a) Witness F testified that Prca} was seen walking around carrying papers, inside and outside the administration building, on the pista, or moving towards the white house.<sup>704</sup> She added that sometimes Prca} would tour the areas where the detainees were held, but most often he would just stay in room B5 in the administration building, where the radios were stored.<sup>705</sup> This room was referred to as the commander's room.

(b) Nusret Siva} testified similarly that he saw Prca} in August 1992 in room B5 or around the camp "carrying lists and sometimes reading names from those lists and sometimes giving them to the guards to read out names. People would be taken from Mujo's room, from the pista, or from the garage and would be lined up in front of the pista, then a kind of selection would take place. Some people would move from the garage to the hangar and the other way round".<sup>706</sup>

(c) Omer Me{an confirmed Nusret Siva}'s statement but declared that Prca} would act independently when he was calling out the names of detainees from his lists and make decisions related to the absence of detainees' names on lists.<sup>707</sup>

(d) Zlata Cikota saw Prca} in the camp "always handling some kind of papers, some lists. He didn't seem to do anything special. He didn't walk around the compound very often, not at least in the area where women were accommodated".<sup>708</sup>

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<sup>702</sup> Defense Final Trial Brief, para. 357.

<sup>703</sup> Exhibit P 3/167, pp 13-14.

<sup>704</sup> Witness F, T. 5362.

<sup>705</sup> Witness F, T. 5354-5355, 5362.

<sup>706</sup> Nusret Siva}, T. 3994-3995.

<sup>707</sup> Omer Me{an, T. 5279-5283. Omer Me{an could not identify Prca} in Court. Omer Me{an, T. 5292.

<sup>708</sup> Zlata Cikota, T. 3319-3320.

(e) Witness J testified that Prca} would read out names of detainees to go for interrogations and that Prca} did the same things as Kvo-ka. Witness J said Prca} worked in @eljko Meakic's office when @eljko Meaki} was absent, he carried lists, and gave instructions and assignments to the guards regarding lists of detainees.<sup>709</sup>

436. On the basis of the tasks performed by Prca} and his treatment by others working in the camp, many detainees assumed that Prca} held a position of authority in the Omarska camp:

(a) Nusret Siva} testified that guards controlled the process of detainee transfer inside the camp, and asked Prca} for instructions in case of problems during this process.<sup>710</sup> Based upon these observations, he concluded that Prca} was deputy commander of the camp. He stressed that Prca} approved the movement of detainees from one room to another and that all the problems that occurred in the second half of July and the beginning of August were addressed by Prca}.<sup>711</sup> He recalled that, on one occasion, Mujo wanted to bring a detainee named Duratovic from the white house to his room. Mujo got permission to move Duratovic after the guards received approval from Prca}.<sup>712</sup>

(b) Witness AN also concluded that Prca} was a deputy commander of the Omarska camp because he was in a police uniform, was often seen walking towards the administrative building, and he carried lists. Witness AN added that he learned from other detainees that Prca} was "deputy commander of the Omarska camp, that he was second in command after [replacing] commander Kvo-ka".<sup>713</sup>

(c) Sifeta Susi} also concluded that Prca} was deputy commander of the camp after Kvo-ka had left because Prca} was working in the "commander room" across the corridor from her room.<sup>714</sup>

(d) Both Azedin Oklop-i} and Witness B noticed that the guards treated Prca} with respect, as a commander, the same way they treated @eljko Meaki}, talking to him and then quietly going to their guard posts.<sup>715</sup>

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<sup>709</sup> Witness J, T. 4747 and 4903.

<sup>710</sup> Nusret Siva}, T. 3994.

<sup>711</sup> Nusret Siva}, T. 4119-4120.

<sup>712</sup> Nusret Siva}, T. 3995-3997. The detainee was Smail Duratovi}, who had been placed in a truck tyre and set afire, and consequently parts of his body were charred and he had burns on his face and arms.

<sup>713</sup> Witness AN, T. 4402-4403

<sup>714</sup> Sifeta Susi}, T. 2979, 3007-3009.

<sup>715</sup> Azedin Oklop-i}, T. 1758-1759; Witness B, T. 2356-2357.



(e) Witness K declared that Prca} had the same authority as Kvo-ka because Witness K saw Prca} giving assignments to guards and directing them within the camp. Witness K said Prca} carried lists.<sup>716</sup>

(f) Witness J saw Prca}, sometimes together with @eljko Meaki}, giving assignments to guards. Witness J also saw them together standing in the cafeteria, or going in the direction of the white house, the garage, or other buildings where detainees were kept.<sup>717</sup>

437. Some witnesses testified that they were told that Prca} was a commander or deputy commander in Omarska camp:

(a) One detainee referred to Prca} as the third commander of the camp.<sup>718</sup> Abdulah Brki}, Kerim Mesanovi}, and Omer Me{an said they heard from other detainees that Prca} was deputy commander.<sup>719</sup> Witnesses AT and U also testified that women detained in the camp told them that Prca} was deputy commander of the camp.<sup>720</sup> Witness U believed this information after observing the tasks performed by Prca}. He testified under cross-examination that "at the end of our stay in the camp, Mr. Prca} came with a list of women who were to go home and because of that, I concluded that he could be a warden or something of that kind".<sup>721</sup>

(b) Witness B, a woman detained in the Omarska camp, testified that on one occasion @eljko Meaki} said that he was the "commander of security" and that Prca} was the commander of the camp. Witness B added that the camp personnel and guards treated Prca} in the same way they did Kvo-ka and @eljko Meaki}. Prca} roamed the camp, spoke to the shift leaders and guards, and was dressed in a police uniform.<sup>722</sup>

(c) Witness F testified that Zlata Cikota told her Prca} was deputy commander.<sup>723</sup> However, the Trial Chamber notes that in her own testimony Zlata Cikota did not state that Prca} was deputy commander of the camp. She said only that she saw Prca} and @eljko Meaki} going for a beer and that they had a good relationship.<sup>724</sup> She also testified that she would not have survived the camp

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<sup>716</sup> Witness K, T. 4923, 4980; 5046-5049.

<sup>717</sup> Witness J, T. 4906; *see also* Witness J, T. 4747 and 4903; 4905-4906.

<sup>718</sup> Edin Mrkalj, T. 2822.

<sup>719</sup> Abdulah Brki}, T. 4506-4507; Kerim Mesanovi}, T. 5180-5181; Omer Me{an, T. 5279.

<sup>720</sup> Witness AT, T. 6069-6070; Witness U, T. 6208.

<sup>721</sup> Witness U, T. 6211. Most of the detainees were not sent home, however, but were transferred to Trnopolje.

<sup>722</sup> Witness B, T. 2356-2357.

<sup>723</sup> Witness F, T. 5360-5363.

<sup>724</sup> Zlata Cikota, T. 3319.

without the help of Prca}, whom she knew well,<sup>725</sup> and that he enabled her to see her husband who was also detained in Omarska.<sup>726</sup> She “noticed” that Prca} had influence in the camp.<sup>727</sup>

438. The evidence adduced at trial demonstrates convincingly that Prca} had some influence in the camp. The fact that Prca} was a former professional policeman coupled with the nature of the tasks he performed in the camp, which involved contacts with guards and investigators and handling of lists of detainees, led detainees to perceive that Prca} held a position of authority in Omarska camp. Prca} accomplished his duties diligently. He on occasion took down particulars of newly arrived detainees,<sup>728</sup> solved problems related to the accommodation of detainees or the absence of their names on lists, took care of the transfer of detainees from one camp to the other or from one place in the camp to another, either calling detainees out himself or asking guards to do so.

439. Considering the totality of the evidence, the Trial Chamber finds that the Prosecution has not presented sufficient evidence to establish beyond a reasonable doubt that Prca} held the position of deputy commander in the Omarska camp. Accordingly, the allegation that Prca} was deputy commander of the Omarska camp is not established. The Trial Chamber does however find that Prca} was an administrative aide to the commander of Omarska camp.

440. The Trial Chamber proceeds now to examine whether Prca}'s participation in the functioning of the camp was accompanied by knowledge of its criminal nature so that crimes committed in furtherance of the enterprise while he was working in the camp can be attributed to him.

##### 5. Prca}'s Knowledge of the Camp Conditions and Abusive Treatment During His Time in the Camp

441. The Prosecution asserts that Prca} knew about abuses of detainees because he was seen walking “freely around the Omarska camp in full view of piles of dead bodies and/or mistreatment of detainees on the pista”.<sup>729</sup> The Defense argues that the evidence offered to prove the Prosecution’s allegation is not reliable, and that the abuses did not occur during the time Prca} worked in the camp.<sup>730</sup>

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<sup>725</sup> Zlata Cikota, T, 3397.

<sup>726</sup> Zlata Cikota, T, 3322-3323.

<sup>727</sup> Zlata Cikota, T, 3316.

<sup>728</sup> Edin Karagi}, T, 12169-12171.

<sup>729</sup> Prosecution Final Trial Brief, para. 151.

<sup>730</sup> Prca} Final Trial Brief, paras 372 *et seq.*

442. On his own admission, Prca} said he noticed that the situation in the camp was bad. He stated in his interview with the Prosecution that on the first day of his arrival in the Omarska camp, "it was very hot, it was very oppressive, it was very humid, there was stench, the air was stinking, you could not stand anywhere around."<sup>731</sup> He added that when he got out of @eljko Meaki}'s car in front of the dining area of the administration building, he "immediately noticed ten-twelve meters away from the eating hall, in the grass, two dead bodies, men. I did not know who they were. They were bloated. Their complexions had turned blue. And there was again this terrible stench, you couldn't even approach. I couldn't see anything, any external injuries".<sup>732</sup> When Prca} asked @eljko Meaki} if the bodies could be removed, he answered that the bodies remained there upon the order of Simo Drlja-a.<sup>733</sup>

443. Witness J stressed that the conditions in the camp were so bad and the beatings so obvious that Prca} would have to have been aware of them. The witness testified that Prca} must have been able to hear the beatings in the interrogation rooms from his office on the same corridor as they could be heard loudly in the cafeteria downstairs.<sup>734</sup> Witness J also testified that from Prca}'s vantage point in the "commanders room", he could see the detainees' bruised and bloody after being beaten. She also said that dead bodies were often lying on the grass near the white house next to the fence or being loaded into trucks.<sup>735</sup> Nedzija Fazli} stated that when she arrived in Omarska camp on 23 July 1992, she counted twelve dead bodies lying on the grass near the white house.<sup>736</sup> These bodies were observed over a week after Prca} arrived in the camp to take up his duties.

444. According to Witnesses B and F, Prca} was usually present when buses of new detainees arrived and were beaten.<sup>737</sup> Witness F testified that on one such occasion, Prca} and @eljko Meaki} were walking behind a group of detainees who were being beaten, and they were carrying papers and behaving as if nothing was happening.<sup>738</sup> Witness F added that Prca} was often present when detainees were taken to the white house and the red house.<sup>739</sup> From the screams coming out of these buildings, it was obvious that detainees were being abused.<sup>740</sup>

445. Nusret Siva} testified that he saw Prca} in the glassed area of the eating hall on the day when Paspalj and Savi} brutally beat two detainees, Riza Had`ali} and Goran Kardum, on the pista.

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<sup>731</sup> Exhibit 3/167, p 9.

<sup>732</sup> Exhibit 3/167, pp 9-10.

<sup>733</sup> Exhibit 3/167, p 10.

<sup>734</sup> Witness J, T. 4764.

<sup>735</sup> Witness J, T, 4770, 4853.

<sup>736</sup> Nedzija Fazli}, T. 5092-5093.

<sup>737</sup> Witness B, T. 2361-2362; Witness F, T.5376.

<sup>738</sup> Witness F, T. 5376.

<sup>739</sup> Witness F, T, 5362, 5374-5376, 5424.

Nusret Siva} admitted that he could not see who was physically present during the beating because he was made to lie down on his stomach, so he could not be certain that Prca} actually watched the beating.<sup>741</sup> In addition, the Defense contends that the beating of Riza Had`ali} occurred on 12 July 1992, before Prca}'s arrival in the camp.<sup>742</sup> Nusret Siva} also described an incident when detainees had to pass a gauntlet of guards who beat them while Prca}, along with other camp personnel, stood in the glass area of the circular staircase laughing at what was going on.<sup>743</sup> The Defense points out, however, that, according to other testimony, this incident occurred on a day known among detainees as the Black Friday, which Witness B recalled as being the day of her birthday, a date prior to Prca}'s arrival in the camp.<sup>744</sup> However, it appears from the testimony that the witness did not indicate that the beatings of Riza Had`ali} and Goran Kardum occurred on the so-called "Black Friday". Nonetheless, noting that detainees were commonly beaten on more than one occasion, the Trial Chamber finds Nusret Siva}'s testimony credible with respect to the beating of Riza Had`ali} and Goran Kardum. However, it is not wholly convinced that Prca} viewed the event with laughter. There is no other similar evidence in the record of his actively enjoying the mistreatment of detainees and it appears out of character.

446. Prca} admitted that he was aware of the terrible living conditions of the detainees. He stated in particular that on a number of occasions he asked @eljko Meaki} to provide detainees with running water, to allow them to relieve themselves in the toilets as needed, and to provide chlorine for disinfecting the camp.<sup>745</sup>

447. The Trial Chamber also notes that Prca}'s professional background as a crime technician would have increased his sensitivity not only to traces of crimes committed in the camp, but also to the blatant criminality of the entire camp system. The expert witness, Dusan Lak-evi}, stated in his report that the job of a crime technician included investigating in order to detect, secure, and examine the traces of a crime and its perpetrator.<sup>746</sup>

448. While it is not clear that Prca} had knowledge of each and every form of abuse committed in the camp, he undoubtedly knew that a wide variety of crimes were being committed against detainees and that physical and mental violence was used to threaten and terrorize them.

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<sup>740</sup> Witness AI, T. 2155; Witness Y, T. 3632-3633; Witness AK, T. 2031-2033; Witness AJ, T. 1603-1605; Witness U, T. 6201-6203.

<sup>741</sup> Nusret Siva}, T. 4071-4074.

<sup>742</sup> Prca} Final Trial Brief, para. 162, p 75.

<sup>743</sup> Nusret Siva}, T. 4075.

<sup>744</sup> Prca} Final Trial Brief, para. 162, p 76.

<sup>745</sup> Exhibit P 3/167, p 10.

<sup>746</sup> Du{an Lak-evi} Report, p 6.

449. The Trial Chamber finds that Prca} was aware of the large scale nature of the abuses committed against detainees in the Omarska camp and that crimes alleged against Prca} in the Amended Indictment were committed during the time he worked in the camp. Prca} had personal knowledge of a criminal system of abusive treatment and conditions in the Omarska camp in which he worked.

450. The Trial Chamber considers now the Prosecution's allegation that Prca} was personally implicated in certain abuses committed in the Omarska camp.

#### 6. Prca}'s Personal Involvement in Abuses

451. The Prosecution relies on the testimony of several Prosecution witnesses to show that Prca} was directly involved in abuses committed in the camp. In contrast, Prca} contends that he did not participate or contribute in any way to the crimes committed in Omarska.<sup>747</sup>

452. Witness A and Witness F testified that women were called out at night by Prca} (among others) and that when they returned, they were usually crying and withdrawn.<sup>748</sup> Witnesses F said that Prca} regularly called out Zlata Cikota.<sup>749</sup> However, Witness F said that she thought that Prca} called out Zlata Cikota often because they knew each other well and he wanted to talk.<sup>750</sup> Zlata Cikota herself testified before the Court and did not mention any abuses by Prca}. Indeed, she said that she would not have survived the camp without Prca}'s assistance.<sup>751</sup>

453. Other witnesses attempted to trace the disappearance of detainees to Prca}'s reading of names from his lists. For instance, Witness J testified that when Prca} called out the name of detainees to leave the camp, some were never seen again.<sup>752</sup> Witness AN gave the example of Esad Sadikovi} who was called out by Prca} and "was never seen again".<sup>753</sup> Prca} addressed this allegation and explained in his interview with the Prosecution that Esad Sadikovi} was one of a group of people whom Prca} was instructed to gather together for purpose of prisoner exchange around the end of July 1992. Prca} claimed that he had no information on what actually happened to the detainees after they left Omarska camp,<sup>754</sup> but later conceded that he knew some detainees were transported to other camps.<sup>755</sup> Witness AT also offered another perspective regarding Prca}'s responsibility for the disappearances of detainees. She declared that some female detainees were

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<sup>747</sup> Prca} Final Trial Brief, paras 372 *et seq.*

<sup>748</sup> Witness A, T. 5487, 5564; Witness F, T. 5382-5383.

<sup>749</sup> Witness F, T. 5382-5383.

<sup>750</sup> Witness F, T. 5383.

<sup>751</sup> Zlata Cikota, T, 3397.

<sup>752</sup> Witness J, T. 4744-4745.

<sup>753</sup> Witness AN, T.4404.

<sup>754</sup> *But see* Exhibit P 3/167, pp 14-15 (indicating that Prca} knew detainees were transported to Manja-c and Trnopolje camps).

left behind in the Omarska camp because Prca} did *not* call them out for transfer to Trnopolje and they were never seen alive again.<sup>756</sup>

454. Prca}, on the other hand, emphasized that he assisted some detainees in the camp. For instance, Prca} stated that he brought some clothes to Zlata Cikota and her husband, Sead, and to another detainee Zumra Mehmedagi}. According to Prca}, he brought medicine to detainee Omer Kerenovi}, whom he knew from before the war as a judge from Prijedor. According to Zlata Cikota, he also delivered food to Pero Josi}.<sup>757</sup> Finally, Prca} recalled one instance where he intervened to protect two detainees. On this occasion, Prca} was preparing a list of newly arrived detainees when he saw guards beating two men he knew well because they were the sons of one of his friends, Vahid Karagi}. Prca} claims that he made the beating stop by threatening the guards with his pistol.<sup>758</sup> However, Edin Karagi}, one of the victims concerned, related the incident differently. He testified that he was arrested with his brother at his home in Tukovi and transferred to the Omarska camp on 18 July 1992. Upon their arrival, he, his brother and a man named Granov were made to lean against a wall while the guards beat them. Prca} came along and took their particulars and behaved as if nothing was happening.<sup>759</sup> The Trial Chamber finds that the version related by the witness is more credible than the version related by Prca}. Other witnesses also testified that Prca} would behave as if nothing unusual was happening while detainees were being abused in his presence.<sup>760</sup>

455. According to the Defense, the only testimony charging Prca} with direct involvement in any crime was given by Mirsad Kugi}, a rebuttal Prosecution witness, who testified that Prca} called him out of the "glass house" three or four days after his arrival in the camp, around 22 June 1992, to ask him for money in exchange for his release. Mirsad Kugi} testified that Prca} called him out a second time, about seven days later, for the same purpose.<sup>761</sup> The Defense contends that this witness is not credible because he alleges that these incidents occurred in June and in early July, periods when Prca} was not present in the Omarska camp. In addition, the Defense asserts that this witness testified that Abdulah Brki} was beaten almost to death, a statement which contradicts what Brki} said himself at trial. The Trial Chamber notes that Brki} did testify that he was beaten in the white

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<sup>755</sup> Exhibit P 3/167, pp 14-15.

<sup>756</sup> Witness AT, T. 6101.

<sup>757</sup> Exhibit P 3/167, pp 11-12; Exhibit 5/23 (letter from Zlata Cikota).

<sup>758</sup> Exhibit P 3/167, pp 65-66.

<sup>759</sup> Edin Karagi}, T. 12169-12171.

<sup>760</sup> Omer Me{an said that Prca} "seemed a bit formal and did not seem to pay much attention to his surroundings". T. 5329, T.5279-5280. Witness F said that Prca} behaved as if nothing was happening during an abuse committed in front of him. T. 5376.

<sup>761</sup> Mirsad Kurgi}, T. 12096-12102.

house.<sup>762</sup> However, it notes that the dates show an uncertainty as to whether Prca} was present when the beating occurred. The Trial Chamber consequently is unable to accept this testimony with respect to Prca}'s involvement in the extortion.

456. The Trial Chamber finds that there is not sufficient evidence establishing beyond a reasonable doubt that Prca} was directly involved in committing specific crimes against detainees.

457. The Trial Chamber finds that Prca} was aware of the crimes of extreme physical and mental violence routinely inflicted upon the non-Serbs detained in Omarska and of the discriminatory context in which these crimes occurred. He was also aware of the abusive conditions of detention. Despite this knowledge, Prca} continued to work for at least twenty-two days in the camp, where he performed the tasks required of him efficiently, effectively, and indifferently.

458. The Trial Chamber considers now whether Prca}'s participation in the joint criminal enterprise was significant enough to incur liability as a participant in the joint criminal enterprise and if so, whether his continued participation in the functioning of Omarska despite his knowledge of the crimes make him a co-perpetrator or an aider and abettor of the enterprise.

7. Was Prca}'s Participation in Omarska Camp, a Joint Criminal Enterprise, Significant Enough to Incur Criminal Responsibility?

459. Prca} was the administrative aide to the commander of the camp. He was also a retired policeman and crime technician. As a person treated with authority and influence, Prca} moved unhindered throughout the camp, carrying lists of detainees who were to be called out for interrogation, transfer, exchange, or release.

460. The Trial Chamber has concluded that there is no doubt that despite Prca}'s awareness of the ongoing system of abuse pervading the camp, Prca} performed his duties with deliberate care and diligence. The Trial Chamber is struck by the number of witnesses who described Prca}'s participation in the functioning of the camp as calmly efficient and his reaction to abuses in his presence as callously indifferent. Some witnesses recalled that Prca} would independently resolve problems related to lists of detainees, without resort to a higher authority. The role Prca} played in the functioning of the camp provided a valuable service, and his administrative duties constituted one of the many integral cogs in the wheel of a system of gross mistreatment.

461. In addition, the Trial Chamber is convinced that Prca}'s participation in the functioning of the camp as an administrative aide, due to the nature of his tasks and his experience as a policeman

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<sup>762</sup> Abdulah Brki}, T. 4489-4491.

and crime technician, gave him some influence over guards. Although he was not responsible for the behavior of the guards or the interrogators, he was still responsible for managing the movement of detainees within the camp, under the orders of the investigators and @eljko Meaki}, and with the assistance of all guards. Many whose names he called out never returned alive.

462. Prca} may have been in a position to oppose the mistreatment he witnessed of detainees who were moved around the camp according to the lists he managed. However, he remained impassive when crimes were committed in his presence, and his silence can be regarded as giving moral support or approval to the perpetrators.

463. The Trial Chamber finds that Prca}'s knowing participation in the camp was significant, as his acts and omissions substantially contributed to assisting and facilitating the joint criminal enterprise to persecute the non-Serb population of Prijedor who were detained in Omarska camp.

464. The Trial Chamber finds beyond a reasonable doubt that Prca} was aware of the context of persecution and ethnic conflict prevalent in the camp, and that he knew that his work in the camp facilitated the crimes committed therein. Prca} is responsible for participating in the persecution committed in Omarska camp, which was a joint criminal enterprise.

#### 8. Criminal Responsibility of Draglojub Prca}

465. As noted above, Prca} is charged under Article 7(1) of the Statute with individual responsibility for participating in the war crimes and crimes against humanity alleged in the Amended Indictment. These charges are brought as "committing, instigating, or otherwise aiding and abetting" the crimes or as participating in a joint criminal enterprise. Prca} is also or alternatively charged under Article 7(3) of the Statute with superior responsibility for acts allegedly committed by subordinates that he failed to prevent, halt, or punish.

##### (a) Superior Responsibility Under Article 7(3) of the Statute

466. The Trial Chamber has found that Prca} exercised authority in Omarska camp. However, the evidence does not prove that he held a superior-subordinate relationship with those perpetrating crimes, exercised effective control over any who committed crimes, or that he had clear authority to prevent or punish crimes.

467. The Trial Chamber holds that Prca} does not incur superior responsibility pursuant to Article 7(3) of the Statute.



(b) The Individual Responsibility of Prca} Under 7(1) for Crimes Proved at Trial

468. The Trial Chamber has already found the following in regards to Prca}:

(a) that he was aware of the abusive treatment and conditions endured by the non-Serbs detained in Omarska prison camp;

(b) that he continued working in the camp for approximately 22 days;

(c) that the crimes alleged against Prca} in the Amended Indictment were committed in Omarska during the time that he was employed in the camp;<sup>763</sup>

(d) that Prca}'s participation as an administrative aide to the camp commander in the functioning of the camp was significant, making him liable as a participant in the joint criminal enterprise of Omarska camp; and

(e) that Prca} was aware of the persecutory nature of the crimes committed against non-Serbs detained in the camp and, based upon his knowing and substantial participation in the system of persecution pervading Omarska camp, Prca} had the intent to discriminate against the non-Serbs detained in the camp.

469. Prca} was in the camp for over three weeks during which time his position and administrative functions contributed significantly to furthering the efforts of Omarska camp, rendering him liable as a co-perpetrator of the joint criminal enterprise.

470. For the reasons set forth previously, in sum, the Trial Chamber finds Prca} guilty of co-perpetrating the following crimes as part of the joint criminal enterprise: persecution (count 1) under Article 5 of the Statute;<sup>764</sup> and murder (count 5) and torture (count 9) under Article 3 of the Statute.

471. The Trial Chamber proceeds now to examine whether the accused Milojica Kos participated in the joint criminal enterprise and, if so, if his participation was significant enough to incur liability for participating in that enterprise, and whether his acts or omissions incur criminal responsibility for "committing, instigating, or aiding and abetting" crimes alleged in the Amended Indictment.

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<sup>763</sup> See, e.g., evidence of torture, T. 5375-5376; evidence of murder, T. 3350-3351; evidence of sexual violence, T. 6228-6230. These crimes occurred during the time that Prca} worked in the camp.

<sup>764</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and other non-Serbs detained in Omarska camp.

## C. MILOJICA KOS

### 1. Introduction

472. Milojica Kos is charged with individual responsibility in counts 1-3, 4-5, and 8-10 of the Amended Indictment as a participant in persecution,<sup>765</sup> murder, torture, inhumane acts, cruel treatment, and outrages upon personal dignity under Article 7(1) of the Statute, as violations of Articles 3 (laws or customs of war) and 5 (crimes against humanity) of the Statute. He is also or alternatively charged with superior responsibility for crimes committed by subordinates, pursuant to Article 7(3) of the Statute.

473. The Prosecution alleges that Kos played an active role in the Omarska camp throughout its existence, as a shift leader of guards. By contrast, the Defense case is based on the premise that the accused held no position of authority in the camp other than that of an ordinary guard.

### 2. Personal Background of Kos

474. Kos was born on 1 April 1963 in Lamovita, a village two kilometers from Omarska. He is of Serb ethnicity. He attended secondary school for catering in 1981 and worked thereafter as a waiter until 6 May 1992, the date he was mobilized to work in the reserve forces of the Omarska police. From 6 May to 8 November 1992, which includes the time period covered in the Amended Indictment, Kos worked as a newly recruited and untrained reserve policeman.<sup>766</sup> Kos' sister described him as a quiet and composed man, not quarrelsome, always willing to help other people and not interested in politics.<sup>767</sup>

### 3. Kos' Arrival and the Duration of His Stay in Omarska Camp

475. The Prosecution submits that Kos took up his duties in the Omarska camp at the end of May 1992 when the camp opened, and he left his duties at the end of August 1992, when the camp closed.<sup>768</sup> The Defense asserts that Kos worked in the camp "for approximately two months".<sup>769</sup> Kvo-ka testified that three days after the camp opened 28 May 1992, @eljko Meaki} consulted him about the appointment of Kos to serve as a guard shift leader in Omarska camp.<sup>770</sup> It appears to the

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<sup>765</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and other non-Serbs detained in Omarska camp.

<sup>766</sup> In 1993, he attended a police-training course for junior police recruits in Banja Luka and became then a junior policeman, with no rank. Exhibit D5/2.

<sup>767</sup> Nada ^u}i}, T. 8440-8442.

<sup>768</sup> Prosecution Final Trial Brief, para. 262.

<sup>769</sup> Kos Final Trial Brief, p 75.

<sup>770</sup> Miroslav Kvo-ka, T. 8156, T. 969-970.

Trial Chamber that Kos took up his duties very shortly after the camp opened. A large number of detainees were expected before the end of May and Simo Drljaca ordered camp security to be organized. The Trial Chamber previously noted that all but 175 detainees left Omarska camp on 6 August 1992, although the camp was not officially closed until the end of August 1992. The Trial Chamber will, in the absence of clear evidence supporting the Prosecution's assertions that Kos remained in the camp after August 6, accept the time frame asserted by the accused.

476. The Trial Chamber finds that Kos' stay in Omarska camp lasted from approximately 31 May until 6 August 1992.

#### 4. Kos' Duties and Position in the Omarska Camp

477. According to the Prosecution, Kos held a position of authority and influence in the camp as a guard shift leader and was in a position of superior authority to guards on his shift.<sup>771</sup> The Prosecution relies on the testimony of detainees to support the contention that he was a shift leader, as well as on Kvo-ka's testimony that Kos was appointed by @eljko Meaki} to this position. However, the Defense contends that Kos was not in a position of authority, he was a newly recruited untrained reserve policeman with no ability to issue orders to or to punish other guards.<sup>772</sup>

478. The Trial Chamber previously noted that in his interview with the Office of the Prosecutor, Kvo-ka stated that Kos was appointed by @eljko Meaki} as a guard shift leader, a position of authority in relation to other guards. During his testimony in Court, Kvo-ka varied his story, asserting that there were no guard shift leaders in the camp.<sup>773</sup> He testified that @eljko Meaki} ordered Kos to staff a telephone and radio station, to note down whether members of a shift reported to work, to be a liaison between guards and @eljko Meaki} and, when @eljko Meaki} was not present, to inform his superiors about anything they needed to know. None of the witnesses corroborated Kvo-ka's description of Kos' specific duties. Kvo-ka also testified that Kos performed his duties on one of the three guards' shifts.<sup>774</sup>

479. The Defense relied on several witnesses to corroborate Kvo-ka's testimony. Kvo-ka testified that Kos had no superior authority in relation to the personnel, guards, or others in Omarska camp,<sup>775</sup> but worked solely as a guard.<sup>776</sup>

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<sup>771</sup> Prosecution Final Trial Brief, para. 48.

<sup>772</sup> Kos Final Trial Brief, pp 27-28.

<sup>773</sup> Miroslav Kvo-ka, T. 8155.

<sup>774</sup> Miroslav Kvo-ka, T. 930-933.

<sup>775</sup> Miroslav Kvo-ka, T. 8012; Dragan Popovi}, T. 7697.

480. A number of witnesses testified that Kos was often in the commander room, that he held a position of superior authority, was assigned to give instructions to guards and was in a position to prevent abuses against detainees.

481. Edin Mrkalj for instance testified that Kos was one of the guard shift leaders.<sup>777</sup> Kerim Mesanovi} concluded that Kos was a guard shift leader because @eljko Meaki} told him “not to worry, that (he) was now safe” and that, if he needed something, he should talk to Kvo-ka, Radi}, Kos and Ckalja.<sup>778</sup> According to Witness J, Kos often sat in the same administration office as the commander and deputy commander and, unlike the other guards, he did not have fixed posts but circulated around the camp. Additionally, guards reported to him for duty. She added that only one of the shift leaders would be present in that office at any one time.<sup>779</sup> Zlata Cikota, who had frequent contact with Kos, also thought that Kos was a shift leader, partially because he ordered her to clean the toilets.<sup>780</sup>

482. Other witnesses stated that Kos gave directions to guards on his shift:

(a) Nusret Siva} saw guards coming to see Kos for instruction. He added that “Krlle” appeared to be coordinating things and giving instructions to the guards. If a detainee wanted to go somewhere, he would ask permission from a guard, and the guard would say they had to ask the shift leader. The guards would then talk to whoever was in charge of the shift: Kos, Radi}, or Ckalja.<sup>781</sup>

(b) Omer Me{an also thought that Kos was a shift leader because of the way he behaved, giving assignments to the guards and moving freely about the camp.<sup>782</sup>

(c) Kerim Mesanovi} testified that he heard Kos issue orders to guards in the camp.<sup>783</sup>

(d) Witness J described the shift changeovers. She testified that in-coming guards arrived by bus in a group and the out-going guards would usually leave on the same bus. Sometimes this took place in front of the entrance to the administration building, sometimes on the pista and sometimes in the reception area of the administration office.<sup>784</sup> She saw the guards go upstairs in the administration

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<sup>776</sup> Witness DE/1, T. 11628; Milenko Jasni}, T. 11539-11540.

<sup>777</sup> Edin Mrkalj, T. 2823.

<sup>778</sup> Kerim Mesanovi}, T. 5178-5181.

<sup>779</sup> Witness J, T. 4745-47, 4815 (indicating that Kos was a shift commander); *but see* Witness J, T.4812 (recording the cross-examination of Witness J).

<sup>780</sup> Zlata Cikota, T. 3325-3326.

building and then come back down. The guards talked about reporting to the commander or the deputy prior to the beginning or ending of a shift.<sup>785</sup>

(e) Sabit Murcehaji} said that the inspectors would always call Krle, who issued orders to the guards.<sup>786</sup>

(f) Nihad Haski} too assumed Kos was a shift leader. He saw Kos moving around the camp: to the hangar, administration building, cafeteria, and white house, talking to guards and seemingly issuing orders to them.<sup>787</sup>

483. Other witnesses testified about instances when Kos exercised control over guards to prevent mistreatment of detainees:

(a) Witness AK recalled one instance when Asef Kapetanovi} was called out in the evening and told to take his things. He feared that he would be killed, but Dr. Esad Sadikovi} said “[i]t’s Krle’s shift. I’ll go to see him and ask.” Dr. Sadikovi} spoke with Kos directly about Kapetanovi} and reported to Witness AK that “[e]verything is all right, stay where you are.”<sup>788</sup>

(b) [efik Zjaki} testified that on another occasion, Kos, while lining detainees in the dining hall, told Mujo Crnali} not to worry because there would be no more beatings that day. Subsequently, there were no more beatings.<sup>789</sup>

(c) Sabit Murcehaji} testified that Kos prevented a man from repeatedly shooting a gun at Bajro Cirkin’s brother.<sup>790</sup>

484. On one occasion, Kos’ attempt at intervention came too late. Kerim Mesanovi} testified that, on 27 July 1992, Kos came to him and asked him about the whereabouts of Dr. Begi}, who according to the witness had helped Kos’ mother. When the witness told him that Dr. Begi} had been taken in the direction of the white house during the previous shift, Kos cursed.<sup>791</sup>

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<sup>781</sup> Nusret Siva}, T.3988.

<sup>782</sup> Omer Me{an, T. 5260-5261.

<sup>783</sup> Kerim Mesanovi}, T. 5190.

<sup>784</sup> Witness J, T. 4905, 4922.

<sup>785</sup> Witness J, T. 4920-4921.

<sup>786</sup> Sabit Murcehaji}, T. 4182.

<sup>787</sup> Nihad Haski}, T. 6272-6273.

<sup>788</sup> Witness AK, T. 2080-2081.

<sup>789</sup> [efik Zjaki}, T. 5994.

<sup>790</sup> Sabit Murcehaji}. T. 4178-4179.

<sup>791</sup> Kerim Mesanovi}, T. 5181-5182.

485. The Trial Chamber finds that Kos held the position of a guard shift leader in Omarska camp. Following his appointment by Meaki} as guard shift leader, Kos performed his duties adequately, giving instructions to guards and orders to female detainees assigned to work in the camp. On rare occasions he prevented guards from committing abuses against detainees. He thus held a position of authority and influence over guards on his shift.

#### 5. Kos' Knowledge of Camp Conditions and Abusive Treatment During His Time in the Camp

486. The Trial Chamber has already concluded that it would have been impossible for anyone present regularly in the camp to be unaware of the criminal nature of the enterprise. Kos worked as a guard shift leader in the camp for almost the entire time of the camp's existence. The time and position alone would be a sufficient basis on which to infer knowledge of the criminal nature of the enterprise.

487. Nonetheless, the Trial Chamber notes evidence of Kos' direct knowledge of the abusive treatment and conditions in Omarska. Witness J saw the accused walking by dead bodies lying on the grass near the white house.<sup>792</sup> According to other witnesses, many crimes, including shootings, beatings, and looting of detainees' property, were committed during Kos' shift. Nusret Siva} stated that the killing of Asmir Crnali}, nicknames "Vico", occurred on Kos' shift.<sup>793</sup> Kerim Mesanovi} testified that Kos and Meaki} were present, sitting at the left corner of the eating hall, when Asmir Crnali} was shot.<sup>794</sup> Azedin Oklop-i} testified that he was beaten in the camp by some of the guards on Kos' shift.<sup>795</sup> Witness AJ heard that Kos' shift was not as bad as the others, despite the fact that he had been beaten by a guard on that shift.<sup>796</sup> Regardless of whether the crimes occurred in Kos' presence or on his shift, it occurred during the time Kos was working in the camp.

488. The Prosecution did not offer evidence on Kos' knowledge of every alleged crime that occurred in the camp. Nevertheless he undoubtedly knew that a wide variety of crimes were being committed and that violence was habitually used to threaten and terrorize the detainees in the camp.

489. The Trial Chamber finds that Kos was aware of the abusive treatment and conditions prevailing in Omarska camp, and that he was undoubtedly aware that crimes of extreme physical and mental violence were routinely inflicted upon the non-Serbs imprisoned in Omarska, and he was aware as well of the context of discrimination in which the crimes were committed. Despite

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<sup>792</sup> Witness J, T. 4770-4771.

<sup>793</sup> Nusret Siva}, T. 4094.

<sup>794</sup> Kerim Mesanovi}, T. 5192-5193.

<sup>795</sup> Azedin Oklop-i}, T. 1752-1753.

<sup>796</sup> Witness AJ, T. 1594-1596.

this knowledge, he continued to work in the camp for over two months, where he performed the tasks required of him without complaint or hesitation.

## 6. Kos' Personal and Direct Involvement in Abuses

490. [efik Zjaki} recounted that, on one occasion, detainees were either beaten or spared as they left the eating hall depending on the orders given to the guards by Kos.<sup>797</sup> Omer Me{an testified that, while he was detained on the pista, he observed on several occasions during mealtimes that Kos beat detainees "with a stick, which could be attached to the arm, something like a cable".<sup>798</sup> Witness AQ also testified that around 27 July 1992 Kos beat detainees as they went into the eating hall.<sup>799</sup> Later as he exited the eating hall, and in the presence of Kos, Witness AQ was beaten by a guard with a whip that had at the end of it a ball with spikes on it.<sup>800</sup> According to the Prosecution, while Kos did not participate physically in the beating of Witness AQ, his position of superior authority and his participation in the first beating provoked the subsequent abuse suffered by Witness AQ as he left the building.<sup>801</sup>

491. In general, the Prosecution submits that the accused is guilty of the crimes charged in the Amended Indictment because of his approving presence as a superior officer and his failure to intervene to stop abuses committed by guards.<sup>802</sup> Witness B testified that Kos was present on the pista when newly-arrived detainees were beaten by guards, but would not interfere to stop the abuses.<sup>803</sup> Kerim Mesanovi} testified that in most cases, new detainees would be met by the shift leader who would stand by as guards beat the new arrivals.<sup>804</sup> Witness F testified that she heard that Kos was a shift leader and saw that he was present when detainees were beaten.<sup>805</sup> Kerim Mesanovi} testified that when Crnali} was shot at by a guard,<sup>806</sup> Kos was present with Meaki}, sitting in the left corner of the eating hall under an awning.<sup>807</sup>

492. By contrast, the Defense submits that evidence given by witnesses regarding Kos' involvement in beatings is not reliable when viewed in the light of evidence given by other witnesses who were in a position to observe the same events and who did not testify about Kos

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<sup>797</sup> [efik Zjaki}, T.5992-5994.

<sup>798</sup> Omer Me{an, T. 5271-5273.

<sup>799</sup> Witness AQ, T. 5694-5699.

<sup>800</sup> Witness AQ, T. 5695-5696.

<sup>801</sup> Prosecution Final Trial Brief, para. 66.

<sup>802</sup> Prosecution Final Trial Brief, paras 76 *et seq.*

<sup>803</sup> Witness B, T. 2359-2362.

<sup>804</sup> Kerim Mesanovi}, T. 5189.

<sup>805</sup> Witness F, T. 5363-5366.

<sup>806</sup> Kerim Mesanovi}, T. 5243.

<sup>807</sup> Kerim Mesanovi}, T. 5192-5193.

hitting anyone or being present during a beating.<sup>808</sup> However, the Trial Chamber does not find this contention compelling. While there were indeed a number of witnesses who testified that they never saw Kos actually perpetrating or present during an abuse, in such a large camp it is entirely possible that one detainee observed an incident that others did not. The Trial Chamber heard a great number of witnesses testifying about many different incidents in the camp. Whether a witness mentioned particular guards or shift leaders often depended on what specific question she was asked or what the Prosecution or Defense was focused upon in that witness' testimony.

493. Several witnesses implicated Kos in extorting money from detainees between the 23<sup>rd</sup> of June and the 1<sup>st</sup> of July 1992.<sup>809</sup> Nusret Siva}, who was held in the garage, testified that looting of detainees' property occurred every night, implicating guards of all shifts.<sup>810</sup> Sabit Murcehaji} testified that one night during one of Kos' shift, Muhamed Cehaji} was called out by a group of guards and beaten. He added that when Muhamed Cehaji} re-entered the garage, he stated that he had to give German Marks to the guards who beat him in order to prevent them from killing him, and that Kos was among the guards demanding money.<sup>811</sup> Nusret Siva} corroborated the main features of this story. He testified that he was in the garage when Muhamed Cehaji} was called out by @eljko Marmat several times. Muhamed Cehaji} announced to the detainees when he re-entered the garage that he was to collect German Marks and give them to the guards outside to avoid being killed. Nusret Siva} observed Dr. Mahmuljin giving money to Muhamed Cehaji}, who then left the garage to give the money to the guards. Nusret Siva} again heard blows outside. When Muhamed Cehaji} re-entered the garage a second time, he fell on the ground and was assisted by detainees near the door of the garage.<sup>812</sup>

494. The Defense objects to the reliability of Sabit Murcehaji}'s account since two witnesses testified about it but only one of them implicated Kos. The Defense submits that the account of Sahib Murcehajic, who said that Kos was among the guards asking for money outside the garage, is based on hearsay, on what the victim told him, whereas the account of Nusret Siva} is direct evidence and should be preferred over hearsay evidence.<sup>813</sup> The Trial Chamber notes however that neither of the two witnesses saw what happened outside the garage. While both witnesses, Nusret Siva} and Sahib Murcehaji}, testified about what they observed, Sahib Murcehaji} testified in addition about what he was told by the victim. The accounts of the witnesses are in no way

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<sup>808</sup> Kos Final Trial Brief, pp 117-118.

<sup>809</sup> Nusret Siva} was held in the garage for seven days. T. 3979. Sabit Murcehaji} was held there from mid June to 1 or 2 July 1992, T. 4164-4166.

<sup>810</sup> Nusret Siva}, T. 3981.

<sup>811</sup> Sabit Murcehaji}, T. 4188. Sabit Mur-ehaji} also said Muhamed Cehaji} said that the guards who beat were all under the influence of alcohol. Sabit Murcehaji}, T. 4188.

<sup>812</sup> Nusret Siva}, T. 3979-3981.



contradictory. One witness simply provided more information than the other regarding the identity of the guards asking for money from the detainee. The question is therefore not whether the Trial Chamber admits hearsay evidence over direct evidence but simply whether the testimony of Sahib Murcehaji} is credible. The Trial Chamber finds this witness credible and accepts his testimony.

495. Nusret Siva} testified that on his arrival in the Omarska camp, after detainees climbed off the bus, guards shoved them towards the wall. He stated: "They first ordered us to take off our shoelaces, our belts, to take out all valuables from our pockets". Nusret Siva} described further how Kos addressed Safet Ramadanovi}, a private caterer, who was standing next to him and who had taken out some money, and who reported that "the chief whose name I learned later on as being Krle, he said to him, "Cifut, you haven't brought us enough money. You will have to bring more to us. We have our methods.""<sup>814</sup>

496. The Trial Chamber finds that the evidence establishes beyond reasonable doubt that Kos was directly and personally involved in beatings of detainees around mid-July 1992. It also finds that Kos was involved in the extortion of detainees and stealing money from detainees in Omarska camp, which in this context can be characterized as part of the harassment inflicted upon detainees in the camp and thus a part of the persecutory campaign.

7. Was Kos' Participation in Omarska Camp, a Joint Criminal Enterprise, Significant Enough to Incur Criminal Responsibility?

497. Kos was a guard shift leader in Omarska camp, a joint criminal enterprise, and he remained in this position for almost the entire period of the camp's existence. As a guard shift leader, Kos was in a position of authority over guards on his shift. There was substantial evidence presented that the guards on Kos' shift beat detainees, sometimes in his presence, and he not only failed to object, but participated on occasion. In the chain of command of the police security forces, guard shift leaders ranked third after the commander and deputy commander of the camp. Maintaining the guard station and supervising the guards were crucial positions in the camp, positions afforded to only three individuals who were each responsible for the guards on one of the three shifts. The guard shift leader position was integral to the efficient and effective functioning of the camp.

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<sup>813</sup> Kos Final Trial Brief, pp123-124.

<sup>814</sup> Nusret Siva}, T.3973.

498. Kos faithfully performed his responsibilities as a guard shift leader. Evidence discloses that Kos was in a position to assist, direct, and supervise guards on his shift. Kos was also in a position to assist detainees and to prevent the abuse of detainees during his shift. Some witnesses testified that Kos' shift was relatively better than Radi's shift, as there were fewer abuses, although plenty of abuses still occurred.

499. The Trial Chamber has found that Kos was well aware of the atrocious conditions in the camp. Kos' intent to further the joint criminal enterprise can be inferred from his continued and extensive presence as a guard shift leader in the camp, as well as his personal and direct implication in crimes of violence, harassment, and intimidation committed against detainees.

500. The Trial Chamber finds that Kos' contribution to the maintenance and functioning of Omarska camp as a guard shift leader was substantial. It further finds that he knowingly and intentionally contributed to the furtherance of the joint criminal enterprise.

#### 8. Criminal Responsibility of Milošević

501. As noted above, Kos is charged under Article 7(1) of the Statute with individual responsibility for participating in the war crimes and crimes against humanity alleged in the Amended Indictment. These charges are brought as "committing, instigating, or otherwise aiding and abetting" the criminal enterprise or for participating in the joint criminal enterprise. Kos is also or alternatively charged under Article 7(3) of the Statute with superior responsibility for acts allegedly committed by subordinates that he failed to prevent, halt, or punish.

##### (a) Superior Responsibility Under Article 7(3) of the Statute

502. The Trial Chamber has found that Kos exercised authority over guards on his shift. However, the Trial Chamber was not satisfied that sufficient proof was provided demonstrating that Kos exercised the necessary degree of effective control over those guards who were shown to have committed specific crimes, or that he had clear authority to prevent or punish crimes committed by his subordinates in the camp. The Trial Chamber holds that Kos does not incur superior responsibility pursuant to Article 7(3) of the Statute.

##### (b) The Individual Responsibility of Kos Under 7(1) for Crimes Proved at Trial.

503. The Trial Chamber has already found the following in regards to Kos:

- (a) that he was aware of the abusive treatment and conditions endured by the non-Serbs detained in Omarska prison camp;
- (b) that he continued working in the camp for well over 2 months;
- (c) that the crimes alleged against Kos in the Amended Indictment were committed in Omarska during the time that he was employed in the camp;<sup>815</sup>
- (d) that his participation as a guard shift leader played a crucial role in the efficient and effective functioning of the camp and his participation was significant, making him liable as a participant in the joint criminal enterprise of Omarska camp;
- (e) that he incurred individual responsibility for beating and harassment of detainees in the camp through his active participation or silent approval of the crimes committed in his presence or by guards on his shift; and
- (f) that he was aware of the persecutory nature of the crimes committed against non-Serbs detained in the camp and, based upon his knowing and substantial participation in the system of persecution pervading Omarska camp, he had the intent to discriminate against the non-Serbs detained in the camp.

504. Due to the fact that Kos played a key role in the functioning of the camp as a guard shift leader, he remained in the camp for almost its entire existence, and he personally exploited the vulnerable position of the detainees in the camp, the Trial Chamber finds Kos was a co-perpetrator of the crimes committed in Omarska camp. In sum, the Trial Chamber finds Kos guilty as a co-perpetrator of the following crimes committed as part of the joint criminal enterprise: persecution (count 1)<sup>816</sup> under Article 5 of the Statute; and murder (count 5) and torture (count 9) under Article 3 of the Statute.

505. The Trial Chamber proceeds now to examine whether the accused Mla|o Radi} participated in the joint criminal enterprise and, if so, if his participation was significant enough to incur liability and whether his acts or omissions incur criminal responsibility for "committing, instigating, or aiding and abetting" crimes alleged in the Amended Indictment.

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<sup>815</sup> See, e.g., evidence of torture, T. 1752-1753; evidence of murder, T. 5261-5262; evidence of sexual violence, T. 5385-5387. These crimes occurred during the time Kos worked in the camp.

<sup>816</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Croats and other non-Serbs detained in Omarska camp.

## D. MLA\O RADI}

### 1. Introduction

506. Radi} is charged with individual responsibility in counts 1-3, 4-5, and 8-10 of the Amended Indictment as a participant in persecution,<sup>817</sup> murder, torture, inhumane acts, cruel treatment, and outrages upon personal dignity under Article 7(1) of the Statute, as violations of Articles 3 (laws or customs of war) and 5 (crimes against humanity) of the Statute. He is also or alternatively charged with superior responsibility for crimes committed by subordinates, pursuant to Article 7(3) of the Statute.

507. In addition, Radi} is charged in counts 14-17 of the Amended Indictment with rape, torture, and outrages upon personal dignity under Article 7(1) of the Statute.

508. The Prosecution alleges that as a guard shift leader, Radi} exercised significant authority over guards on his shift in Omarska camp and, further, that he physically and directly participated in crimes, particularly rape and other forms of sexual violence. The Defense asserts that the accused did not directly participate in any crimes and that he held no position of authority in the camp other than that of an ordinary guard. Thus, he asserts that he had no responsibility for the detention and conditions of detention of persons incarcerated in Omarska camp during the period he was present in the camp, and that he was not personally involved in any mistreatment that may have taken place there.

### 2. Personal Background of Radic

509. The accused Mlado Radic, nicknamed Krkan, was born on 15 May 1952, in the village of Lamovita, Prijedor municipality, Bosnia and Herzegovina. He is married with three children. From 1972 until the conflict began, he worked as a police officer in the Prijedor municipality, assigned to the local police station of Ljubija. He testified that as a police officer he was usually on patrol, providing traffic control, checking for drunk drivers, and providing security for schools and banks.

510. In 1992, @eljko Meaki} was Radi}'s commander at the Omarska police station.<sup>818</sup> His wife, Bosiljka, worked in the canteen at the Omarska mining complex, where she continued to work after

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<sup>817</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and other non-Serbs detained in Omarska camp.

<sup>818</sup> Mla}o Radic, T. 1033. In 1994, Radi} was promoted to shift leader so that he could receive better retirement benefits and in 1995, he was promoted to senior Sergeant. Mlado Radi}, T. 1027-1029. After the conflict, Radi} received an award for his twenty years of service as a police officer.

the conflict began. Radic testified that he had many Muslim friends and that neither he nor his family had hostile feelings towards Muslims or Croats.<sup>819</sup>

### 3. Radi}'s Arrival and the Duration of His Stay in the Omarska Camp

511. Radic testified that he arrived at Omarska between 27 and 29 May 1992.<sup>820</sup> He told the Trial Chamber that he did not miss any of his shifts and he left in August 1992, when the camp was closed.<sup>821</sup>

512. The Trial Chamber finds that Radi} took up his duties in Omarska camp around 28 May 1992, and that he remained there until the end of August 1992.

### 4. Radic's Duties and Position in the Camp

513. Radi} said that he, Kvo-ka, and @eljko Meakic were the only active duty policemen from the Omarska police station department working at the camp.<sup>822</sup> Radic said that when he arrived at Omarska, @eljko Meakic told him that his duties were to maintain security and prevent the detainees from escaping.<sup>823</sup> Initially, Radi} took up a guard position in front of the garage, until @eljko Meakic told him to work in the duty office on the first floor of the administration building. There he manned the radio transmitter and the local telephone. He would also sometimes stand guard in the circular glass window in the staircase of the administration building overlooking the pista.<sup>824</sup>

514. Kerim Mesanovi} testified that Radi} was a shift leader and he stated that one of the three shift leaders, Radi}, Kos, or Ckalja, was always present when new detainees arrived.<sup>825</sup> If the new detainees arrived on Radi}'s shift, he took down their personal details and registered them.<sup>826</sup> The shift leaders were present when the guards changed shift. When each new group of guards arrived for their shift, they reported to the shift leader.<sup>827</sup> Radic was often seen in the office of the administration building giving assignments to the guards.<sup>828</sup> Kvo-ka was frequently there with him.<sup>829</sup>

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<sup>819</sup> Mla|o Radic, T. 1054; Bosiljka Radic, T. 9220-9221; Exhibit D8/3 was submitted confirming that Radic was a witness to the wedding of Stipe Pavlovi}, a Croat.

<sup>820</sup> Mla|o Radic testified that he began to work in the Omarska camp between the 27<sup>th</sup> and 29<sup>th</sup> of May 1992. T.1034.

<sup>821</sup> Mla|o Radic, T.11174.

<sup>822</sup> Mla|o Radic, T. 11178-11179.

<sup>823</sup> Mla|o Radic, T. 1035.

<sup>824</sup> Mla|o Radic, T. 11179.

<sup>825</sup> Kerim Mesanovi}, T. 5189. When Hase I-i}'s group arrived from Keraterm, Radic came on the bus and took their names as though he was in charge. Hase I-i}, T. 4649.

<sup>826</sup> Nedzija Fazli}, T. 5086, 5136; Zlata Cikota, T. 3321.

<sup>827</sup> Witness AN, T. 4405.

<sup>828</sup> Witness J, T. 4729; Hase Ici}, T. 4710; Witness AT, T. 6067; Witness F, T. 5367; Nusret Siva}, T. 3991.

<sup>829</sup> Sifeta Su{i}, T. 3007-3010.

515. While the guards had fixed positions, the shift leaders walked around freely.<sup>830</sup> Radi} walked unhindered around the camp, armed with an automatic weapon.<sup>831</sup> He also oversaw the detainees' departure from their rooms for lunch.<sup>832</sup>

516. Witness AN concluded that Radic was a shift leader because he would go into the administration building when new guards arrived on buses and the guards addressed him as a superior.<sup>833</sup>

517. The Trial Chamber finds that Radi} was a guard shift leader in Omarska camp.

518. As a guard shift leader, Radic was in a position of authority over the guards. Witness B felt that Radic was important in the camp, not only because he was a policeman but also because guards listened to him.<sup>834</sup> Witness B further testified that she believed Radi} had the authority to control the conduct of the guards on his shift.<sup>835</sup> Omer Me{an testified that Radi} had a superior position in relation to the guards and that he would distribute the guards around the camp by showing them where they should go.<sup>836</sup> Nedzija Fazli} testified that Radic registered her when she arrived at the camp and that he informed her of his position in the camp, making her believe that, as a shift leader, he was the most important person present in the camp that evening.<sup>837</sup>

519. According to Radi}, he had no authority to issue any orders and the only reason detainees referred to "Krkan's shift" was because people knew him from before the conflict.<sup>838</sup>

520. A few witnesses testified that Radi} intervened to prevent or stop guards from beating them. Hase I-i} testified that when his group arrived in Omarska, they were taken to the white house, forced to lie on the floor and make the three-finger Serbian sign, and then beaten by guards. Radic came in and stopped this mistreatment and said that the detainees were to be taken for interrogation.<sup>839</sup> The Trial Chamber notes that the suspension of abuse in order to escort detainees to a place of interrogation is not intervention intended to prevent a crime. Witness AT testified that a man wearing a camouflage uniform who worked on Radic's shift upset her on several occasions

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<sup>830</sup> Witness AI, T. 2120; Ermin Strikovi}, T. 3509-3510, 3512; Witness AN, T. 4405, 4407.

<sup>831</sup> Kerim Mesanovi}, T. 5180; Witness B, T. 2369; Emir Beganovi}, T. 1381; Witness F, T. 5367; Ermin Strikovi}, T. 3569.

<sup>832</sup> Ermin Strikovi}, T. 3508-3509; Witness AN, T. 4407-4408.

<sup>833</sup> Witness AN, T. 4405.

<sup>834</sup> Witness B, T. 2419-2420.

<sup>835</sup> Witness B, T. 2368-2369, 2420.

<sup>836</sup> Omer Me{an, T. 5275.

<sup>837</sup> Nedzija Fazli}, T. 5136.

<sup>838</sup> Mla}o Radic, T. 1049-1050.

and that as soon as she complained to Radic the abuse ended.<sup>840</sup> Several witnesses believed that Radi} could have intervened to stop the beatings and that they expected him, as a shift leader, to protect them from the other guards.<sup>841</sup>

521. Witness Y, who was detained at Omarska for thirty-two days, testified that he asked Radic for protection. The witness and the rest of the group of detainees who arrived from the village of Ljubija were told to form a line next to the door of the "hangar" so as to be identified. After this, the guards did not take any of them out of the hangar to beat them. The witness thus concluded that Radic was in a position of power and could secure better treatment for some of the detainees.<sup>842</sup>

522. Witnesses from Ljubija corroborated this evidence.<sup>843</sup> Several former detainees from this village testified that Radi} transferred them into the same room so they could be together and safer.<sup>844</sup> Witness DC6 testified that when he arrived at the Omarska camp, Radi} intervened so that he and two other detainees could be sent back to Ljubija. They were put back on the van and taken away from the camp.<sup>845</sup> Witness DC7, also from Ljubija, testified that he was imprisoned in the white house and that it was common knowledge that those placed in the white house had only a slim chance of emerging alive. The witness asked Radic to put him together with his son who was on the pista, and Radic obliged.<sup>846</sup>

523. The Trial Chamber takes note of the fact that Ljubija is where Radi} lived and served as a police officer for nearly 20 years prior to taking up his duties in Omarska camp, and considers it quite believable that he would have provided protection to these particular civilians in Omarska camp.

524. Witness DC5 told the Trial Chamber that on one occasion the guards ordered a group of detainees returning to their quarters following lunch to line up and then forced them to squat down with their legs close to their bodies and with their heads between their knees. The guards then started randomly beating them on their backs. At one point one of the guards said "Stop, let's stop. Krkan is coming", and the beating stopped.<sup>847</sup> On another occasion, Witness DC3 testified that four military police officers came into the room where he was held. Since he didn't bow his head, they

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<sup>839</sup> Hase I-i}, T. 4650-4651.

<sup>840</sup> Witness AT, T. 6064.

<sup>841</sup> Witness B, T. 2369; Mirsad Ali{i}, T. 2535.

<sup>842</sup> Witness Y, T. 3623, 3665.

<sup>843</sup> Witness DC1, T. 8748; Witness DC2, T. 8788; Witness DC3, T. 8813; Witness DC7, T. 9019.

<sup>844</sup> Witness DC7, T. 9022-9023; Witness DC3, T. 8817.

<sup>845</sup> Witness DC6, T. 8922-8923.

<sup>846</sup> Witness DC7, T. 9030.

took the detainee out to the corridor and began beating him. Radi} came by and asked the officers who had given them permission to enter there. He stopped the beating and sent the victim back to his room.<sup>848</sup>

525. During his testimony, Radic told the Trial Chamber that he had no control over the conditions in the camp or the brutal manner in which detainees were being treated.<sup>849</sup> He further testified that he did not hold any authority over the other guards and, in fact, he feared for his own safety during his time serving at Omarska.<sup>850</sup>

526. The Trial Chamber finds that Radi} had substantial authority over guards on his shift in the camp and that he used his power to prevent crimes selectively, while ignoring the vast majority of crimes committed during his shift.

#### 5. Crimes Committed by Guards on Radic's Shift

527. The Trial Chamber heard extensive evidence that guards on Radic's shift committed serious crimes against detainees.<sup>851</sup> Krkan's shift was quite infamous in the camp.<sup>852</sup> Emir Strikovi} told the Trial Chamber that the reason they feared Radic's shift more was because guards on that shift were particularly brutal. It was during his shift that the worst mistreatment was inflicted and more people were called out of the rooms, never to return.<sup>853</sup>

528. Hase I-i} told the Trial Chamber that on his very first day in Omarska camp, a woman named Hajra warned them to behave because the worst group of guards, led by Radi}, was currently on duty.<sup>854</sup> Azedin Oklop-i} also testified that Radi}'s shift was the worst, and that detainees did not ask to go to the restroom on that shift for fear of beatings.<sup>855</sup> The guards on Radic's shift beat detainees on their way to and from the eating hall.<sup>856</sup>

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<sup>847</sup> Witness DC5, T. 8877.

<sup>848</sup> Witness DC3, T. 8817-8818.

<sup>849</sup> Mla}o Radic, T. 11294.

<sup>850</sup> Mla}o Radic, T. 1063.

<sup>851</sup> Nusret Siva}, T. 3989; Azedin Oklop-i}, T. 1734; Witness AK, T. 2015-2016; Witness B, T. 2364. Abdulah Brki} testified that Popovi} was the worst on the shift. Abdulah Brki}, T. 4503. Witness J testified that two of the guards on Radi}'s shift, Živko Marmat and Milutin Popovi}, were particularly aggressive and would often beat prisoners. Witness J, T. 4750. Drazenko Predojevi}, a guard on Radic's shift, was described as a being more violent than the rest, "he was a raging animal in the camp". Witness B, T. 2428-2429.

<sup>852</sup> Witness F, T. 5367-5368; Abdulah Brki}, T. 4500-4501; Azedin Oklop-i}, T. 1702.

<sup>853</sup> Ermin Strikovi}, T. 3513, 3585-3586.

<sup>854</sup> Hase I-i}, T. 4649.

<sup>855</sup> Azedin Oklopcic, T. 1702.

<sup>856</sup> Azedin Oklopcic, T. 1744-1747; Witness B, T. 2365.



529. Several former detainees testified that as the detainees arrived in Omarska camp Krkan took the roll call as they got off the bus. They were later made to run from the bus to the white house through a gauntlet of policemen and soldiers who hit them with a variety of objects.<sup>857</sup>

530. Witness J told the Trial Chamber that it was during Radi's shift that @igic called out a detainee by the name of Asef Kapetanovi and took him to the white house to be beaten.<sup>858</sup> Ermin Strikovi testified that Silvije Sari was taken out and when he returned, he was so severely beaten he could hardly walk.<sup>859</sup> Ermin Strikovi testified that Emir Karaba{i} was called out twice and when he returned his back was covered in bruises, and although he was a strong man, he eventually collapsed from the beating.<sup>860</sup> This all happened during Radi's shift.

531. Witness Y testified that there was a guard on Radi's shift known as the "karate kid", who had earned that nickname by inflicting particularly brutal beatings upon detainees.<sup>861</sup> On one occasion, the "karate kid" told a detainee to go around the room collecting money from the other detainees and that, if not enough money was forthcoming, he would take them out one by one for a beating. Not enough money was collected, and Witness Y was kicked in the heart by the "karate kid", then taken out into a small room where he and three other guards beat him for about twenty minutes.<sup>862</sup> On another occasion, according to Witness Y, guards on Radic's shift, including the "karate kid", took a detainee named Fnu Gavranovi from the interrogation room to the white house. He testified that he watched guards repeatedly strike Fnu Gavranovi's head against the doorway. Fnu Gavranovi died as a result.<sup>863</sup>

532. Mirsad Ali{i} testified that when he arrived in Omarska camp, the buses stopped between the "hangar" and the administration building and the detainees were told to get out of the bus with their hands behind their head. The first six detainees that stepped out were immediately killed by a burst of gunfire shot by a guard named Predojevi. This happened during Radic's shift.<sup>864</sup>

533. Mirsad Ali{i} also testified that on 4 June 1992 he was beaten by several guards on Radi's shift. While on the pista, Mirsad Ali{i}, like other detainees, was leaning against the wall of the administration building using three fingers, when the guards Predojevi and Paspalj came along. Mirsad Ali{i} begged Predojevi not to make an invalid out of him, but Predojevi informed him

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<sup>857</sup> Hase I-i}, T. 4650; Witness AM, T.3928.

<sup>858</sup> Witness J, T. 4784.

<sup>859</sup> Ermin Strikovi}, T. 3514-3515; Fadil Avdagi}, T. 3441.

<sup>860</sup> Ermin Strikovi}, T. 3515.

<sup>861</sup> Witness Y, T. 3625.

<sup>862</sup> Witness Y, T. 3626-3627.

<sup>863</sup> Witness Y, T. 3632-3633.

<sup>864</sup> Mirsad Ali{i}, T. 2469-2471; Fadil Avdagi}, T. 3438.

that they were going to kill him. He was then taken to the first floor of the administration building where other guards were waiting with special whips which had metal balls attached to them. Predojevi} turned to the other guards and said "Look at the dog and kill him." Then they all started beating him with the whips. Mirsad Ali{i} told the Trial Chamber that Radic was in an office nearby and, despite his screams of agony caused by the unbearable pain, Radi} did not intervene to stop the beatings.<sup>865</sup>

534. Mirsad Ali{i} further testified that he once saw another detainee, Jasmin Hrni}, who he knew before the war, being beaten by Predojevi}, Popovi} and Paspalj, all of whom worked on Radic's shift.<sup>866</sup> On another occasion, Paspalj and Popovi} ordered a detainee named Bajram Zgog to collect money from the other detainees held in Mujo's room. Having collected the money, Paspalj told Bajram Zgog that the amount was insufficient, and started to beat him with a baton. Mirsad Ali{i} stated that Bajram Zgog tried to slit his own throat with a piece of broken glass to end his suffering, but another detainee prevented him. When Paspalj and Popovi} returned they again beat Bajram Zgog severely. The approximately 200 detainees held in Mujo's room were subsequently transferred to the ground floor of the hangar building and later brought back to Mujo's room. The witness never saw Bajram Zgog again.<sup>867</sup>

535. Hase Ici} testified that the day he arrived at Omarska camp, Radi} called him out to the corridor to take him for interrogation and later pushed him inside the interrogation room. There he saw outsiders such as Dule Tadic, Du{an Kne`evi}, and another guard who everyone called Babi}. After being told to greet them in the Serb way, they hit him, placed a noose around his neck and squeezed it tight while continuing to hit him. He testified:

They broke my ribs here. My skin split on the back because of the blows. I was bleeding and my skin was cut. I had wounds there and it crusted later on. They beat me all over except on the head...they had a baseball bat. They also had a whip made of a cable with some metal balls on it. They had some metal rods.<sup>868</sup>

536. Azedin Oklop-i} testified that another detainee, Safet Ramadanovi} was beaten by the guards on Radi}'s shift upon his arrival in Omarska camp, and then again a week later while waiting for his interrogation. He was later taken inside the administration building for his interrogation where he was beaten again.<sup>869</sup> Two detainees had to carry him back to the pista, where he was again beaten by the guards.<sup>870</sup> Safet Ramadanovi} died as a result of the beatings. Azedin Oklop-i} further testified that he saw the body of this detainee lying outside on the grass for several

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<sup>865</sup> Mirsad Ali{i}, T. 2502-2504.

<sup>866</sup> Mirsad Ali{i}, T. 2487-2488.

<sup>867</sup> Mirsad Ali{i}, T. 2498-2499.

<sup>868</sup> Hase I-i}, T. 4661-4662.

<sup>869</sup> Azedin Oklop-i}, T. 1726-1731.

<sup>870</sup> Witness AN, T. 4408.

hours before his son-in-law came and took the body away from the camp.<sup>871</sup> Witness AN also heard from another detainee about the body being taken away.<sup>872</sup>

537. Azedin Oklop-i} further described how Riza Had`ali} was brutally beaten to death on the pista by guards on Radi}'s shift.<sup>873</sup> Abdulah Brki} was also on the pista that day and identified the specific guards who did the beatings as belonging to Radi}'s shift.<sup>874</sup>

538. The Trial Chamber has received a substantial amount of credible and consistent evidence that a large number of crimes were committed by guards on Radi}'s shift. It is clear to the Trial Chamber that these guards perpetrated a wide range of abuses and mistreatment against the detainees, including murder and torture, and that Radi}, as their shift leader, never exercised his authority to stop the guards from committing such crimes. Indeed, his failure to intervene gave the guards a strong message of approving of their behavior. Given his position of authority over the guards, his non-intervention condoned, encouraged, and contributed to the crime's commission and continuance.

#### 6. Radic's Knowledge of the Camp Conditions and Abusive Treatment During His Time in the Camp

539. Throughout his testimony before the Court, Radic told the Trial Chamber that he never saw signs of mistreatment in any detainees or witnessed them being beaten.<sup>875</sup> Quite apart from the considerable testimony the Trial Chamber has received concerning his personal participation in abuses of detainees, the Trial Chamber finds his statement wholly incredible considering the fact that, from his post at the circular window, Radic could see the pista, the hangar, the white house and the detainees coming in and out of the cafeteria. Moreover, Radic, unlike the regular guards, was free to walk around the camp and, when in the duty office, and he often sat close to where the interrogations were taking place. The Trial Chamber heard testimonies from numerous Prosecution and Defense witnesses who described the gruesome condition of detainees, and the screams and moans emanating from the interrogation rooms.

540. A parade of witnesses testified to abuses committed in the camp. Sifeta Susi} testified that the rooms where women stayed at night were used for questioning during daytime. From the eating

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<sup>871</sup> Azedin Oklop-i}, T. 1730-1731.

<sup>872</sup> Witness AN, T. 4409.

<sup>873</sup> Azedin Oklop-i}, T. 1732-1735.

<sup>874</sup> Abdulah Brki} testified he saw Had`ali}'s body being taken away in a yellow TAM truck, T. 4501-4503. Witness Y testified that he loaded the body of a man called "Rizo" from Prijedor onto a small TAM truck. Witness Y, T. 3642. Witness J, T. 4766-4767.

<sup>875</sup> Mla}o Radic, T. 11207. When cross-examined, Radi} admitted he saw prisoners leaving the interrogation rooms with signs of mistreatment. Mla}o Radic, T. 11217.

hall downstairs, she could clearly hear cries and groans coming from those rooms.<sup>876</sup> Azedin Oklop-i} testified that during the night, terrible screams could be heard from practically all the rooms of the camp, though mostly the hangar, the canteen, and the pista.<sup>877</sup>

541. Ermin Strikovic testified that he saw Radic walking around, talking to the guards, and watching what was going on regularly. While on the pista he saw Radic entering the white house on one occasion.<sup>878</sup> Radic also supervised the departure of detainees for meals.<sup>879</sup> Omer Me{an recounted an occasion when, during the time when the meal was being distributed, all the detainees lined up to enter the eating hall and were brutally beaten. A group of guards formed a line at the entrance and in the inside corridor, and the detainees were severely beaten going for lunch and when exiting. On that occasion, the witness remembers seeing Radi} in the glass area on the staircase inside the administration building.<sup>880</sup>

542. Hase I-ic testified that when he was transferred from Keraterm to Omarska sometime around July 1992, Radic came onto the bus to get the list of all the transferees. That same night, Radic called out the names of the people on the list and directed them to a room above the cafeteria, where interrogations and beatings were taking place. Although the witness never actually saw Radic beat any of the detainees, Radic pushed the witness himself into the interrogation room and he took the detainees back to their rooms after the beatings.<sup>881</sup> The witness further testified that Radic would be present on other occasions when detainees were taken for interrogations in the white house. According to the witness, a group of "torturers" would arrive, headed by Radic.<sup>882</sup> Other witnesses testified that shift leaders, including Radi} and Kos, were usually present when guards beat the camp's newest arrivals.<sup>883</sup>

543. Radic denied ever hearing about any shooting taking place in the camp. Although he had a clear view of the white house from the circular glass window where he stood and was within hearing distance of any gunshots fired in the camp, he claimed that he never saw or heard any detainees being killed, nor did he see any dead bodies around the camp.<sup>884</sup> Radi} denied hearing any

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<sup>876</sup> Sifeta Su{i}, T. 3011.

<sup>877</sup> Azedin Oklop-i}, T.1714. Kerim Mesanovi} testified that almost all day the sounds of pain, cries and moans and of the actual blows received by the detainees could be heard in the "glass house" coming from the interrogation rooms upstairs. Kerim Mesanovi}, T.5187-5188. Witness F testified that moans and screams could be heard coming from all sides of the camp, from the pista, from the "glass house". Witness F, T.5414.

<sup>878</sup> Mla}o Radic testified he entered the white house only on one occasion. Mla}o Radic, T. 11212.

<sup>879</sup> Ermin Strikovi}, T. 3508-3509; According to Witness AN, Radi} was upstairs when prisoners were beaten on the way to eat. Witness AN, T. 4408.

<sup>880</sup> Omer Me{an, T. 5277-5278.

<sup>881</sup> Hase I-i}, T. 4660-4662. According to Hase I-i}, Radic asked them to hand over the money soon after the detainees arrived in Omarska. Radic told them: " All of you are to write down your name, the amount of money or gold or jewellery you have with you. And if you have enough, you'll be spared torture." Hase I-i}, T. 4652.

<sup>882</sup> Hase I-i}, T. 4657.

<sup>883</sup> Omer Mesanovi}, T. 5189; Witness B, T. 2362.

<sup>884</sup> Mla}o Radic, T. 11209-11210.

noises from the interrogation rooms, other than the sound of what he thought might be furniture falling.<sup>885</sup> However, Witness DD/10, who worked in the same duty office as Radi}, testified that one could clearly hear all the sounds of abuse coming from the room next door.<sup>886</sup>

544. In short, the Trial Chamber fully and forcefully rejects Radi}'s claim that he did not see, hear, or notice evidence of any abuses committed in Omarska camp during the 3 months he worked there.

545. The Trial Chamber finds that Radi}, in his role as a guard shift leader, was exposed on a daily basis to killings, tortures, and other abuses committed in Omarska camp against non-Serb detainees. He knew that crimes of extreme physical and mental violence were routinely committed in the camp for discriminatory purposes. Radi} was directly responsible for a number of these abuses.

### 7. Radi}'s Personal Involvement in Sexual Violence

546. The Trial Chamber heard compelling evidence that Radic was personally involved in the sexual harassment, humiliation, and violation of women in Omarska camp. He would call particular women out from their place of detention and when these women returned, it was apparent to the other women that something terrible had happened to them. Typically, they did not speak to or look at the other women.<sup>887</sup>

547. Witness F testified that Radic took her to one of the rooms (referred to as the "police room"). Once there, Radic told Witness F that he could help her if she agreed to sleep with him and that she should get out of the room where she was held one night when he was on duty. He then touched the "female parts" of her body.<sup>888</sup> Sifeta Su{i} testified that on one occasion when Radic was having breakfast with the guards and she was clearing the table, Radic grabbed her, put her down on his knees and said: "It's better for me to rape you than somebody else do it". Terrified, she ran off.<sup>889</sup> Zlata Cikota testified that the morning after her arrival in the camp, she was told she should go see Radi} and take her identity card. Once in the office with Radi}, he wrote down her

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<sup>885</sup> When cross-examined, Radi} testified that he could hear people in the interrogation rooms yelling "Why are you lying? Don't lie!" and then he would hear sound as if furniture was falling, but he couldn't tell if they were beating someone. Mladić Radic, T. 11214-11215.

<sup>886</sup> Witness DD/10, T. 10689; see also Nada Markowski, T. 7772. Witness DC5 also testified that screams, sounds of things breaking, and "howling" could be heard coming from the interrogation rooms upstairs. Witness DC5, T.8876.

<sup>887</sup> Witness J, T. 4775; Witness A, T. 5487; Witness U, T. 6217; Witness F, T. 5383; Zlata Cikota, T. 3342. Witness U testified that Radi} took a female detainee out and when she returned she looked afraid and her face was all red. Witness U, T. 6216-6217. Witness B testified that on one occasion she entered a room by mistake and she found Mladić Radic waiting for a female detainee, and he began to curse her and said that he would take his revenge on her. Witness B, T. 2385-2386.

<sup>888</sup> Witness F, T. 5388.

<sup>889</sup> Sifeta Su{i}, T. 3022-3023.

personal details then grabbed her breasts. She was shocked and told him she was an old woman, but Radi} said "Well, you're good, it doesn't really matter". Zlata Cikota managed to leave the room when another person came in.<sup>890</sup> Nedzija Fazli} testified that Radic once called her into his office after he heard that Lugar, a guard, had tried to have sexual intercourse with her. Radic suggested that he have sex with her in exchange for helping her meet her husband who was also being held at the camp.<sup>891</sup> Nedzija Fazli} was not mentioned among the counts of the Amended Indictment against Radi} or in the attached Schedules. The Trial Chamber is satisfied that the testimony can assist in establishing a consistent pattern of conduct in conformity with Rule 93.

548. Radic grossly abused his position and took advantage of the vulnerability of the detainees. On one occasion he called Witness J into his office and told her that he could help her if she had sexual intercourse with him.<sup>892</sup> Later he attempted to rape her. Witness J testified that after finishing her duties in the cafeteria, Radic called her to his office. He pushed her against a wall and started touching her. Witness J testified that although she pleaded with him, telling him that she was menstruating, Radic took out his penis, attempted to penetrate her, and then ejaculated over her:

...He pushed me against a wall, and he started touching me on my breasts and on my bottom . . . I was pleading with him to let me go, not to touch me, but he was very rough. He was pushing against me, and I was breathless.<sup>893</sup>

549. The Defense objects to the credibility of this testimony,<sup>894</sup> stating that the description of this rape incident is identical to another rape incident Witness J described involving a man known as "Kapitan".<sup>895</sup> The Trial Chamber, however, considers the testimony and the witness credible and finds that both incidents occurred.

550. Three other former detainees, Witnesses K, AT, and A, testified that Radi} sexually assaulted them:

551. Witness K testified about an occasion when one of the cleaning ladies in the camp, Vinka Andzi}, came to fetch her, saying that Radic needed her. Radic had previously attempted to coerce her into having sex with him by saying that her children would not be killed if she would agree to having sexual intercourse with him.<sup>896</sup> She was led upstairs to the conference room where Radic was waiting. Witness K noticed a foam mattress on the floor,<sup>897</sup> and stated that "[h]e told me that

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<sup>890</sup> Zlata Cikota , T. 3320-3221.

<sup>891</sup> Nedzija Fazli}, T. 5100-5101.

<sup>892</sup> Witness J, T. 4758.

<sup>893</sup> Witness J, T. 4777.

<sup>894</sup> Radi} Final Trial Brief, paras 283-287.

<sup>895</sup> Witness J, T. 4779-4783.

<sup>896</sup> Witness K, T. 4983-4984, 5056.

<sup>897</sup> Witness K, T. 4983-4984.

my children would not be harmed . . . . Then he attacked me, he assaulted me, and he raped me.”<sup>898</sup> After Radic left, she said that she stayed in the room for a while to try to stop her bleeding, which was due not only to her menstruating but also to the forced penetration of her vagina.<sup>899</sup>

552. The Defense challenged the credibility of Witness K, since during cross-examination, the witness acknowledged she had not mentioned that Radi} raped her to a female journalist that interviewed her in Zagreb in 1993, while in the statement given to the Office of the Prosecutor in 1995 she did describe this incident.<sup>900</sup> Furthermore, the Defense pointed out that there were contradictions between the 1995 statement and the testimony of Witness K before the Trial Chamber concerning the time of the day that the rape occurred. However, the Trial Chamber finds the fact that Witness K did not mention this rape incident in 1993 to a journalist is irrelevant, particularly in light of the sexual and intensely personal nature of the crime. This omission does not undermine the credibility of her testimony. Further, any discrepancy that may exist in her two testimonies concerning the time of day the rape occurred is not fatal to the credibility of the testimony.

553. Defense witness Vinka Andic<sup>901</sup> testified that Radic never asked her to bring Witness K, or any other woman, to the conference room.<sup>902</sup> According to Vinka Andic, Radic was a fine man who treated women in a correct manner.<sup>903</sup> The testimony of Vinka Andic is in direct contrast to the evidence of sexual assault and harassment given by a number of witnesses. As such, the Trial Chamber rejects the testimony of Vinka Andic and accepts the testimony of Witness K.

554. Witness AT testified that Radic called her out of her room several times during her 23 days spent in Omarska camp. Like other women, she was taken to a room at the end of the corridor, where a sponge mattress was on the floor. The witness described how, on one such occasion, Radic told her to take her clothes off and forced her to have sexual intercourse with him.<sup>904</sup> She emphasized: “I defended myself, and I asked him why he was doing that. But I had to, under pressure from him, to take my clothes off and lie down on the foam mattress.”<sup>905</sup>

555. The Defense pointed out that the witness acknowledged, during cross-examination, that Radi} had helped her by bringing her food and water and by moving her husband from the white

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<sup>898</sup> Witness K, T. 4984-4985, 4987-4988.

<sup>899</sup> Witness K, T. 5058.

<sup>900</sup> Witness K, T.12203-12205.

<sup>901</sup> One of the cleaning ladies who worked at Omarska.

<sup>902</sup> Vinka Andic, T.9133-9134, 9136. According to the testimony of Witness K, Vinka, one of the cleaning ladies, came to get her to go to Radic. Witness K, T. 4983-4984, 12203, 12218, 12238.

<sup>903</sup> Vinka Andic, T. 9130-9133.

<sup>904</sup> Witness AT, T. 6095-6098, 6155.

<sup>905</sup> Witness AT, T. 6157-6158.

house to the glass house.<sup>906</sup> However, the Trial Chamber does not find that this fact discredits the testimony of the witness in any way. Indeed, the evidence suggests that he regularly attempted to bribe or coerce victims to “agree” to sexual intercourse in exchange for favors. The Trial Chamber recalls previous holdings by the Tribunal, as well as Rule 96, dealing with evidence in cases of sexual assault, which states that a status of detention will normally vitiate consent in such circumstances.<sup>907</sup>

556. The Defense further stated that the rape of Witness AT was not mentioned either among the counts of the Amended Indictment against Radi} or in the attached Schedules. The Trial Chamber agrees with the Defense on this point and considers that out of fairness to the accused, new charges cannot be brought against the accused in mid-trial without adequate notice. The testimony of Witness AT charging Radi} with rape will not therefore be considered in the determination of his guilt. However, the Trial Chamber is satisfied that the testimony of this witness is highly credible and can assist in establishing a consistent pattern of conduct in conformity with Rule 93.<sup>908</sup>

557. Witness A was the third witness who testified before the Court that Radic raped her.<sup>909</sup> The Trial Chamber has no difficulty believing that this witness suffered a terrible and traumatizing ordeal. However, her testimony was so confused as to details of the rape that it cannot be relied upon to establish guilt.

558. On 6 August 1992, most of the detainees were transferred out of Omarska camp. Five women remained in the camp, including Witness AT. On 23 of August 1992, Witness AT and another woman were taken away to Trnopolje. The other three women who were not allowed to transfer have never been seen again.<sup>910</sup>

559. The Trial Chamber finds that Radi} raped Witness K and that he attempted to rape Witness J. It recalls the definition of sexual violence established in *Akayesu* as “any act of a sexual nature, which is committed on a person under circumstances which are coercive”.<sup>911</sup> The Trial Chamber finds that the sexual intimidations, harassment, and assaults committed by Radi} against Witness J,

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<sup>906</sup> Witness AT, T. 6152-6155.

<sup>907</sup> See *^elebi}* Trial Chamber Judgement, para. 495; *Furund`ija* Trial Chamber Judgement, para. 271; *Kunara}* Trial Chamber Judgement, para. 464. Rule 96 of the Rules of Procedure and Evidence provides that in cases of sexual assault, consent shall not be allowed as a defense if “the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression”.

<sup>908</sup> Rule 93 provides: “(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice”.

<sup>909</sup> Witness A testified that she was called out by Radic about ten times. On four occasions he took her to a room on the ground floor, beat her up and raped her. Witness A testified: “First he led me inside. I resisted...He threw me over the table, he pulled me by the hair, and he raped me”. On another occasion Radic raped her in the room where they slept. When Witness AT arrived at the camp Radi} stopped calling Witness A out to be raped. T. 5489-5490, 5494-5495, 5568.

<sup>910</sup> Witness AT, T. 6100-6101; Witness B, T. 2386.



Witness F, Sifeta Susi}, and Zlata Cikota clearly fall within this definition, and thus finds that Radi} committed sexual violence against these survivors.

560. The Trial Chamber further finds that the rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp and that they were committed solely against women, making the crimes discriminatory on multiple levels. Radi} did not rape any of the male non-Serb detainees. As recognized in *^elebi}i*, raping a person on the basis of sex or gender is a prohibited purpose for the offence of torture.<sup>912</sup> Torture also requires proof of intentional infliction of severe pain and suffering. Based on the testimony above the Trial Chamber concludes that Radi} intentionally committed the aforementioned acts. The rape of Witness K and the attempted rape of Witness J manifest his intent to inflict severe pain and suffering. Thus, the Trial Chamber also finds that Radi} is guilty of the torture of Witness K and Witness J.

561. In considering whether severe pain and suffering was also inflicted upon the other victims of sexual violence, the Trial Chamber takes into consideration the extraordinary vulnerability of the victims and the fact that they were held imprisoned in a facility in which violence against detainees was the rule, not the exception. The detainees knew that Radi} held a position of authority in the camp, that he could roam the camp at will, and order their presence before him at any time. The women also knew or suspected that other women were being raped or otherwise subjected to sexual violence in the camp. The fear was pervasive and the threat was always real that they could be subjected to sexual violence at the whim of Radic. Under these circumstances, the Trial Chamber finds that threat of rape or other forms of sexual violence undoubtedly caused severe pain and suffering to Witness F, Zlata Cikota, and Sifeta Susi} and thus, the elements of torture are also satisfied in relation to these survivors.

8. Was Radi}'s Participation in the Omarska Camp, a Joint Criminal Enterprise, Significant Enough to Incur Criminal Responsibility?

562. The Defense of Radi} submits that Radi} did not have the intent to participate in a joint criminal enterprise.<sup>913</sup> Radi} stated that he tried to sever his relationship with the Omarska camp. He testified that he asked @eljko Meaki} to send him to Kupres, to the front line, instead of remaining in the camp. Radi} recounted how his request was passed to Simo Drlja-a, who

asked me what I wanted, why I didn't want to work there and so on. And I said, "You see, Simo, I grew up with these people. I have friends here. I have my sister's friends married to Muslims, and

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<sup>911</sup> *Akayesu* Trial Chamber Judgement, para. 688.

<sup>912</sup> *^elebi-i* Trial Chamber Judgement, paras 941, 963.

<sup>913</sup> Radi} Pre-Trial Brief, paras 10, 26.

I feel very uncomfortable working here. Could I go somewhere else?" Then he raised his voice and said "And who is in command here?" And I said, "My superior is Meakic and you are probably superior to all of us."

And then he said, "You're going to do as you are told." And to that I had to say "I understand," and that was it.<sup>914</sup>

563. The Trial Chamber is however not convinced that Radi} had no option but to stay in the camp. As has been discussed above, evidence has been presented that guards could come and go from their assignments in the camp without suffering repercussions. Indeed, in answer to a question from Judge Wald as to whether anything happened to guards who decided to go home or not to turn up for work – whether they were disciplined or sent to the front, for example – Radi} answered:

Well, you see, there was wartime euphoria at the time. Nothing happened to them. But people would go home to dig the maize fields, to collect wood. No one was tied up there. People would abandon their posts. I even heard that some went swimming, but there was nothing I could do about it.

Q. No, I understand. I'm just asking.

A. It depended on the individual and how conscientious he was.<sup>915</sup>

564. Radi}'s choice to be "conscientious" and stay at his post in the camp is likely consistent with his tendency towards obedience and conformity, identified in the psychological report ordered by the Trial Chamber.<sup>916</sup> The report explains that this tendency is likely to increase Radi}'s wish to carry out orders to please his superiors, or to behave in conformity with his peers to gain their acceptance, and to decrease his sense of his own responsibility for his actions.<sup>917</sup>

565. The Trial Chamber finds that Radi} did not remain in his post reluctantly. On the contrary, Radi} testified that he never missed a single shift.<sup>918</sup> This would not indicate reluctance to work in the camp. The camp provided a forum and the power in which to commit abuses. By every indication, he participated in crimes without hesitation. Assisting a few former colleagues, townmates, or friends in no way diminishes the seriousness of the crimes for which he incurs responsibility.

566. The Trial Chamber finds that Radi}'s contribution to the maintenance and functioning of the Omarska camp was knowing and substantial. It further finds that he willingly and intentionally contributed to the furtherance of the joint criminal enterprise to persecute and otherwise abuse the non-Serbs detained in the camp, that he was responsible for gross mistreatment of detainees in the camp, and that he physically perpetrated a number of serious crimes, particularly sexual violence.

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<sup>914</sup> Mlajko Radic, T.11296.

<sup>915</sup> Mlajko Radi}, T.11297.

<sup>916</sup> Exhibit D4/30.

<sup>917</sup> Exhibit D4/30, pp 7-8.

<sup>918</sup> Mlajko Radic, T. 11174.

## 9. Criminal Responsibility of Mla|o Radi}

567. As noted above, Radi} is charged under Article 7(1) of the Statute with individual responsibility for participating in the war crimes and crimes against humanity alleged in the Amended Indictment and for “committing, instigating, or otherwise aiding and abetting” the crimes as a participant in a joint criminal enterprise. Radi} is also or alternatively charged under Article 7(3) of the Statute with superior responsibility for alleged acts committed by subordinates that he failed to prevent, halt, or punish.

### (a) Superior Responsibility Under Article 7(3) of the Statute

568. The Trial Chamber has established that Radi} was one of the three guard shift leaders in Omarska camp. It has also established that guards on Radi}'s shift committed crimes particularly perversely and ruthlessly. Indeed, there is a vast amount of evidence pertaining to crimes committed by guards on Radi}'s shift.

569. One witness described the guards on Radi}'s shift as “an unruly crowd of people” and said that in the camp “nobody obeyed anyone” and that “anybody could kill anybody they liked at any time in any shift”.<sup>919</sup> Another detainee testified that, in her opinion, the guards would have obliged Radi} if he had asked them to cease their brutality.<sup>920</sup> However others considered that the guards on his shift were “beating people at random, on their own” and were “absolutely out of control”.<sup>921</sup> Certainly the guards on his shift were notorious: one of the most egregious offenders, a guard by the name of Predojevi}, was described as a “raging animal in the camp”.<sup>922</sup> Others included the “karate kid”, who beat detainees to death, as well as Paspalj, Soskan, and Popovi}. Defense witnesses agreed that there were guards on Radi}'s shift who “had absolutely no human feeling”.<sup>923</sup>

570. The Trial Chamber has found that Radi} exercised authority over guards on his shift, although it is not entirely clear that Radi} exercised “effective control” over these guards. More pertinently, although there is substantial credible evidence of crimes committed by Radi}'s subordinates, there is some doubt as to whether, within the context of a joint criminal enterprise, a co-perpetrator or aider or abettor who is held responsible for the totality of crimes committed during his tenure on the basis of a criminal enterprise theory can be found separately responsible for part of those crimes on an Article 7(3) superior responsibility theory. In any case there is no need to do so

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<sup>919</sup> Witness AK, T. 2073-2075.

<sup>920</sup> Witness B, T. 2369.

<sup>921</sup> Abdulah Brki}, T. 4518; Witness AI, T. 2226.

<sup>922</sup> Witness B, T. 2428-2429.

<sup>923</sup> Witness DC5, T. 8885.

as his liability for those crimes is already covered. In light of this doubt, the Trial Chamber finds that Radi}'s superior responsibility within the context of a joint criminal enterprise, need not be decided.<sup>924</sup> The Trial Chamber declines to find that Radi}' incurs superior responsibility pursuant to Article 7(3) of the Statute.

(b) The Individual Responsibility of Radi}' Under 7(1) for Crimes Proved at Trial

571. The Trial Chamber has already found the following in regards to Radi}:

(a) that he was aware of the abusive treatment and conditions endured by the non-Serbs detained in Omarska prison camp;

(b) that he continued working in the camp for nearly three months, the entirety of the camp's existence;

(c) that the crimes alleged against Radi}' in the Amended Indictment were committed in Omarska during the time that he was employed in the camp;<sup>925</sup>

(d) that Radi}'s participation as a guard shift leader played a crucial role in the efficient and effective functioning of the camp, and his participation was significant, making him liable as a participant in the joint criminal enterprise of Omarska camp;

(e) that guards on Radi}'s shift committed numerous heinous crimes against detainees and he is also responsible for his active participation in or silent encouragement of the crimes committed in his presence or with his tacit approval;

(f) that Radi}' physically perpetrated crimes of sexual violence against females detained in the camp; and

(g) that Radi}' was aware of the persecutory nature of the crimes committed against non-Serbs detained in the camp and, based upon his knowing and substantial participation in the system of persecution pervading Omarska camp, Radi}' had the intent to discriminate against the non-Serbs detained in the camp.

572. In addition to the crimes charged in conjunction with persecution, Radi}' was also charged under counts 14 to 17 with rape, torture, and outrages upon personal dignity. There is no indication in the Amended Indictment as to whether the crimes of sexual violence alleged generally under the

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<sup>924</sup> This is consistent with our holding in *Krstić*. See *Krstić* Trial Chamber Judgement, para. 652.

<sup>925</sup> See, e.g., evidence of torture, T. 4661-4662; evidence of murder, T. 1726-1731; evidence of sexual violence, T. 5385-5388. These crimes occurred during the time that Radi}' worked in the camp.

persecution count are based on the same acts as the individualized charges brought under counts 14-17 of the Amended Indictment. Counts 14-17 do not separately allege persecution for the sexual violence.

573. The Trial Chamber notes that the Defense challenged the form of the Amended Indictment, and Radi} complained that the Amended Indictment did not provide him sufficient specific indication about the crimes with which he was charged.<sup>926</sup> The Prosecution was not required to specify whether the sexual violence included within the persecution count formed the basis of the crimes of sexual violence charged separately. The Trial Chamber considers that Radi} was not the sole perpetrator of sexual violence in the Omarska camp and notes there is evidence of additional sex crimes in the Factual Findings that do not relate to Radi} and thus, there is no reason to infer that the sexual violence underlying the persecution count or committed as part of the joint criminal enterprise is limited to the crimes of sexual violence charged against Radi}. Nonetheless, in the circumstances of this case, due to lack of clarity on this issue in the Amended Indictment, the Trial Chamber holds that the conviction for persecution for crimes including sexual violence cover the rape crimes for which Radi} is separately charged. Insofar as rape and torture are charged as crimes against humanity under Article 5 of the Statute, the charges will be dismissed as subsumed within the persecution count.

574. There were allegations of sexual violence charged in the Amended Indictment which were not addressed or established at trial. The Trial Chamber proceeds solely on the basis of the evidence before it. The Trial Chamber already concluded that Radi} raped Witness K, attempted to rape Witness J, and that he committed sexual violence against Witness J and three other women.

575. The Trial Chamber has found that Radi} played a substantial role in the functioning of Omarska camp as a guard shift leader. He remained at the camp for its entire duration never missing a single shift, guard's on his shift were notoriously brutal and he played a role in orchestrating the abuses, and he personally committed crimes of sexual violence against female detainees. Radi} is thus a co-perpetrator of the joint criminal enterprise.

576. Radic is charged with torture (count 16) and outrages upon personal dignity (count 17) as violations of the laws or customs of war under Article 3 of the Statute, based on the rapes and other forms of sexual violence committed in Omarska camp.

577. As noted in Part III, B, Cumulative Convictions, it is permissible to enter convictions for rape and torture based on the same acts when elements of both crimes have been satisfied. It is not

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<sup>926</sup> See *Prosecutor v. Kvočka et al.*, Decision on Defense Preliminary Motions on the Form of the Indictment, 12 April 1999.

permissible, based upon the same underlying conduct, to enter multiple convictions for torture and outrages upon personal dignity, as torture is the more distinct crime.

578. In sum, the Trial Chamber finds Radi} guilty as a co-perpetrator of the following crimes committed as part of the joint criminal enterprise: persecution (count 1) under Article 5 of the Statute;<sup>927</sup> and murder (count 5) and torture (counts 9 and 16) under Article 3 of the Statute.

579. For the reasons set forth previously, the following crimes are dismissed: inhumane acts (count 2), murder (count 4), rape (count 15) and torture (counts 8 and 14), which were subsumed within the persecution conviction under Article 5 of the Statute; and outrages upon personal dignity (count 3) and cruel treatment (count 10), which were subsumed within the torture conviction; and outrages upon personal dignity (count 17), which was subsumed within the torture conviction for the sexual violence, under Article 3 of the Statute.

580. The Trial Chamber proceeds now to examine whether the accused Zoran @igi} participated in the joint criminal enterprise of the Omarska camp and, if so, if his participation was significant enough to incur liability and whether his acts or omissions constitute the “committing, instigating, or aiding and abetting” of crimes alleged in the Amended Indictment, including in Keraterm and Trnopolje camps.

## E. ZORAN @IGI}

### 1. Introduction

581. Zoran @igi} is charged with individual responsibility in counts 1-3, 6-7, and 11-13 of the Amended Indictment as a participant in persecution,<sup>928</sup> murder, torture, cruel treatment, inhumane acts and outrages upon personal dignity under Article 7(1) of the Statute, as violations of Articles 3 (laws or customs of war) and 5 (crimes against humanity) of the Statute.

582. The crimes of persecution, inhumane acts and outrages upon person dignity are based upon the identical acts charged against the other accused in counts 1-3 of the Amended Indictment.

583. The other counts charged against @igi} in counts 6-7 and 11-13 are based on allegations that @igi} physically and directly participated in the murder, torture, and cruel treatment of detainees at Omarska, Keraterm, and Trnopolje camps, in the Prijedor area.

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<sup>927</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats, and other non-Serbs detained in the Omarska camp.

<sup>928</sup> For murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats, and other non-Serbs detained in the Omarska, Keraterm, and Trnopolje camps.

## 2. Omarska Camp

584. The Trial Chamber heard testimony of several atrocious incidents involving Žigi} and cohorts in the Omarska camp. Azedin Oklop-i} summed up Zigi's effect on the camp this way:

Let me tell you one thing, all the guards in the camp, in the Omarska camp, it was an attraction for them all when Žigi}, Timarac, and Du}a turned up, because they knew that at that time when they turned up, they would see something that they couldn't even see on film. And when it happened that Žigi} beat Riza Hadzali}, or anybody else, all the other guards from the surrounding points would come to watch, to experience those incidents.<sup>929</sup>

Further testimony is examined in detail below.

(a) Beating and Mistreatment of Witness AK, Witness AJ, Asef Kapetanovi}, Emir Beganovi} and Abdulah Brki}<sup>930</sup>

585. Witness J testified that on 10 June 1992, she saw Žigi} standing in front of the cafeteria on the pista. He was asking the guards about certain detainees and calling out their names, including Asef Kapetanovi} and the names of Witness AJ and Witness AK.<sup>931</sup> Several witnesses, including in particular Witness AJ and Witness AK, testified to the events that followed.<sup>932</sup>

586. Witness AJ recalled that he was in Mujo's room when he heard a loud voice calling his name and screaming, "Žigi} has come to see you." Asef Kapetanovi} then came running inside and told him that Žigi} was calling him out.<sup>933</sup> Witness AJ proceeded outside the eating hall where Žigi} grabbed him by his hair and neck and demanded 100,000 German Marks, which the witness did not have. Witness AJ was then taken to the white house where he joined Witness AK, Asef Kapetanovi}, and Emir Beganovi}.<sup>934</sup>

587. Witness AK testified that he was taken to the white house after he had heard someone calling out Witness AJ's name. Žigi} stepped forward from among a group of people waiting at the entrance of the white house and provocatively put his arm around Witness AK.<sup>935</sup> Žigi} said, "Where are you . . . brother", which Witness AK interpreted to mean, "I've got you now. I've got hold of you. I'm not going to let you go".<sup>936</sup>

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<sup>929</sup> Azedin Oklop-i}, T.1901. See also Ervin Rami}, T.5624.

<sup>930</sup> Counts 11-13 of the Amended Indictment and Schedule D.

<sup>931</sup> Witness J, T.4784. Witness DD/10 also testified she saw @igi} at Omarska camp around 10 June 1992, T.10656.

<sup>932</sup> Witness AJ, T.1607; Witness AK, T.2026.

<sup>933</sup> Witness AJ, T.1601-1602; Witness AK, T.2028.

<sup>934</sup> Witness AJ, T.1603, 1604; Witness AK, T.2026.

<sup>935</sup> Witness AK, T.2029-2030.

<sup>936</sup> Witness AK, T.2030.

588. Witness AK and Witness AJ testified that together with Asef Kapetanovi} they were taken into a room on the left-hand side of the white house where,<sup>937</sup> according to Witness AK, Žigi} ordered them to take up a position like dogs, sitting on their hands and feet.<sup>938</sup> Žigi} and others, including a large man named Du{an Kne`evi},<sup>939</sup> started to beat them as well as Asef Kapetanovi}.<sup>940</sup> According to Witness AK:

[...] Žigi} cursed and swore. And at one point, I felt some terrible blows on my back. I don't know what he was hitting me with, what kind of baton or club, whether it was wooden or metal or whatever. But I felt that blood was coming down my face because I got blows from underneath my face, hit from below. And at one point, I felt that with all this blood that I was spitting out, I was spitting out parts of my teeth as well.<sup>941</sup>

589. A man named Slavko Ecimovi} (nicknamed "Ribar") who, according to Witness AK, had been involved in military activities around Prijedor, was also in the room when the three men were being beaten.<sup>942</sup> Slavko Ecimovi} had been terribly assaulted. At one stage, Žigi} turned Slavko Ecimovi} over to face Asef Kapetanovi}, who admitted that he had once been to the assembly place of Slavko Ecimovi}'s military group. Žigi} cursed Asef Kapetanovi} and with Du{an Kne`evi} beat him into unconsciousness.<sup>943</sup>

590. Both Witness AK and Witness AJ testified that after the beating had been going on for a long time, Žigi} ordered them all outside the white house. They were made to crawl outside like dogs and to wash their bloody faces in a puddle of dirty rainwater.<sup>944</sup> Žigi} took Witness AJ by the head saying, "[y]ou are covered in blood. Wash yourselves. Pigs, go and wash yourselves".<sup>945</sup> Witness AK testified that Žigi} snickered and said, "[w]ell, the children have been picking strawberries, and their faces are a little red from eating them".<sup>946</sup>

591. All three men were then returned to the same room where Žigi} and Du{an Kne`evi} continued beating them. Žigi} told Witness AK that the three of them had killed his whole family and that he would do the same to them.<sup>947</sup> According to Witness AK it was "as if the rage had totally enveloped him".<sup>948</sup> The beating only stopped when an apparently senior officer entered the

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<sup>937</sup> Witness AJ, T.1640.

<sup>938</sup> Witness AK, T.2031.

<sup>939</sup> Witness AK, T.2030-2032; Witness AJ, T.1607.

<sup>940</sup> Witness AJ, T.1604, 1640-1641.

<sup>941</sup> Witness AK, T.2031.

<sup>942</sup> Witness AK, T.2034-2035; Witness AJ, T.1604, 1640.

<sup>943</sup> Witness AK, T.2036.

<sup>944</sup> Witness AK, T.2033; Witness AJ, T.1604-1605.

<sup>945</sup> Witness AJ, T.1604-1605.

<sup>946</sup> Witness AK, T.2033.

<sup>947</sup> Witness AK, T.2033-2035.

<sup>948</sup> Witness AK, T.2035.



room, and they were then once more ordered to wash themselves in the puddle outside the white house.<sup>949</sup>

592. Witness AK testified that he lost consciousness when he was returned to Mujo's room and that as a result of these beatings one of his arms was broken in two places, one or two ribs were broken, and his front teeth and nose were fractured.<sup>950</sup> Witness AJ also detailed the serious physical injuries he suffered as a result of the assaults. The witness further testified that Žigi} had said that he would come back the next day (he did not<sup>951</sup>) and that this frightened him so much that he attempted to commit suicide by cutting his wrists.<sup>952</sup>

593. Two other former detainees gave evidence that they too were brutalized on this occasion. Emir Beganovi} testified that while the beating of Witness AK, Witness AJ, and Asef Kapetanovi} was going on, he was also being beaten in the white house in the second room to the right. However, he did not testify that Žigi} was the one who beat him, as alleged in the Amended Indictment.<sup>953</sup> Emir Beganovi} said that at some stage he was taken outside with a group of men, including Witness AJ and Asef Kapetanovi}, and ordered by Žigi} to lap water from a puddle like a dog.<sup>954</sup> Azedin Oklop-i} also testified that he saw Žigi} order Emir Beganovi} and Witness AK to drink and wash themselves with the water from a puddle on the pista.<sup>955</sup> Abdulah Brki} was also in the white house at this time. He testified that after he was beaten by Du{an Kne`evi}, Žigi} took him to another room on the right hand side and ordered him to write down the name of the SDA President in Puharska.<sup>956</sup> In that second room he witnessed Emir Beganovi} being beaten.<sup>957</sup>

594. In its Final Trial Brief, the Defense pointed out certain discrepancies in witnesses' testimonies in this particular matter. The Defense highlighted that Witness AK failed to mention that Žigi} was wounded and wore a bandage.<sup>958</sup> The Trial Chamber notes, however, that the accused himself admitted hitting him and expressed remorse.<sup>959</sup>

595. The Defense further stressed that Witness AJ was unable to identify Žigi} in Court.<sup>960</sup> Finally the Defense referred to the imprecision and confusion in Witness AJ's testimony about his

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<sup>949</sup> Witness AK, T.2036-2037.

<sup>950</sup> Witness AK, T.2037-2038. See also [efik Zjaki}, T.5999.

<sup>951</sup> Witness AJ, T.1606.

<sup>952</sup> Witness AJ, T.1605, 1607.

<sup>953</sup> Amended Indictment, para. 41(c), counts 11-13.

<sup>954</sup> Emir Beganovi}, T.1408. Note, however, that this witness includes others in the group and does not mention Witness AK.

<sup>955</sup> Azedin Oklop-i}, T.1742.

<sup>956</sup> In his unsworn statement, @igi} said that he "chatted with Abdulah Brki} in the white house". Zoran @igi}, T. 9465.

<sup>957</sup> Abdulah Brki}, T.4489-4491.

<sup>958</sup> @igi} Final Trial Brief, para. 162.4.

<sup>959</sup> Zoran @igi}, T. 9465-9466. Defense Witness DD/10 heard Witness AK had been beaten by @igi}. Witness DD/10, T.10646.

<sup>960</sup> @igi} Final Trial Brief, para. 163.3.

“unfamiliarity with the white house”<sup>961</sup> and pointed out the “silence” of other witnesses about this incident, even though they were allegedly present at the time.<sup>962</sup>

596. The Trial Chamber considers that these “discrepancies” alleged by the Defense are minor and understandable when several witnesses testify to the same incident and do not affect the overall credibility of the witnesses. On the contrary, the Prosecution witnesses cited above were consistent and reliable.

597. Consequently, the Trial Chamber finds that there is sufficient evidence to establish the physical and direct participation of the accused in the beating of Witness AK, AJ, and Asef Kapetanovi}, with an intent to discriminate against them as Muslims. Furthermore, the Trial Chamber finds that Žigi} aided and abetted the beating of Abdulah Brki}. However, because Emir Beganovi} did not testify that it was @igi} who beat him, the Trial Chamber finds that the accused is not liable for that beating. Nevertheless, the Trial Chamber does believe that Žigi} made Emir Beganovi} drink and wash himself from water in a puddle on the pista, with an intent to cause humiliation. The Trial Chamber also considers that given the fact that only non-Serbs were detained in Omarska there is sufficient reason to conclude that @igi} attacked these men because they were of a different ethnic, religious, or political group and thus, they were targeted for abuse for discriminatory purposes. It further considers that the treatment was designed to humiliate the victims. In view of the clear intent to inflict severe pain and suffering on these detainees for prohibited purposes, torture was committed against Witness AK, AJ, and Asef Kapetanovi} by Žigi}.

598. The Trial Chamber finds that @igi} co-perpetrated the beating of Witness AK, AJ, and Asef Kapetanovi} which are cumulatively characterized as torture, cruel treatment, and inhumane acts, that @igi} aided and abetted the beating of Abdulah Brki}, which amounts to the crimes of torture, cruel treatment, and inhumane acts, and that @igi} intentionally humiliated Emir Beganovi}, which amounts to cruel treatment.

(b) Fatal beating of Be}ir Medunjanin and beating of Witness T<sup>963</sup>

599. Be}ir Medunjanin and Witness T arrived in Omarska camp around 10 June 1992, and were taken to a room on the first floor of the administration building where they were forced to face the wall. Be}ir Medunjanin was beaten at this time.<sup>964</sup> They were then detained in room “A3” of the white house with about 20 other prisoners. Witness T testified to the battered condition of Be}ir

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<sup>961</sup> @igi} Final Trial Brief, para. 160.5.

<sup>962</sup> @igi} Final Trial Brief, para. 168.3.

<sup>963</sup> Amended Indictment, para. 37(c), and Schedule D, counts 1-3, 6-7, and 11-13.

<sup>964</sup> Witness T, T.2648.

Medunjanin at that stage.<sup>965</sup> Witness DD/10 confirmed that Be}ir Medunjanin had been beaten and was in a very poor physical state.<sup>966</sup>

600. The next day, Witness T and Be}ir Medunjanin were interrogated in the administration building. Witness T was beaten during his interrogation while he heard Be}ir Medunjanin being abused next door. The next day they were interrogated again, but Witness T was not beaten this time. However, he testified that Be}ir Medunjanin returned afterwards to the white house very seriously injured.<sup>967</sup>

601. Witness T testified that the following day, Žigi} and Du{an Kne`evi} entered the white house, while a third person stood by the door to room 3. They chased away the other detainees as they approached Witness T and Be}ir Medunjanin, and Dusan Kne`evi} said, "this is where our little birds are."<sup>968</sup> He then addressed Be}ir Medunjanin and informed him that "what had happened in the barracks was nothing compared to what he would get now".<sup>969</sup> Witness T recounted how Žigi} and Dusan Kne`evi} then started to beat both him and Be}ir Medunjanin mercilessly. Dusan Kne`evi} had a wooden truncheon and Žigi} had a special kind of baton with a metal ball at the end of it. Dusan Kne`evi} focused on Be}ir Medunjanin. Žigi} focused upon Witness T:

Each blow with this ball provoked such pain that I could hardly see; there were spots in front of my eyes. I tried to protect myself with my hands. Whenever a blow would hit a bone, I felt as if the bones were cracking. I felt blood streaking down my head.<sup>970</sup>

602. During this attack, Žigi} also ordered another prisoner to beat Witness T. At some stage, Witness T heard Be}ir Medunjanin scream, "Kill me like a human being. Why are you torturing me like this?"<sup>971</sup> When the beating was over, Witness T and Be}ir Medunjanin were badly wounded. Witness T testified: "I had about six deep cuts on my head. Both my wrists were broken, and two fingers on my left hand."<sup>972</sup> As to Be}ir Medunjanin, Witness T testified that "his whole head was covered in wounds. He was entirely covered in blood. The blood was gushing. On his head, one could see these large, deep wounds."<sup>973</sup>

603. Du{an Kne`evi} and Žigi} returned the next day and again beat Witness T and Be}ir Medunjanin. At one point, both men were beating Be}ir Medunjanin. Žigi} then beat Witness T

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<sup>965</sup> Witness T, T.2648-2657.

<sup>966</sup> Witness DD/10, T.10660.

<sup>967</sup> Witness T, T.2658-2731.

<sup>968</sup> Witness T, T.2732.

<sup>969</sup> Witness T, T.2732.

<sup>970</sup> Witness T, T.2732-2733.

<sup>971</sup> Witness T, T.2733.

<sup>972</sup> Witness T, T.2734.

<sup>973</sup> Witness T, T.2734-2735.

with a rubber truncheon in the face. Before losing consciousness, Witness T heard Dusan Kne`evi} ordering Be}ir Medunjanin to lick his own blood.<sup>974</sup>

604. Witness T regained consciousness on the grass opposite the white house. He testified that at the time he was taken back into the white house, Be}ir Medunjanin was critically injured and died early the next morning.<sup>975</sup>

605. Fadil Avdagi} corroborated the testimony of Witness T. He too was in the white house on a day he identified as 16 June 1992,<sup>976</sup> when he saw Žigi}, Dusan Kne`evi} and two other uniformed men in room 3. Among the approximately 25 detainees in the room he recognised Be}ir Medunjanin and Witness T. Be}ir Medunjanin was sitting on a chair. He had been badly beaten and was absent-minded. Witness T was lying on the ground covered in blood, bleeding from a head wound. Fadil Avdagi} then witnessed Žigi} and the other three men beat Witness T and Be}ir Medunjanin, who was already unconscious as a result of kicks which Dusan Kne`evi} had previously rendered.<sup>977</sup>

606. The Defense challenged the evidence that Žigi} took part in these assaults. It questioned the credibility of Fadil Avdagi} regarding his description of the accused.<sup>978</sup> Fadil Avdagi} described Žigi} as a man wearing an earring and having “yellowish-reddish dyed hair,”<sup>979</sup> while several witnesses testified that Žigi} had never dyed his hair or worn an earring.<sup>980</sup>

607. In addition, the Defense pointed out that Witness T only “heard” from an “unreliable witness” that Žigi} was the man who beat him and Be}ir Medunjanin. This witness was a man named Samir, known as Esefin,<sup>981</sup> whose testimony, the Defense argued, is unreliable because the Prosecution did not prove that he was present during the beatings, or that he knew Žigi}.<sup>982</sup> Moreover, according to the Defense, Witness T was not able to identify Žigi} confidently in Court. When asked if he could indicate the accused in the courtroom, he said that he wasn’t sure.<sup>983</sup> Finally the Defense pointed out that other witnesses, who were in the white house at that time (Azedin

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<sup>974</sup> Witness T, T.2736-2737.

<sup>975</sup> Witness T, T.2737-2739. Azedin Oklop-i} testified that he saw Dusan Kne`evi} beat Be}ir Medunjanin in the white house and then take him outside. He concluded that Dusan Kne`evi} killed Be}ir Medunjanin. T.1898-1899. Abdulah Brki} testified that he saw Du}a Kne`evi} beat Be}ir Medunjanin and slice his throat with a knife. Abdulah Brki} does not know whether this resulted in Be}ir Medunjanin’s death. @igi} was in Omarska on that day. T.4625-4631.

<sup>976</sup> Fadil Avdagi}, T.3482. Witness DD/10 also testified that Be}ir Medunjanin succumbed to the beatings on 16 or 17 June, T.10663.

<sup>977</sup> Fadil Avdagi}, T.3449-3459.

<sup>978</sup> @igi} Final Trial Brief, para. 123.13-123.17.

<sup>979</sup> Fadil Avdagi}, T.3471.

<sup>980</sup> Witness DD/8, T.10857; Witness DD/7, T.10740; Witness DD/6, T.9865.

<sup>981</sup> Witness T, T.2731.

<sup>982</sup> @igi} Final Trial Brief, para. 122.

<sup>983</sup> Witness T, T.2752.

Oklop-i} and Abdulah Brki}), did not mention the participation or even the presence of Žigi} during the beatings of Witness T and Be}ir Medunjanin.<sup>984</sup>

608. The Trial Chamber considers, however, that Witness T was credible and trustworthy. He gave a correct description of the accused<sup>985</sup> despite his confusion of minor details in Court. His confusion is understandable considering the content of his testimony and the amount of time that had passed since the event.<sup>986</sup>

609. The Trial Chamber finds that @igi} incurs responsibility for the beating of Witness T. It also considers that given the fact that only non-Serbs were detained in Omarska there is sufficient reason to conclude that @igi} attacked these men because they were of a different ethnic, religious, or political group and thus, they were targeted for abuse for discriminatory purposes. In view of the clear intent to inflict severe pain and suffering on Witness T for prohibited purposes, torture, cruel treatment were committed against Witness T by Žigi}. The Trial Chamber also finds that @igi} is liable for the murder of Be}ir Medunjanin.

(c) Was @igi}'s Participation in Omarska Camp, a Joint Criminal Enterprise, Significant Enough to Incur Criminal Responsibility?

610. The evidence demonstrates conclusively that @igi} regularly entered Omarska camp for the specific purpose of abusing detainees. Omarska functioned as a joint criminal enterprise and @igi} played a significant role in perpetrating crimes in Omarska camp as part of that enterprise. He physically and directly perpetrated crimes of serious physical and mental violence against the non-Serbs detained in Omarska camp, knowing they were non-Serbs detained in the camp by reason of their religion, politics, race, or ethnicity. The Trial Chamber finds that Žigi}'s participation in Omarska camp was significant. @igi} was aware of the persecutory nature of the crimes and he aggressively and eagerly participated in the persecution of non-Serbs in Omarska and was a co-perpetrator of the joint criminal enterprise of the Omarska camp.

611. The Trial Chamber turns now to consider the role of @igi} in the Keraterm and Trnopolje camps.

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<sup>984</sup> @igi} Final Trial Brief, para. 124.2.

<sup>985</sup> Witness T, T.2635-2636.

<sup>986</sup> Witness T, T.2753-2754.

### 3. Keraterm Camp

#### (a) Žigić's presence and duties in the Keraterm camp

612. Žigić is the sole accused still charged with responsibility for crimes committed in the Keraterm camp.<sup>987</sup> The Prosecution submits that the accused was a guard at Keraterm for ten days in June 1992 and that he participated in repeated acts of brutality against the detainees in the camp.<sup>988</sup> In his unsworn statement, Žigić said that his unit was assigned to secure the Keraterm investigation centre during a ten-day period in early June 1992, but that he spent no more than 8 hours working in the camp.<sup>989</sup> However, several witnesses have testified that during the month of June 1992, Žigić entered the Keraterm camp on a daily basis.<sup>990</sup> According to Defense Witness DD/8, Žigić was in Keraterm every day during his stay at the camp from 30 May to 5 June 1992.<sup>991</sup> Witness DD5 declared that he saw Žigić in Keraterm about ten times from 30 May until 13 June 1992.<sup>992</sup> According to Ervin Ramić,<sup>993</sup> during every day of his detention at Keraterm, from 31 May to 5 August 1992, Žigić abused detainees:

I remember the first time. It was a Tuesday. A green Mercedes entered where I was. Four or five people stepped out. Žigić was already in the camp, and they started beating up everyone without any reason. They just started beating everybody.<sup>994</sup>

613. Some Defense witnesses testified Žigić brought food, water and cigarettes for the detainees in his mini-van.<sup>995</sup> That was allegedly his only duty at the camp. Several detainees testified that he gave cigarettes and food to detainees.<sup>996</sup> Detainees who collaborated with the Serb authorities at Keraterm testified that Žigić offered to "protect" them and provided them with cigarettes, biscuits, or sweets.<sup>997</sup> According to Žigić, the conditions were so dreadful that he avoided staying at the camp and tried to help the detainees by providing some with alcohol.<sup>998</sup>

614. The Trial Chamber however has received extensive and credible evidence confirming that Žigić regularly entered the Keraterm camp in order to beat the detainees, as reported by the Security Chief of the camp in an official note addressed to Serb authorities.<sup>999</sup> While Žigić seemed able to

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<sup>987</sup> Charges relating to Keraterm and Trnopolje camps against the other four accused were dismissed by the Decision on the Defense Motions for the Judgement of Acquittal, 15 December 2000.

<sup>988</sup> Prosecution Final Trial Brief, para. 389.

<sup>989</sup> Zoran Žigić, T. 9457.

<sup>990</sup> Witness N, T.3892; Abdulah Brkić, T.4544; Hase Ilić, T.4642.

<sup>991</sup> Witness DD/8, T.10881.

<sup>992</sup> Witness DD5, T. 10069.

<sup>993</sup> Ervin Ramić, T.5613, 5625, 5617.

<sup>994</sup> Ervin Ramić, T.5618.

<sup>995</sup> Witness DD/7, T.10739; Witness DD/5, T.9961; Zeljko Gavranović, T. 10213; Stojanović, T. 10188; Witness DD6, T. 9843.

<sup>996</sup> Witness DD7, T. 9961; Witness DD1, T. 9654; Zeljko Gavranović, T. 10225.

<sup>997</sup> Witness DD/1, T.9523 and T.9651-9652; Witness DD/2, T.9736-9637; Witness DD/5, T.9961.

<sup>998</sup> Zoran Žigić, T.9459.

<sup>999</sup> Exhibit P 3/249.

enter the camp at will, some shift leaders refused to allow Žigi} *carte blanche* to mistreat detainees at random in the Keraterm camp.<sup>1000</sup> Witness Y testified that toward the end of June, after the beating of one of the detainees, he heard someone (probably the shift leader, Kajin) informing Žigi}, "You're not going to do as you please. You will not be allowed into the camp anymore".<sup>1001</sup> But the other commanders of the camp allowed @igi} free reign. Hase I-i} described how Žigi} left an indelible impression upon detainees arriving in Keraterm:

You know, my impression was that he wanted to leave the impression that he do [*sic*] with each one of us as he pleased, to kill whomever he wanted, beat, take out, or whatever. As a matter of fact, yes, he could do that, and he did do that.<sup>1002</sup>

615. Witnesses described how the detainees would say, "Hush, Žigi} is coming" and try to get to the back of the room to avoid being called out.<sup>1003</sup> Du{an Kne`evi} often accompanied @igi}. They would look for certain people, inspecting their identity cards and Žigi} would curse at the detainees.<sup>1004</sup> Witness Y testified that vehicles would approach in the night and people were subsequently called out of their place of detention. The inmates would say, "@iga and Du}a are coming again to kill".<sup>1005</sup>

616. The Defense asserts that Žigi} was intoxicated during many of the incidents alleged in the Amended Indictment, although it does not specify during which incidents @igi} was drinking.<sup>1006</sup>

(b) Beatings Resulting in the Death of Emsud Bahonji} and Sead Jusufagi}<sup>1007</sup>

617. Several witnesses testified how, over a period of several days, Emsud Bahonji}, a policeman, and Sead Jusufagi}, nicknamed "Car", were slowly beaten to death by Žigi} and others. Witness N testified that on 8 or 9 June 1992, Žigi} called Emsud Bahonji} out from room 2, asked him, "Will I have to feed your children?" and referred to Emsud Bahonji} as "sniper".<sup>1008</sup> Emsud Bahonji} was beaten upon his arrival at the camp and Žigi} then started beating and kicking him while making him sing. Emsud Bahonji} was subsequently returned to room 2 with extensive injuries.<sup>1009</sup> The next day, Zoran Žigi}, Dusan Kne`evi}, and Predrag Banovi} again called out Emsud Bahonji} and Sead Jusufagi}:

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<sup>1000</sup> Hase I-i}, T.4632 and 4696.

<sup>1001</sup> Witness Y, T.3592-3593.

<sup>1002</sup> Hase I-i}, T.4636, 4643.

<sup>1003</sup> Safet Ta}i, T.3721; Witness AD, T.3754.

<sup>1004</sup> Safet Ta}i, T.3721.

<sup>1005</sup> Witness Y, T.3489.

<sup>1006</sup> Zoran @igi}, T. 9458, 9462; @igi} Final Trial Brief, paras 273.1, 274.1.

<sup>1007</sup> Amended Indictment, para. 37(a), counts 6-7.

<sup>1008</sup> Witness N, T.3892.

<sup>1009</sup> Safet Ta}i testified that Emsud Bahonji} had told him that if Žigi} "shows up again, he would be finished, if @igi} comes in, that he would be dead". T.3759.

They forced them to jump onto a truck and then jump off the truck again while beating them at the same time. After that, they brought Emsud back to the room, and Žigi} gave Car a machine-gun and made him run around the area. After that, he ordered him to dismantle the machine-gun. Car managed to do it. However, he was not able to put it back again. Later on, Car was ordered to call Emsud out so that Emsud could help him put the machine-gun back again. At the same time, they were beating him with their fists, kicking him, hitting him with their rifle butts. After that, Emsud was brought back to the room and Car remained outside, still running around in the area.<sup>1010</sup>

618. In his unsworn statement, Žigi} admitted that he made Sead Jusufagi} run around with a machine gun because he wanted to humiliate him for his participation in the attack on Prijedor. Žigi} further admitted that he kicked him, but said he did it only once. This was confirmed by Witnesses DD/1 and DD/5.<sup>1011</sup> Defense Witness DD/9 also testified that Žigi} went up to Sead Jusufagi} and said, "Put the machine gun on your shoulder and run round in a circle. That's what you get for shooting at Serb soldiers and policemen".<sup>1012</sup>

619. According to Ervin Rami}, another detainee:

After that Zoran Žigi} came back on several occasions, kicking him and saying, 'Are you still alive, baljia?' After that, they left him lying there, and the next day Car died. He was taken out and left by the container.<sup>1013</sup>

620. Witness N also saw Sead Jusufagi}'s dead body the following day lying outside the entrance to the toilet, next to a container.<sup>1014</sup>

621. However, according to Žigi}, after having forced Sead Jusufagi} to run in circles carrying the machine-gun, he left the camp and went to a bar. He didn't know what happened to Sead Jusufagi} after he left Keraterm.<sup>1015</sup> Many witnesses called by the Defense corroborated Žigi}'s unsworn statement, saying that they saw Žigi} beating Sead Jusufagi} only once.<sup>1016</sup> Some testified that Žigi} did not remain in Keraterm camp after the initial beating of Sead Jusufagi}. According to a Defense witness, after the machine gun incident a group of soldiers arrived at the camp around 4 or 5 p.m., after the funeral of a military officer, and they called out Sead Jusufagi} and beat him.<sup>1017</sup> The next morning he was dead.<sup>1018</sup>

622. As to the fate of Emsud Bahunji}, Witness N recounted that after the joint beating of Emsud Bahunji} and Sead Jusufagi}, Emsud Bahunji} was taken to the hospital on the orders of an officer of the Serbian Army. Upon his return to the camp, Emsud Bahunji} told Witness N that Žigi} and others had further abused him at the hospital. A cross had been painted on Emsud Bahunji}'s

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<sup>1010</sup> Witness N, T.3893-3894. See also Abdulah Brki}, T.4484.

<sup>1011</sup> Zoran @igi}, T.9458-9459; Witness DD/1, T.9533-9656; Witness DD/5, T.9965.

<sup>1012</sup> Witness DD/9, T.10414.

<sup>1013</sup> Ervin Rami}, T.5618-5619.

<sup>1014</sup> Witness N, T.3894.

<sup>1015</sup> Zoran @igi}, T.9459.

<sup>1016</sup> Witness DD/1, T.9533; Witness DD/2, T.9670.

<sup>1017</sup> Witness DD/9, T.10415.



forehead and “[h]e was still conscious but he looked terrible. His kidneys were black and blue, his back was black and blue, and his face had been smashed. He could barely walk.”<sup>1019</sup> According to Witness N, Emsud Bahonji} died on 19 June 1992 some 10 days after the beatings.<sup>1020</sup> This was corroborated by Witness AE who testified that Emsud Bahonji} died as a result of daily beatings by Žigi} and others:

It went on day after day after day for about seven days. In the end, one could simply see that he wouldn't really live much longer, that he was already half dead. His two uncles asked the guards to give him some water and wash him because he was stinking, there was a terrible odour coming from him. After he was washed, only a few hours later he died.<sup>1021</sup>

623. The Trial Chamber is convinced that @igi} took an active role in the beating of Sead Jusufagi}, and is therefore responsible as a co-perpetrator for his subsequent death, regardless of whether he struck the final blow.

624. Concerning Emsud Bahonji}, the Defense questioned the credibility of Witness AE after he failed to identify Žigi} in the courtroom.<sup>1022</sup> However, as related above, Witness AE was not the only witness to these events, and the Trial Chamber has received sufficient evidence on which to conclude that Žigi} participated in the fatal beating of Emsud Bahonji} as a co-perpetrator.

625. The Trial Chamber finds that @igi} incurs criminal liability for the murders of Sead Jusufagi} and Emsud Bahonji}.

(c) Murder of Jasmin Izejiri<sup>1023</sup>

626. The Amended Indictment charges Žigi} with responsibility for the murder of Jasmin Izejiri. Hase I-i} testified that when Žigi} called out Emsud Bahonji} for a beating on one occasion, he also called out a young Albanian man who used to work at and purportedly owned a coffee shop. To his knowledge, this man did not survive.<sup>1024</sup> The Prosecution claims that this man is Jasmin Izejiri.<sup>1025</sup>

627. Witness DD/8, who owns a bakery in Prijedor, testified that he had never heard of a man called Jasmin Izejiri either working at or owning a coffee shop.<sup>1026</sup> According to Exhibit D4/23, a

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<sup>1018</sup> Witness DD/1, T.9537, Witness DD/5, T. 9965.

<sup>1019</sup> Witness N, T.3897.

<sup>1020</sup> Witness N, T.3895-3897, 3910. See also Witness AD, T.3796-3797, 3802; Hase I-i}, 4638-4642; Ervin Rami}, T.5621.

<sup>1021</sup> Witness AE, T.4286.

<sup>1022</sup> @igi} Final Trial Brief, para. 47.4.

<sup>1023</sup> Amended Indictment, para. 37(b), counts 6-7. See also Prosecution Final Trial Brief, para. 401.

<sup>1024</sup> Hase I-i}, T.4642, 4695, 4704-4705.

<sup>1025</sup> Prosecution Final Trial Brief, paras 401-403.

<sup>1026</sup> Witness DD/8, T.10835.

certificate from the Prijedor municipality, no person under the name of Jasmin Izejiri was ever registered on the territory of this municipality.

628. The Trial Chamber notes that there is no evidence that the young Albanian called out by Žigi} was named Jasmin Izejiri as alleged in the Amended Indictment. The Trial Chamber therefore finds that there is insufficient evidence to support the Prosecution's assertion that Žigi} personally killed the young Albanian, Jasmin Izejiri.

(d) Murder of Špija Mešic<sup>1027</sup>

629. The Amended Indictment further alleges that Žigi} incurs criminal responsibility for the fatal beating of a man called Špija Mešic. Edin Gani} testified that Špija Meši} is dead.<sup>1028</sup> Witness AE testified that a man called "Špija" was the first one to be taken out and killed after Du{an Tadi} arrived at the camp.<sup>1029</sup> However, this was the only evidence presented in relation to this charge.

630. The Trial Chamber therefore considers that there is insufficient evidence to conclude beyond a reasonable doubt that Žigi} participated in the murder of this man.

(e) Beating resulting in the death of Drago Tokmad`i}<sup>1030</sup>

631. Witness Y was detained in room 4. On 24 June 1992, he saw the headlights of a car on the ceiling and other detainees said, "@iga and Du}a are coming again to kill."<sup>1031</sup> Following the arrival of the car, two policemen, Drago Tokmad`i} and Esad Islamovi}, were called out from room 4. Witness Y did not see who called the men out or who carried out the subsequent beating, but he heard the screams and pleas of the victims.<sup>1032</sup> He testified that Drago Tokmad`i} died of his injuries within 15 minutes after he and Esad Islamovi} had been returned to room 4.<sup>1033</sup> Edin Gani} witnessed Drago Tokmad`i} being beaten. While Žigi} beat Edin Gani}, Žigi} warned him that he had to be careful or he might end up "like that pig",<sup>1034</sup> pointing at Drago Tokmad`i}. Žigi} then instructed Goran Laji} to "finish that off" and Goran Laji} continued to beat Drago Tokmad`i}.<sup>1035</sup>

632. The Defense submits that the statement of Edin Gani} should be dismissed in full.<sup>1036</sup> Further, it states that no former detainee at Keraterm could confirm the beating, despite Edin

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<sup>1027</sup> Amended Indictment, para. 37(b), counts 6-7.

<sup>1028</sup> Edin Gani}, T.5955.

<sup>1029</sup> Witness AE, T.4296.

<sup>1030</sup> Amended Indictment, para. 37(b), counts 6-7.

<sup>1031</sup> Witness Y, T.3606.

<sup>1032</sup> Witness Y, T.3680.

<sup>1033</sup> Witness Y, T.3607-3610.

<sup>1034</sup> Edin Gani}, T.5908.

<sup>1035</sup> Edin Gani}, T.5908-5909.

<sup>1036</sup> @igi} Final Trial Brief, para. 227.

Gani}'s claim that he knew most of the detainees at Keraterm.<sup>1037</sup> However, the Trial Chamber finds there is no reason to doubt the credibility of this witness.

633. Hence, the Trial Chamber finds that Žigi} contributed to the fatal beating of Drago Tokmad`i}. @igi} is thus responsible as a co-perpetrator for the murder of Drago Tokmad`i}.

(f) Mass Murder of the Occupants of Room 3<sup>1038</sup>

634. Safet Ta}i and several other witnesses testified about a mass killing in room 3 that occurred towards the end of July 1992.<sup>1039</sup> Safet Ta}i testified that a group of soldiers appeared in the camp around this time,<sup>1040</sup> set up a table at a distance of about 15 to 20 metres from the entrance to room 3 and placed a machine gun on it.<sup>1041</sup> Žigi} was moving about as this was going on and his behavior was unusual insofar as he was quiet.<sup>1042</sup> Witness AD stated that @igi} was nearby when the detainees were being threatened and while the gun was being set up on the table outside the room:

At one point he came closer to the table. He took the table and moved it away for about 1 metre or 2 metres, and he sat on a chair behind the table. He started swearing at us, telling us that he would kill us all. I saw Zoran Žigi} at that time near that table.<sup>1043</sup>

635. The detainees in room 3 were then taken out and moved to another room and people from the recently captured villages of Hambarine and Brdo and the region of Ljubija took their place in room 3. Around midnight, Witness AD heard shooting start, and it lasted until dawn. A survivor later told Witness AD that tear gas was thrown into the room and that people were shot when they attempted to escape from the room.<sup>1044</sup> The next morning, Witness N was told to collect the dead bodies from room 3 and put them into a pile. He testified:

There were people with arms missing, half their backs, a small hole in front and behind no back left. I think there were about 120 men. There were people who had no visible wounds but who had choked to death as they fell, one on top of each other.<sup>1045</sup>

636. Witness N stated he saw Žigi} nearby as the bodies were being collected. When a truck arrived to pick them up, Witness AD saw Žigi} instruct the driver how to park.<sup>1046</sup> The bodies were

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<sup>1037</sup> @igi} Final Trial Brief, para. 227.1. Overall, the Defense asserted that his testimony was illogical and inconsistent.

<sup>1038</sup> Amended Indictment, para. 37(d), counts 6-7.

<sup>1039</sup> Safet Ta}i, T.3763-3770; Witness AD, T.3817-3823, 3834-3835, 3869-3871, 3874-3875; Witness V, T.3707-3712; Witness N, T.3898-3890.

<sup>1040</sup> Safet Ta}i, T.3762-3764.

<sup>1041</sup> Witness AD testified that it was the guards at the camp who set up the table with the machine gun. Witness AD, T.3818-3819.

<sup>1042</sup> Safet Ta}i, T.3765-3766, 3779; Witness AD, T.3819-3820.

<sup>1043</sup> Witness AD, T.3819.

<sup>1044</sup> Witness AD, T.3821-3823.

<sup>1045</sup> Witness N, T.3899.

<sup>1046</sup> Witness N, T.3921; Witness AD, T.3834.

then loaded onto the truck. Later, a second truck arrived with a water hose to wash away the blood. A survivor told Witness AD that a total of 160 detainees were killed and 40 were wounded.<sup>1047</sup>

637. The Defense claims by way of alibi that Žigi} was at a party organized at his parent's house during the slaughter. The Defense witnesses who were allegedly at the party and the accused himself, however, gave inconsistent testimony as to the party's purpose. According to Žigi}, the party was to commemorate the death of a good friend,<sup>1048</sup> while Soka Siki} reported that there was "no special occasion".<sup>1049</sup> Miroslav Dzebri} testified that the party took place "because it was a month since [he] was wounded".<sup>1050</sup> The Trial Chamber also notes the discrepancies in the testimonies of the different Defense witnesses in relation to exactly when the party started and finished, and when Žigi} was present. In addition, the Trial Chamber notes that Exhibit 3/144a, a report from the Prijedor police, states that: "At about 2100 hours on 24 July 1992, in the corridor of the . . . hospital in Prijedor, . . . he [Žigi}] approached a first aid stretcher on which the wounded Omer Kardzic was lying and stabbed him in the heart with a knife, killing him instantly."<sup>1051</sup> At that time, according to the testimony of Defense witnesses, Žigi} was at the barbecue.

638. The Trial Chamber has doubts concerning @igi}'s alibi, although it also fails to be convinced that @igi} was present during the massacre. Furthermore, his roaming around while the gun was being set up and directing a truck to pick up bodies after the slaughter is not found to be sufficient proof that @igi} participated in the killings. Consequently, the Trial Chamber finds Žigi} does not incur criminal responsibility for the room 3 massacre.

(f) Beating of Fajzo Mujkanovi}<sup>1052</sup>

639. Abdulah Brki} was detained at Keraterm from 30 May to 11 or 12 June 1992.<sup>1053</sup> He was held in room 2, along with 150 other detainees. He testified that around 1 June 1992, the door of the room suddenly opened and a black car stormed in at great speed. Žigi} and other men, including Du{an Kne`evi}, got out of the car and demanded that the detainees tell them where Fajzo Mujkanovi} was hiding or be killed. Then suddenly somebody shouted out that Fajzo Mujkanovi} was in room 1, so @igi} and his men left. Du{an Kne`evi} demanded to know from Fajzo Mujkanovi} who had killed his brother. He then beat Fajzo Mujkanovi} and made an incision across his neck with a knife. Fajzo Mujkanovi}'s wife and child were then brought in and Du{an Kne`evi} threatened he would kill them if Fajzo Mujkanovi} refused to answer. Žigi}, Du{an

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<sup>1047</sup> Witness AD, T.3875.

<sup>1048</sup> Zoran @igi}, T.9469.

<sup>1049</sup> Soka Siki}, T.9496-9497.

<sup>1050</sup> Miroslav Dzebri}, T.10113.

<sup>1051</sup> Exhibit P 3/144a.

<sup>1052</sup> Amended Indictment, para. 41(a), counts 11-13.

Kne`evi} and the other men left, however, when one of the guards said, "They're coming." Abdulah Brki} testified that Žigi} was present during the incident.<sup>1054</sup>

640. The Trial Chamber believes that this incident happened as described by Abdulah Brki}. Žigi} was present in the group of men who beat Fajzo Mujkanovi}, which under the circumstances would have given a tacit approval of and provided support for the crime. The Trial Chamber finds that the beating, inflicted on the basis of the ethnicity of the victim and combined with the attempts to get information from the detainee, as well as the real and immediate threats to kill his wife and child, intentionally inflicted severe pain and suffering, both physical and mental, upon Fajzo Mujkanovi}, constituting torture and cruel treatment.

(g) Beating of Witness AE and Red`ep Grabi}<sup>1055</sup>

641. Witness AE was detained in the Keraterm camp from 13 June through early July 1992.<sup>1056</sup> He testified that upon arrival in the camp, he and three other men were selected for "special treatment",<sup>1057</sup> meaning that they were beaten by a group of about four men, including Žigi}. Rifle butts were used as an assault weapon, and Žigi} used a scorpion gun.<sup>1058</sup> Witness AE also testified that the Jakupovi} brothers were accused of having raped a Serbian girl and that they were beaten on this occasion by Žigi} and others, including Du}an Kne`evi} and the Banovi} brothers.<sup>1059</sup> The Trial Chamber notes that its Decision on Defence Motions for Acquittal acquitted Zigic of crimes committed against one of the Jakupovi} brothers. The other brother is listed neither in the Amended Indictment nor attached Schedules, and thus the Trial Chamber does not consider this incident as a basis upon which @igi} can be found guilty of any crime.

642. Approximately 10 to 15 days after Witness AE arrived in the camp, Žigi} called out a group of 22 men from Kozarac, including Witness AE himself, Redo (Red`ep) Grabi}, Labud Mujkanovi}, Ferik Kapetanovi}, and Hilmi}a Avdagi}.<sup>1060</sup> He ordered the men to get down on their hands and knees and to crawl up and down on a small gravelled structure until they were bleeding. Žigi} next ordered the men to kneel down in columns of two wherein he and others beat them with a metal rod on the back and the neck and kicked them with their boots:

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<sup>1053</sup> Abdulah Brki}, T.4481.

<sup>1054</sup> Abdulah Brki}, T.4481-4483. The Witness declared that Žigi} "was standing up above him but was not taking part in it. He was present but he didn't beat Fajzo. Du}a did that." T.4483.

<sup>1055</sup> Indictment, para 41(f), counts 11-13; Schedule D, counts 11-13.

<sup>1056</sup> Witness AE, T.4297, 4285.

<sup>1057</sup> Witness AE identified the three other men as Sengin and the Jakupovi} brothers. Witness AE, T.4291.

<sup>1058</sup> Witness AE, T.4279-4281.

<sup>1059</sup> Witness AE, T.4291-4292. This was corroborated by Ervin Rami} who testified that it was mostly @igi} who beat the Jakupovi} brothers. Ervin Rami}, T.5623.

<sup>1060</sup> Witness AE, T.4287-4288.

As he hit the man on the back or neck, those men would fall down, head forward, on the asphalt. Another soldier was moving between the column and would receive in his hands those individuals that Žigi} would hit, and then he would then hit him with his soldier's boot under the chin or on the face, wherever, so that that individual would again be returned upward, in the upright position. It went on until all of us had passed through it.<sup>1061</sup>

Žigi} then ordered the men to fight amongst themselves, threatening that if they refused to do so, he would assault them. Witness AE was ordered fight Redo Grabi}.<sup>1062</sup> The incident only ended when a man called Kajin, whom the witness thought was probably the shift leader, intervened.<sup>1063</sup>

643. According to the Defense, this statement should be dismissed in full, firstly because Witness AE is the only one to testify about this "huge incident, happening right there in and out of the room, and in front of all detainees".<sup>1064</sup> Secondly, the witness failed to recognize Žigi} in the courtroom, although he explained this failure simply by stating that "people change over a period of time".<sup>1065</sup> Finally, the Defense alleged that Žigi} was at the hospital from 21 until 26 June 1992, during the period this incident occurred.<sup>1066</sup> According to Witness AE the incident took place about 10-15 days after his arrival in the camp. The Defense thus claimed that Žigi} was absent from the camp during the time period the witness asserted this crime occurred.

644. The Trial Chamber finds, however, that this incident, which is not precisely dated, could have happened before or after the hospitalization of the accused. The Trial Chamber considers also that the fact that Witness AE is the only one to testify about this event does not of itself render his testimony unreliable.<sup>1067</sup> Indeed, the Trial Chamber finds the witness credible. He accurately described the accused, mentioning the bandage on his hand and correctly recalling the uniform worn by the accused at the time of the incident.<sup>1068</sup> He initially convincingly described the accused in the courtroom,<sup>1069</sup> only faltering later during a rather confusing exchange with the Prosecution.<sup>1070</sup>

645. The Trial Chamber finds that Žigi} is responsible for the beating of Witness AE and Red`ep Grabi}. It also considers that given the fact that only non-Serbs were detained in Keraterm there is sufficient reason to conclude that @igi} attacked these men because they were of a different ethnic, religious, or political group and thus that they were targeted for abuse for discriminatory purposes.

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<sup>1061</sup> Witness AE, T.4288.

<sup>1062</sup> Witness AE, T.4289-4290.

<sup>1063</sup> Witness AE, T.4288. Ervin Rami} testified that @igi} regularly beat the men from Kozarac detained in room 2, T. 5620.

<sup>1064</sup> @igi} Final Trial Brief, para. 173.3.

<sup>1065</sup> Witness AE, T.4319.

<sup>1066</sup> Expert witness Dr. Mirko Barudzija, T.10894. See also Exhibits D4/24 and D4/27.

<sup>1067</sup> Tadi} Trial Chamber Judgement, para. 539; ^elebi}i Trial Chamber Judgement, para. 594; Tadi} Appeals Chamber Judgement, para. 64; Aleksovski Appeals Chamber Judgement, paras 62-63.

<sup>1068</sup> Witness AE, T.4309.

<sup>1069</sup> Witness AE, T.4309-4310.

<sup>1070</sup> Witness AE, T.4323-4325.

It further considers that the treatment was designed to humiliate the victims. In view of the clear intent to inflict severe pain and suffering on these detainees for prohibited purposes, torture and cruel treatment was committed by Žigić against Witness AE and Red`ep Grabić.

(h) Beating of Jasmin Ramadanović, nicknamed "Sengin"<sup>1071</sup>

646. Witness N testified that Žigić asked a man named Jasmin Ramadanović, nicknamed Sengin, "[a]re you now going to wear a green beret for a hundred German marks?" Žigić then started beating him. Jasmin Ramadanović subsequently received medical aid at the hospital and left the Keraterm camp on 5 August 1992.<sup>1072</sup>

647. The Defense questioned the credibility of Witness N on the basis that he failed to describe the color of Žigić's taxi with exact precision<sup>1073</sup> and erred when he said that the Yugoslav Police Force still existed when another victim was arrested.<sup>1074</sup> Defense Witnesses DD/9 and DD/7 also testified that they never saw Žigić beating Jasmin Ramadanović and Witness DD/5 testified that it was the Banović brothers, Dusan Kne`ević and Ivica Janjić, and not Žigić, who beat Jasmin Ramadanović.

648. However, although Witness J was the only one testifying as to Žigić's participation in this event, the Trial Chamber considers that the discrepancies in his testimony pointed out by the Defense are not relevant, because they do not relate to this incident and do not affect the overall credibility of the witness. The Trial Chamber also considers that most detainees were beaten by multiple perpetrators on several different occasions and, even if the Banović brothers beat Sengin, that in no way suggests he could not have also been beaten by Žigić. Therefore, the Trial Chamber finds that Žigić is responsible for the beating of Jasmin Ramadanović. The Trial Chamber notes the reference to wearing a "green beret" during the beating, strongly suggesting that the beating was motivated by ethnic and religious differences, and further notes that the beating was so severe it required hospital treatment.

649. Based on the foregoing, the Trial Chamber finds that Žigić intentionally subjected Jasmin Ramadanović to severe pain or suffering for a prohibited purpose, constituting torture and cruel treatment.

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<sup>1071</sup> Amended Indictment, para. 41(g), counts 11-13.

<sup>1072</sup> Witness N, T.3897-3898.

<sup>1073</sup> Žigić Final Trial Brief, para. 46.6. See also Witness AE, T. 3907.

<sup>1074</sup> Žigić Final Trial Brief, para. 46.10. See also Witness AE, T.3909.

(i) Beating of Zijad Krivdi} and Witness V<sup>1075</sup>

650. The Amended Indictment, in its Schedules, lists an individual known as Witness V as a victim of persecution, inhumane acts, and outrages upon personal dignity.<sup>1076</sup> Witness V testified about an occasion where Žigi} kicked him in the face. However, the primary focus of Žigi}'s aggression on this occasion, according to the witness, was another individual: Zijad Krivdi}. On 14 June 1992, Witness V arrived at Keraterm camp where he stayed until 5 August 1992. He was first detained in room 3 and then in room 2.<sup>1077</sup> He testified that at some point Žigi} opened the door of room 3 and allowed a group of men to go outside to urinate. Zijad Krivdi} was among them and when he returned, Žigi} ordered him to kneel down in front of him, after which @igi} hit him with his gun.<sup>1078</sup> Witness AD said that the gun went off and a bullet hit Zijad Krivdi} in the head, causing serious injury.<sup>1079</sup> Žigi} ordered Witness V to remove the hair that was sticking on the gun. He then ordered the witness to kiss his shoe, whereupon @igi} kicked him between the eyes.<sup>1080</sup>

651. The Trial Chamber finds that Žigi} kicked and wounded Witness V, constituting an inhumane act.

652. The Trial Chamber does not rely on the assault on Zijad Krivdi} as one of the crimes for which @igi} is found guilty because the victim is not listed in the Amended Indictment or Schedules,<sup>1081</sup> but it does note that the testimony is credible and can be used as corroborating evidence of a consistent pattern of conduct, pursuant to Rule 93.

(j) Beating of Witness AD<sup>1082</sup>

653. Witness AD was detained in the Keraterm camp from 14 June until 5 August 1992.<sup>1083</sup> He testified that Žigi} he allowed groups of five men at a time to come out of room 3 to urinate and that he would beat these men on those occasions. When it was Witness AD's turn, Žigi} kicked him in the face, which caused the witness to lose his teeth.<sup>1084</sup>

654. The Defense strongly questions this witness's credibility.<sup>1085</sup> Witness AD testified that he saw Žigi}'s scar many times in Keraterm.<sup>1086</sup> However, according to the Defense, this scar is the

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<sup>1075</sup> Schedule D, counts 1-3.

<sup>1076</sup> Schedule D, counts 1-3.

<sup>1077</sup> Witness V, T.3744-3745.

<sup>1078</sup> Witness AD, T.3808.

<sup>1079</sup> Witness AD believes that Zijad Krivdi} survived. Witness AD, T.3808-3810.

<sup>1080</sup> Witness V, T.3702-3703.

<sup>1081</sup> He is listed, however, in the Prosecution Final Trial Brief, para. 396.

<sup>1082</sup> Schedule D, counts 1-3.

<sup>1083</sup> Witness AD, T.3796.

<sup>1084</sup> Witness AD, T.3798.

<sup>1085</sup> @igi} Final Trial Brief, para. 45.5.

<sup>1086</sup> Witness AD, T.3848.



result of an accident that took place on 19 August 1992. Witness AD testified that he left the camp around 5 August.<sup>1087</sup> The Defense also pointed out that the courtroom identification of the accused by Witness AD is not reliable. Witness AD correctly identified Žigi} in Court, but according to the Defense, this positive identification was due to the fact that the Presiding Judge asked Zigic if he could understand the Court proceedings, and when he answered in the witness' presence, he identified himself as the accused.<sup>1088</sup> Furthermore, Witness AD refused to answer some of the questions posed by the Defense.<sup>1089</sup> Finally, the Defense highlighted what it considered to be contradictions in the witness' testimony.<sup>1090</sup>

655. The Trial Chamber considers that the core part of Witness AD's testimony is consistent with that of other witnesses' statements, but concludes that there are enough inconsistencies for the Trial Chamber to raise reasonable doubt as to whether this particular event happened exactly as testified by Witness AD. The Trial Chamber finds that Žigi} does not incur responsibility for the beating of Witness AD.

(k) Beating of Edin Gani} and Husein Gani}<sup>1091</sup>

656. Edin Gani} testified that Žigi} beat and pursued him both in and beyond the Keraterm camp. While Edin Gani} was detained at Keraterm, Predrag Banovi} called him out and told him that Žigi} was waiting for him because he wanted Edin Gani}'s money and motorbike. Edin Gani} proceeded toward a garbage container at the other side of the camp, where he saw the Alisic brothers, who had been beaten and were lying on the ground. Žigi} and several other people were present. Žigi} verified Edin Gani}'s identity and then instructed him to sit on the ground in the "Turkish fashion". Žigi} said he wanted the Gani} family's gold and vehicle. Žigi} and others then beat him:

I can't say how long it lasted now. It seemed to me to last forever. I know that I lost consciousness several times, and they poured water over me. In the end, Žigi} said, 'you know, guys, he's got money and he'll probably get out of here. That's why we have to incapacitate him.'<sup>1092</sup>

657. Du}a, whose full name Edin Gani} believed to be Du{an Kne`evi}, then proceeded to break his leg with a baseball bat. Žigi} took him back to the room where Edin Gani}'s father, Husein Gani}, was detained. Žigi} threatened Husein Gani} by telling him that he would kill his son if he would not tell him where their money was hidden.<sup>1093</sup>

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<sup>1087</sup> Witness AD, T.3796.

<sup>1088</sup> @igi} Final Trial Brief, para. 45.7.

<sup>1089</sup> Witness AD, T.3831-3832.

<sup>1090</sup> The contradictions alleged relate to an incident concerning Muharem Siva}. @igi} Final Trial Brief, para. 47.9.

<sup>1091</sup> Edin Gani} is listed in Schedule D, counts 1-3. Husein Gani} is not listed.

<sup>1092</sup> Edin Gani}, T.5910.

<sup>1093</sup> Edin Gani}, T.5900-5912.

658. Husein Gani} testified that on 29 June 1992, Žigi} called him out and beat him. Žigi} demanded 100,000 German Marks and a “pot of gold” if he was to spare the life of his son Edin Gani}. Husein Gani} was then beaten again by several of @igi}'s cohorts:

When they took my clothes off, they started kicking me, and that is, they started beating me on the legs. And then Zoran Žigi} ordered them not to hit me on the head because I was already bleeding through my ears and nose, and they said, ‘don’t hit him anymore, he’s finished.’<sup>1094</sup>

Husein Gani} was then thrown into a water barrel. A day or two later, both Husein Gani} and Edin Gani} were taken to the hospital.<sup>1095</sup>

659. Edin Gani} stayed at the hospital for over a month. Surgery was performed on his leg and he had a cast from his heel to his hip. One day at the hospital, Edin Gani} saw Žigi} with a knife and a nurse told him that Žigi} had killed another patient.<sup>1096</sup> Two weeks later, Žigi} returned, heavily armed with a machine gun, a hand grenade, a pistol and a knife. On this occasion, Žigi} found Edin Gani} and again demanded to know the whereabouts of the gold and vehicle. He then robbed Edin Gani} of his gold ring before being thrown out of the hospital by a military policeman.<sup>1097</sup>

660. After his release from hospital, in early August 1992, Edin Gani} was detained at the Trnopolje camp where Žigi} came looking for him yet again. Edin Gani} left the camp on 7 August 1992, and hid at his neighbors’ home, but Žigi} found him there and attempted to rob him. On that occasion, Žigi} stabbed the neighbor and shot at the police, who had been alerted. Žigi} then forced Edin Gani} into a car and told him he would take him to Carakova on the hill Zigic “mentioned a number, said that I was now the 240-something victim”.<sup>1098</sup> Edin Gani} decided to dig up the family money. However, after he did so, Žigi} demanded an additional 50,000 German Marks. After first having taken Edin Gani}'s wife hostage, Žigi} was finally overpowered and handed over to the police.<sup>1099</sup>

661. The Defense strongly questions the credibility of these two witnesses.<sup>1100</sup> According to the Defense, there are some discrepancies between the testimonies given by the two witnesses, such as the date Edin Gani}'s birth.<sup>1101</sup> The Defense point out that these witnesses have a father-son relationship, they live together and work together.<sup>1102</sup> The Defense protests that Husein Gani} is the only one testifying about the beating of his son and, likewise, Edin Gani} is the only one who

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<sup>1094</sup> Husein Gani}, T.5766.

<sup>1095</sup> Husein Gani}, T.5762-5771; Edin Gani}, T.5915.

<sup>1096</sup> Edin Gani} refers to the murder of Omer Kardzi}, T.5920-5921; *see also* Exhibit 3/144a.

<sup>1097</sup> Edin Gani}, T.5915-5926.

<sup>1098</sup> Edin Gani}, T.5934.

<sup>1099</sup> Edin Gani}, T.5926-5935.

<sup>1100</sup> @igi} Final Trial Brief, paras 226-234.1.

<sup>1101</sup> Edin Gani} said he was born in 1961 and his father certified that his son was born in 1965. Edin Gani}, T.5856; Husein Gani}, T.5752.

asserted his father has been beaten by Žigi}. Furthermore, Husein Gani} purportedly knew many detainees,<sup>1103</sup> but nobody else who was detained in the camp at the same period of time mentioned this incident.

662. The Trial Chamber again notes that there are countless crimes in which the only witness to the event is a relative, and this relationship should not automatically undermine the credibility of the witness. In their courtroom testimonies, the Trial Chamber found both witnesses credible. The Trial Chamber finds that @igi} and others beat Edin Gani}, amounting to an inhumane act.

663. The Trial Chamber does not rely on @igi}'s culpability for the assaults on Husein Gani} as one of the crimes underlying his convictions because Husein Gani} is not listed as a victim in the Amended Indictment or Schedules.<sup>1104</sup> The Trial Chamber does note that this testimony is credible and can be used as corroborating evidence of a consistent pattern of conduct, pursuant to Rule 93.

664. The Trial Chamber also takes into account the following evidence entered into the trial record. However, because the victims in these cases were not listed in the Amended Indictment or Schedules, the Trial Chamber does not rely on the culpability of @igi} for the crimes committed against them to underly his convictions. It does, however, pursuant to Rule 93, use the evidence for corroboration purposes since it finds the testimony credible and the evidence indicates a consistent pattern of conduct by the accused.

(I) Murder of Vahid Siva} and beating of Huso Siva}

665. Witness AD testified that one day during his detention in Keraterm, Žigi} launched a burst of gunfire in room 2 where at least 500 men were kept. The witness does not know whether Žigi} aimed at anyone in particular, but Huso Sivac was hit in the stomach area and Vahid Sivac was hit in the leg. Hase I-i} also witnessed Žigi} entering room 2 at Keraterm and firing at the ceiling. A bullet ricocheted and hit a man in the leg.<sup>1105</sup> Žigi} then began to mistreat Vahid Siva}, who was badly wounded, demanding 3,000 German Marks from him. Witness AD subsequently learned that Vahid Siva}'s body was taken away together with the victims from a massacre in room 3.<sup>1106</sup> As noted previously, the credibility of Witness AD is strongly challenged by the Defense. Considering, in particular, that Witness AD is not the only person to testify about this incident, the Trial Chamber believes that it happened as described by Witness AD and Hase I}i} but uses it solely as corroborating evidence.

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<sup>1102</sup> @igi} Final Trial Brief, para. 226.

<sup>1103</sup> Husein Gani}, T. 5777-5778.

<sup>1104</sup> He is listed however in the Prosecution Final Trial Brief, para. 396.

(m) Beating of Safet Ta}i

666. Safet Ta}i was detained at Keraterm from the middle of June to early August 1992.<sup>1107</sup> Žigi} beat him once when the witness was on his way from the toilet to room 2.<sup>1108</sup> The credibility of Safet Ta}i is not questioned by the Defense. He accurately described the accused and stated that Žigi} was wearing a bandage on his hand.<sup>1109</sup> The Trial Chamber uses this testimony as corroborating evidence.

(n) Beating of Zeri}, Ivo Sikura, and Samir Si{tek

667. During the four days that Witness AN was detained in Keraterm camp, from 30 May to 3 June 1992,<sup>1110</sup> he witnessed Žigi} beating several men, including a man by the name of Zeri}:

Mr. Zeric was a detainee like us, and at one occasion Žigi} was walking around the Keraterm compound and he recognised him and immediately started kicking him. And he was cursing his baljia mother, accusing him of selling some hand grenades at the market. And he continued to beat him until the person almost fainted.<sup>1111</sup>

He also witnessed Žigi} beating an elderly man named Ivo Sikura and a young man by the name of Samir Sistek. Žigi} also forced the latter to sing "Chetnik" songs.<sup>1112</sup>

668. The credibility of this witness is not challenged by the Defense. It simply mentioned that this witness showed no affinity for Žigi} in his statement.<sup>1113</sup> The witness spent only four days in Keraterm, but he knew Žigi} as a taxi driver and described him accurately.<sup>1114</sup> The Trial Chamber has no reason to doubt the reliability of the witness and uses this testimony as corroborating a consistent pattern of conduct.

(o) Beating of Hase I-i}'s brother and a man called "Ali}"

669. Hase I-i}, who was detained in the Keraterm camp from 14 or 15 June to 9 July 1992,<sup>1115</sup> testified that Žigi} beat his brother and his brother's friend, Ali}, upon their arrival in the camp.<sup>1116</sup>

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<sup>1105</sup> Hase I-i}, T.4643. See also Ervin Rami}, T.5619.

<sup>1106</sup> Witness AD, T.3812-3814.

<sup>1107</sup> Safet Ta}i, T.3756, 3770.

<sup>1108</sup> Safet Ta}i, T.3762.

<sup>1109</sup> Safet Ta}i, T.3731.

<sup>1110</sup> Witness AN, T.4392-4394.

<sup>1111</sup> Witness AN, T.4395.

<sup>1112</sup> Witness AN, T.4396-4397. See also Ervin Rami}, T.5622.

<sup>1113</sup> Defense Brief, para. 152.1.

<sup>1114</sup> Witness AN, T.4393-4394.

<sup>1115</sup> Hase I-i}, T.4634, 4648.

<sup>1116</sup> Hase I-i}, T.4636.

670. The Defense does not question the credibility of this witness. However, the beating of Alic was acquitted in the Decision on Defence Motions for Acquittal.<sup>1117</sup> As to Hase Ičić's brother, while the Trial Chamber in the *Tadić* case found that Hase Ičić was a reliable and trustworthy witness,<sup>1118</sup> here the testimony of the witness in this particular matter is too vague as he fails to describe the place or manner of the beating of his brother in any detail. The Trial Chamber is therefore unable to assess the seriousness of the assault and considers that there is insufficient information for the Trial Chamber to consider this testimony as corroborating a consistent pattern of conduct.

671. There was also other evidence against @igi} entered into the trial record, but which the Trial Chamber declines to use because it questions the reliability of the evidence.

(p) Conclusion

672. The Trial Chamber finds that Žigi} committed persecution, torture, and murder in Keraterm camp, and finds these crimes were committed as part of a widespread or systematic attack against non-Serbs detained in the camp, constituting crimes against humanity.

673. The Trial Chamber next considers allegations against @igi} for a crime committed at the Trnopolje camp.

#### 4. Trnopolje Camp

674. Žigi} is the only accused charged with responsibility for crimes committed at the Trnopolje camp,<sup>1119</sup> which was established in the village of Trnopolje at the same time as the Omarska and Keraterm camps were established in Prijedor. The Amended Indictment alleges @igi} beat Hasan Karabai} at the Trnopolje camp.<sup>1120</sup>

675. Witnesses testified that Žigi} entered the camp to abuse detainees. On occasion, guards intervened to prevent Žigi} from abusing people held in Trnopolje.<sup>1121</sup> For example, Witness U testified that on 3 August 1992, she was detained at the camp together with other women who had come from the Omarska camp. When Žigi} arrived with two or three other men, the guard at the entrance to the room warned the women to lie down on the ground. When Žigi} asked where the women were, the guard replied that there were none there and that he was responsible for the

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<sup>1117</sup> Decision on Defence Motions for Acquittal, para. 57.

<sup>1118</sup> *Tadić* Trial Chamber Judgement, paras 259-260.

<sup>1119</sup> Charges against the other four accused for crimes committed in Trnopolje camp were dismissed by the Decision on Defense Motions for the Judgement of Acquittal.

<sup>1120</sup> Amended Indictment, para. 41(h) (counts 11-13).

<sup>1121</sup> See, e.g., Ervin Rami}, T.5625.

detainees.<sup>1122</sup> The guard then asked Žigi} to leave, which he did saying “I’m going to Omarska now. I have to finish off a job there.”<sup>1123</sup>

676. @igi} entered Trnopolje camp and abused detainees. Three witnesses gave an account of Žigi}'s beating of Hasan Karaba{i} in the Trnopolje camp, as discussed below.<sup>1124</sup>

(a) Beating of Hasan Karaba{i}<sup>1125</sup>

677. Hasan Karaba{i} was Žigi}'s “kum” or close friend. Witness AD recounted that on one occasion when Žigi} encountered Hasan Karaba{i} at Keraterm camp, @igi} “hugged him and said Hasan was a good guy and that all the others needed to be killed. He said that Hasan was his kum”.<sup>1126</sup> However, in the Trnopolje camp, Witness AD saw Žigi} attack Hasan Karaba{i}: “He beat him, started to choke and strangle him, and he might have strangled him had he not been stopped by the other guards.”<sup>1127</sup> Witness N testified that on 5 or 6 August 1992, Žigi} arrived at the Trnopolje camp. When he said, “Good day to you, balijas”, @igi} expected the detainees to answer, “God help you too, Hero”,<sup>1128</sup> as he had ordered many of them to respond during their detention in Keraterm. When Žigi} found Hasan Karaba{i} “he started kicking him as if he were a ball” until the guards dragged Žigi} out.<sup>1129</sup> Witness V, who also witnessed the incident, testified that it took place on 5 August 1992 and that, when Žigi} started beating Hasan Karaba{i}, he said, “It seems you’re still alive, pal”, and Karaba{i} shouted, “Please, don’t do it, pal”.<sup>1130</sup> Safet Ta}i testified that he heard Žigi} tell him “that he was lucky that he was drunk and couldn’t strangle him with one hand.”<sup>1131</sup>

678. In his unsworn statement, Žigi} stated that Hasan Karabasi} was his kum and the kum to his family, which suggests a constructive or *de facto* familial relationship between them. In his statement, he explained the incident as follows: at some stage, he and Hasan Karaba{i} both met on the street and Hasan Karaba{i} fell down. Žigi} extended his arm to help him and people who were present and who testified about this incident misinterpreted his intentions.<sup>1132</sup>

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<sup>1122</sup> See also Witness J, T.4787-4788.

<sup>1123</sup> Witness U, T.6235-6236.

<sup>1124</sup> Witness AD, T.3838 and T.3879; Witness V, T.3714; Witness N, T.3900.

<sup>1125</sup> Amended Indictment, para. 41(h), counts 11-13.

<sup>1126</sup> Witness AD, T.3838.

<sup>1127</sup> Witness AD, T.3838. Safet Ta}i also witnessed @igic beat and throttle a man who he understood to be @igic’s “kum, or best man”. Safet Ta}i, T.3772-3773.

<sup>1128</sup> Witness N, T.3900. See also Witness J, T.4787 and Edin Gani}, T.5893.

<sup>1129</sup> Witness N, T.3900.

<sup>1130</sup> Witness V, T.3714.

<sup>1131</sup> Safet Ta}i, T.3772-3773.

<sup>1132</sup> Zoran @igi}, T.9466.

679. However, the Defense asserted that this event was only “a family dispute, . . . about family matters” between friends, clearly indicating that @igi} was not merely assisting his friend during their encounter.<sup>1133</sup>

680. The Trial Chamber notes that several witnesses testified consistently about this attack. The Trial Chamber also considers that it would not appear to be out of character for @igi} to hug a friend one day and attack him the next. The Defense acknowledged that the personality of the accused would completely change under the influence of alcohol.<sup>1134</sup>

681. The Trial Chamber finds that the accused is responsible for the beating of Hasan Karaba{i}, constituting cruel treatment.

## 5. Conclusion

682. The Trial Chamber finds that @igi}'s contribution to the crimes committed in Omarska and Keraterm camps was intentional and substantial. He knowingly contributed to the furtherance of the joint criminal enterprise of Omarska camp as a co-perpetrator of the enterprise, and he also committed, instigated, and aided or abetted serious crimes in Keraterm camp. @igi} is further responsible for cruel treatment committed in Trnopolje camp. The crimes committed by @igi} in these camps were part of the persecutory scheme and they formed part of the widespread and systematic attack directed against non-Serbs detained in the camps, thus constituting crimes against humanity.

## 6. Criminal Responsibility of Zoran @igi}

683. As noted above, @igi} is charged under Article 7(1) of the Statute with individual responsibility for participating in the war crimes and crimes against humanity alleged in the Amended Indictment. @igi} is not charged under Article 7(3) with responsibility as a superior.

### (a) The Individual Responsibility of @igi} under Article 7(1) for Crimes Proved at Trial – Omarska Camp.

684. The Trial Chamber has already found with regard to @igi}'s participation in specifically enumerated crimes or in the joint criminal enterprise of Omarska camp:

- (a) that he was aware of the abusive treatment and conditions endured by the non-Serbs detained in Omarska prison camp;

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<sup>1133</sup> @igi} Final Trial Brief, para. 196.

<sup>1134</sup> @igi} Final Trial Brief, para. 269.1.

(b) that he regularly entered Omarska camp to abuse detainees;

(c) that @igi} physically and directly perpetrated crimes of physical and mental violence against detainees in Omarska camp;

(d) that the role he played in perpetrating crimes in Omarska camp as part of the joint criminal enterprise was significant, making him liable as a participant in the joint criminal enterprise of Omarska camp; and

(e) that @igi} was aware of the persecutory nature of the crimes committed against non-Serbs detained in the camp and, based upon his knowing and substantial participation in the system of persecution pervading Omarska camp, @igi} had the intent to discriminate against the non-Serbs detained in the camp.

685. The Trial Chamber has found that @igi} incurs criminal responsibility for the murder of Be}ir Medunjanin (counts 1, 6 and 7), the torture of Asef Kapetanovi} (counts 1, 11, 12 and 13), the torture of Witnesses AK, AJ, and T (counts 1, 11, 12 and 13), the torture of Abdulah Brki} (counts 1, 11, 12 and 13), and the cruel treatment of Emir Beganovi} (counts 1 and 13).

686. The Trial Chamber takes note of its Decision on Defense Preliminary Motions on the Form of the Indictment,<sup>1135</sup> discussed above in regards to Radi}, in which the accused generally raised the issue of whether the crimes used as the basis of the persecution charge were the same crimes charged in other separate counts of the Amended Indictment. The Decision did not require the Prosecution to specify with particularity whether the murders, tortures, and cruel treatments alleged in counts 6-7 and 11-13 were included within the persecution charge in count 1. As a result, the Defense may not have had sufficient notice as to whether there were differences in the crimes charged in these different counts. Consequently, even though the Trial Chamber has sufficient evidence from which to conclude that the specific murders and tortures alleged in counts 6-7 and 11-13 with regards to crimes committed in Omarska did not form the basis of the murders and tortures included in the persecution conviction, in fairness to the accused it will not draw this conclusion. The Trial Chamber thus finds that all crimes against humanity committed by the accused in Omarska were covered by the persecution conviction. Consequently, counts 6 and 11 must be dismissed.

687. Article 3 charges in relation to @igi} (counts 3, 7, 12 and 13) are based on the same set of facts as those underlying the Article 5 charges. As discussed in Part III, B, cumulative convictions

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<sup>1135</sup> *Prosecutor v. Kvočka et al.*, Decision on Defense Preliminary Motions on the Form of the Indictment, 12 April 1999.



under Articles 3 and 5 are allowed to stand together. As between the torture (count 12), cruel treatment (count 13), and outrages upon personal dignity (count 3) charges under Article 3, torture is the more precise crime (count 12) and the outrages upon personal dignity (count 3) and cruel treatment (count 13) charges must be dismissed. The same logic applies for Article 5 charges. As between persecution (count 1), inhumane acts (count 2), torture (count 11), and murder (count 6), persecution is the more precise crime (count 1) and the other charges under Article 5 must be dismissed.

688. Based on the foregoing, we find that @igi} participated in Omarska camp as a co-perpetrator of the joint criminal enterprise.

(b) The Individual Responsibility of @igi} under Article 7(1) for Crimes Proved at Trial – Keraterm and Trnopolje camps

689. For crimes committed in Keraterm and Trnopolje camps, Zoran @igi} is charged cumulatively with violations of the laws and customs of war under Article 3 and crimes against humanity under Article 5. Again, the more precise crime under Article 5 is persecution (count 1), which must be retained and the other charges of inhumane acts (count 2), murder (count 4) and torture (count 11) must be dismissed. The more precise crime under Article 3, excluding the murder charge which stands (count 7), is torture (count 12) and the other charges of outrages upon personal dignity (count 3) and cruel treatment (count 13) must be dismissed, if based on the same acts or conduct.

690. The Trial Chamber has found the following with regard to @igi}'s participation in crimes in these two camps:

(a) @igi} is responsible for the murder of Emsud Bahunji}, Sead Jusafagi} and Drago Tokmad`i}. Pursuant to Part III, B, on cumulative convictions, count 1, persecution, and count 7, murder, are to be retained.

(b) @igi} is responsible for the torture of Fajzo Mujkanovi}. Pursuant to Part III, B, on cumulative convictions, count 1, persecution, and count 12, torture, are to be retained.

(c) @igi} is responsible for the torture of Witness AE<sup>1136</sup> and Red`ep Grabi}. Pursuant to Part III, B, on cumulative convictions, count 1, persecution, and count 12, torture, are to be retained.

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<sup>1136</sup> Schedule D characterized the crimes committed against Witness AE to include, “[c]onfinement in inhumane conditions, Beating with metal rod”. The Trial Chamber determines that such a characterization allows it to consider the elements of torture.

(d) @igi} is responsible for the torture of Jasmin Ramadanovi}. Pursuant to Part III, B, on cumulative convictions, count 1, persecution, and count 12, torture, are to be retained.

(e) @igi} is responsible for committing an inhumane act against Witness V. Pursuant to Part III, B, on cumulative convictions, count 1, persecution, is to be retained.

(f) @igi} is responsible for committing an inhumane act against Edin Gani}. Pursuant to Part III, B, on cumulative convictions, count 1, persecution, is to be retained.

(g) @igi} is responsible for the cruel treatment of Hasan Karaba{i} in Trnopolje camp. Pursuant to Part III, B, on cumulative convictions, count 13, cruel treatment, is to be retained.

691. In sum, the Trial Chamber finds Žigi} guilty of the following crimes:

(a) Persecution (count 1) for the crimes committed in the Omarska camp generally and in particular against Be}ir Medunjanin, Asef Kapetanovi}, Witnesses AK, AJ, T, Abdulah Brki} and Emir Beganovi} and for crimes committed in the Keraterm camp against Fajzo Mujkanovi}, Witness AE, Red`ep Grabi}, Jasmin Ramadanovi}, Witness V, Edin Gani}, Emsud Bahonji}, Drago Tokmad`i}, and Sead Jusufagi}.

(b) Murder (count 7) with respect to crimes committed in the Omarska camp generally and against Be}ir Medunjanin in particular. In the Keraterm camp, murder (count 7) with respect to Drago Tokmad`i}, Sead Jusufagi} and Emsud Bahonji}.

(c) Torture (count 12), with respect to crimes committed in the Omarska camp generally and against Abdulah Brki}, Witness T, Witness AK, AJ, Asef Kapetanovi}, in particular and to crimes committed in the Keraterm camp against Fajzo Mujkanovi}, Witness AE, Red`ep Grabi}, and Jasmin Ramadanovi}.

(d) Cruel treatment (count 13) with respect to crimes committed against Emir Beganovi} in the Omarska camp and Hasan Karabasi} in the Trnopolje camp.

692. @igi} is acquitted of the following crimes: torture (count 12) with respect to Hasan Karaba{i} and Emir Beganovi}.

693. The remaining charges are dismissed for the reasons set out previously.

694. The Trial Chamber will next determine which sentence is to be imposed on each of the accused in light of the convictions entered.

## V. SENTENCING

695. The Prosecution submits that, pursuant to Article 24 of the Tribunal's Statute and Rule 101 of the Rules of Procedure and Evidence, Kvo-ka and Prca} should receive 35 years of imprisonment, Kos 25 years of imprisonment, and Radi} and @igi} should receive sentences of life imprisonment.<sup>1137</sup> The Prosecution requests that the Trial Chamber recommend a minimum term of imprisonment not subject to commutation or reduction of not less than 30 years for Kvo-ka and Prca}, twenty years for Kos, forty years for Radi} and forty-five years for @igi}.<sup>1138</sup>

696. The Prosecution submits that the gravity of the offences and the harm caused is very high<sup>1139</sup> and account should also be taken of the fact that the crimes were committed on a widespread and systematic basis.<sup>1140</sup> The Prosecution further submits that the "considerable prominence of the accused Kvo-ka, Prca}, Kos and Radi}" should be considered in aggravation.<sup>1141</sup> Furthermore, the "continued captivity" of the victims, the lengthy existence of the camps in which detainees were persecuted and held in confinement under inhumane conditions, the willingness of the accused to participate in the crimes, the discriminatory motives of the crimes, "the sadistic and perverse pleasure which several accused took from abuses", and the repeated and premeditated nature of the abuses are all additional elements considered by the Prosecution to be aggravating factors.<sup>1142</sup> Moreover, the Prosecution asserted that no mitigating circumstances are present for any of the defendants.<sup>1143</sup>

697. Kvo-ka's Defense submits that Kvo-ka demonstrated real courage in attempting to assist and protect detainees,<sup>1144</sup> and that the Trial Chamber should take into consideration the sentencing guidelines of Article 41/1 of the SFRY criminal code.<sup>1145</sup> For his part, Prca} submits that the Court should take into consideration the fact that he is an old, honest, generous and sick man, of good character, the father of two disabled sons and that he was co-operative throughout the proceedings. Prca} also submits that he worked in Omarska camp under coercion, that he was a pensioner who was mobilised as a reserve policeman and that he helped detainees in the camp despite his limited financial ability and the risks to which he was exposed.<sup>1146</sup> Radi} submits that he is of good

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<sup>1137</sup> Prosecution Final Trial Brief, para. 531.

<sup>1138</sup> Prosecution Final Trial Brief, para. 532.

<sup>1139</sup> Prosecution Final Trial Brief, paras 513-517.

<sup>1140</sup> Prosecution Final Trial Brief, paras 515-516.

<sup>1141</sup> Prosecution Final Trial Brief, para. 521.

<sup>1142</sup> Prosecution Final Trial Brief, paras 522 *et seq.*

<sup>1143</sup> Prosecution Final Trial Brief, paras 528 *et seq.*

<sup>1144</sup> Kvo-ka Final Trial Brief, para. 311.

<sup>1145</sup> Kvo-ka Final Trial Brief, para. 314.

<sup>1146</sup> Prca} Final Trial Brief, para. 497.

character,<sup>1147</sup> that he contributed to the clarification and expedition of the trial because he testified before the Tribunal,<sup>1148</sup> and that he helped some detainees.<sup>1149</sup> Kos submits for consideration some general sentencing guidelines as enunciated in Tribunal judgements.<sup>1150</sup> @igi} suggests mitigating circumstances which should be applied to him. He offers the report of his expert Mr. Cejovi}, which indicates that sentences in the former Yugoslavia for violent acts such as “murder and corporal injuries are rather lenient”,<sup>1151</sup> and that “criminal acts committed under influence of alcohol” are viewed as less heinous than those committed with full consciousness.<sup>1152</sup> According to Mr. Cejovi}, @igi}'s “serious medical condition due to his wounds, causing pain and specific emotional condition can and should be used as [a] mitigating circumstance”.<sup>1153</sup> @igi} also asserts that he has changed since 1992 and that he is a much better person now. He asserts that he surrendered to the Tribunal and he insists he never played a leading role in the camp operations.<sup>1154</sup>

### **A. THE APPLICABLE PROVISIONS**

698. The sentences must be determined by reference to the relevant provisions of Articles 23 and 24, Rules 87 (C) and 101. Those provisions lay out the objectives of sentencing in the Trial Chamber, the factors to be taken into consideration for the determination of a sentence, and the manner in which a sentence should be imposed. Those provisions, in pertinent part, state:

#### **Article 23** Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

#### **Article 24** Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

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<sup>1147</sup> Radi} Final Trial Brief, paras 311-315.

<sup>1148</sup> Radi} Final Trial Brief, para. 316.

<sup>1149</sup> Radi} Final Trial Brief, para. 317.

<sup>1150</sup> Kos Final Trial Brief, pp 144-151.

<sup>1151</sup> @igi} Final Trial Brief, para. 241.2.

<sup>1152</sup> @igi} Final Trial Brief, para. 241.3.

<sup>1153</sup> @igi} Final Trial Brief, paras 241.4, 242.7. The expert submits that @igi} lost a finger and was not able to play guitar anymore which caused loss in self-esteem.

<sup>1154</sup> @igi} Final Trial Brief, paras 278 *et seq.*

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

### **Rule 87 Deliberations**

(C) If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

### **Rule 101 Penalties**

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

- (i) any aggravating circumstances;
- (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
- (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
- (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

699. In imposing a sentence, the Trial Chamber takes into consideration the general practice regarding prison sentences in the courts of the former Yugoslavia (although these practices are not binding),<sup>1155</sup> the gravity of the offences, and the individual circumstances of the accused, including any mitigating and/or aggravating circumstances. In addition, the jurisprudence of the Tribunals has specified two primary objectives for imposing a sentence: the need to punish an individual for the crimes committed and the need to deter other individuals from committing crimes.<sup>1156</sup>

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<sup>1155</sup> The ICTR adopts, *mutatis mutandis*, a similar position. See *Erdemovi*} Trial Chamber Judgement, para. 40; *Kambanda* Trial Chamber Judgement, para. 23; *Furund* ija Trial Chamber Judgement, para. 285; *Aleksovski* Trial Chamber Judgement, para. 242; *Akayesu* Sentencing Decision, paras. 12-14; *Kayishema* Trial Chamber Judgement, paras 5-7 of Section "Sentence".

<sup>1156</sup> See, e.g., *Kunara*} Trial Chamber Judgement, paras. 836 *et seq.*; *Kordi*} Trial Chamber Judgement, para. 847.

## B. THE SENTENCING PRINCIPLES

700. Sentencing by the courts of the former Yugoslavia was based on the provisions of Chapter XVI, "Criminal Acts Against Humanity and International Law"<sup>1157</sup> and Article 41(1)<sup>1158</sup> of the SFRY criminal code. The Prosecution submits that Article 142(1) of this code provided in particular that "it is a criminal offence, when committed during an armed conflict or occupation, to submit the civilian population to killing, inhuman treatment, great suffering or injury to body and health, forced prostitution or rape". A violation of this Article was to be "punished by imprisonment of no less than five years or by death - with the exception that the death penalty may be replaced by twenty years of imprisonment".<sup>1159</sup> Indeed, Article 38(2) of the SFRY criminal code permitted courts generally to hand down a sentence of twenty years in prison in lieu of the death penalty.<sup>1160</sup> For aggravated murders, a minimum prison sentence of ten years and a maximum of fifteen years were stipulated as the penalty.

701. The Tribunal has often reiterated in its Judgements that the primary factor to be taken into account in imposing a sentence is the gravity of the offence, including the impact of the crimes.<sup>1161</sup> The seriousness of the crimes must weigh heavily in the sentence imposed irrespective of the form of the criminal participation of the individual.<sup>1162</sup> In this regard, the Trial Chamber subscribes to the approach taken by the Appeals Chamber that the level of penalty in each particular case should "be fixed by reference to the circumstances of the case."<sup>1163</sup> In general, the Trial Chamber will assess the seriousness of the crimes by taking into account quantitatively the number of victims and the

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<sup>1157</sup> See Chapter XVI of the Criminal Code of the former Yugoslavia "Crimes Against Humanity and International Law: Articles 141 and 142(1) dealt with the crimes of genocide and other war crimes committed against civilians. See also Articles 142-156 and Articles 38 "Imprisonment", 41 "Sentences", and 48 "Coincidence of several offences." Crimes against peace and international law, including the crime of genocide and war crimes against a civilian population, were punishable by a sentence of 5-15 years in prison, by the death penalty or by 20 years in prison if a prison sentence was substituted for the death penalty.

<sup>1158</sup> Article 41(1) of the Criminal Code of the SFRY states (in translation): "The court shall determine the sentence for the perpetrator of a given crime within the limits prescribed by the law for this crime, bearing in mind the purpose of the punishment and taking into account all the circumstances that could lead to this sentence being more or less severe, in particular: the degree of criminal responsibility, the motives of the crime, the degree of the threat or damage to protected property, the circumstances under which the crime was committed, the background of the perpetrator, his personal circumstances and behaviour after the commission of the crime as well as other circumstances which relate to the character of the perpetrator".

<sup>1159</sup> Prosecution Final Trial Brief, para. 510.

<sup>1160</sup> *Kordi*} Trial Chamber Judgement, para. 849.

<sup>1161</sup> The Trial Chamber in the *^elebi*}i case stated that the gravity of the offence was "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence", *^elebi*}i Trial Chamber Judgement, para. 1225.

<sup>1162</sup> *^elebi*}i Appeals Chamber Judgement, para. 741.

<sup>1163</sup> *Tadi*} Appeals Sentencing Judgement III, para. 69.

effect of the crimes on the broader targeted group and qualitatively the suffering inflicted on the victims and survivors.<sup>1164</sup>

702. The Trial Chamber notes the following should be taken into consideration: the victim detainees were totally vulnerable and at the mercy of their captors,<sup>1165</sup> the repetitious and continuing nature of most of the crimes, the psychological suffering inflicted upon victims and witnesses of the crimes and the very real fears of witnesses that they would be next,<sup>1166</sup> the "indiscriminate, disproportionate, terrifying" or "heinous" means and methods used to commit the crimes,<sup>1167</sup> the sexual violence inflicted upon the women,<sup>1168</sup> and the discriminatory nature of the crimes. All are relevant factors in assessing the gravity of the crimes.<sup>1169</sup> Appropriate consideration of those circumstances gives "a voice" to the suffering of the victims.<sup>1170</sup>

703. In general, factors peculiar to the person who participated in the crimes are considered as aggravating or mitigating circumstances.<sup>1171</sup> Neither the Statute nor the Rules stipulate which factors are to be considered as aggravating or mitigating circumstances, except that Rule 101(B)(ii) requires the Chamber to take into account any "significant cooperation" with the Prosecutor as a mitigating factor.

704. The Trial Chamber may also take into account factors pertaining to the individual circumstances of the convicted person in order to determine any "reasons for the accused's criminal conduct". Such information enables the Chamber more accurately to assess the possibility of rehabilitating those convicted by the Tribunal.<sup>1172</sup> Relevant individual factors may include cooperation with the Court, voluntary surrender, demonstrations of remorse,<sup>1173</sup> or no history of violent behavior.<sup>1174</sup>

705. The jurisprudence of the Tribunal has identified potentially aggravating factors to include the level of criminal participation, premeditation, and the motive of the convicted person.<sup>1175</sup>

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<sup>1164</sup> *^elebi}* Trial Chamber Judgement, para. 1226, *Erdemovi}* Appeals Sentencing Judgement, para. 15; *Kambanda* Trial Chamber Judgement, para. 42; *Kayishema* Trial Chamber Judgement, para. 26; *Kordi}* Trial Chamber Judgement, para. 852.

<sup>1165</sup> *^elebi}* Trial Chamber Judgement, para. 1268.

<sup>1166</sup> *Jelisi}* Trial Chamber Judgement, para. 132.

<sup>1167</sup> *Kayishema* Sentencing Judgement, para. 18; *Bla{ki}* Trial Chamber Judgement, para. 787; *Kordi}* Trial Chamber Judgement, para. 852.

<sup>1168</sup> *Krsti}* Trial Chamber Judgement, para. 702.

<sup>1169</sup> *Kunara}* Trial Chamber Judgement, which refers to the fact that some crimes stretch over a long period or are committed repeatedly, are aggravating circumstances, para. 865.

<sup>1170</sup> *Tadi}* Trial Chamber Judgement; the *^elebi}* Trial Chamber Judgement, paras. 1226, 1260, 1273; *Furund`ija* Trial Chamber Judgement, paras. 281 *et seq*; and *Bla{ki}* Trial Chamber Judgement, para. 787.

<sup>1171</sup> *Krsti}* Trial Chamber Judgement, para. 704.

<sup>1172</sup> *Bla{ki}* Trial Chamber Judgement, paras 779 and 780.

<sup>1173</sup> *Kunara}* Trial Chamber Judgement, para. 868.

<sup>1174</sup> *Jelisi}* Trial Chamber Judgement, para. 124, *Furund`ija* Trial Chamber Judgement, para. 284.

<sup>1175</sup> *Krsti}* Trial Chamber Judgement, paras 705 *et seq*; see also *^elebi}* Appeals Chamber Judgement, para. 847.

Indirect or forced participation on the part of the perpetrators have also been identified as factors to be weighed.<sup>1176</sup> Similarly, the level of participation, the physical perpetration of a crime, and the zealotry with which a crime is committed should also be taken into account in determining a sentence. The Defense of Kos argues that fairness requires that the Prosecution prove aggravating circumstances beyond a reasonable doubt.<sup>1177</sup> The Trial Chamber agrees with the *elebi}i* Appeals Chamber that only those matters which are proven beyond reasonable doubt against an accused may be taken into account in the aggravation of a sentence.<sup>1178</sup>

706. The *igi}* Defense submits that committing a crime under the influence of drugs or alcohol serves as a mitigating factor because the defendant's mental capacity is diminished. In this regard, the Trial Chamber acknowledges that mental impairment is considered relevant in mitigation of sentences in many countries.<sup>1179</sup> However, when mental capacity is diminished due to use of alcohol or drugs, account must be taken of whether the person subjected himself voluntarily or consciously to such a diminished mental state. While a state of intoxication could constitute a mitigating circumstance if it is forced or coerced, the Trial Chamber cannot accept *igi}*'s contention that an intentionally procured diminished mental state could result in a mitigated sentence.<sup>1180</sup> Indeed, the Trial Chamber considers that, particularly in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor.

707. The Trial Chamber takes account of the fact that most of the crimes were committed within the context of participating in a joint criminal enterprise. Several aspects of this case were critical to our decision that the five defendants did participate significantly and unlawfully in a persecutory system against non-Serb detainees, and these aspects deserve recalling, even though they will not be considered as aggravating circumstances. The first aspect is the pervasive and intense nature of the cruelties and deprivations, recounted in detail in Parts II and IV. Omarska was not a place where occasional random acts of cruelty against inmates occurred or where living conditions were simply hard. This was a hellish environment in which men and women were deprived of the most basic needs for their survival and of their humanity: food of edible quality; the opportunity to freely perform basic bodily functions; a place to sleep; water to drink and use for washing; and access to friends or family. Omarska was a place where beatings occurred daily and with devilish instruments

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<sup>1176</sup> *Krsti}* Trial Chamber Judgement, paras 713 *et seq*; Kos Final Trial Brief, p 150, citing the *Kunara}* Trial Chamber Judgement, para. 847.

<sup>1177</sup> Kos Final Trial Brief, p 150, citing the *Kunara}* Trial Chamber Judgement, para. 847.

<sup>1178</sup> *elebi}i* Appeals Chamber Judgement, para. 763.

<sup>1179</sup> *elebi}i* Appeals Chamber Judgement, para. 588, citing criminal and procedural codes of several national jurisdictions.

<sup>1180</sup> *Todorovi}* Trial Chamber Judgement, footnote 98: "The fact that Stevan Todorovi} was drinking at the time of the offences will not be accepted as a mitigating factor".



of torture. No one could mistake Omarska for merely a badly run prison; it was a criminal enterprise designed to operate in a way that destroyed the mind, body, and spirit of its prisoners.

708. The second aspect of this case that deserves recalling is that the defendants were not – contrary to their assertions – mere lowly cogs in the wheel of the camp’s operation. They were not janitors who swept the floors or even cooks who served the meals. Their function was the *raison d’être* of the camp: to ensure that these thousands of men and dozens of women remained captive in their deplorable surroundings, subject to the whims of errant guards, opportunistic visitors, or the official interrogators who came to abuse them. Without their guarding function, without the role they played in maintaining the efficient and continuous functioning of the camp, there could have been no camp at all. Moreover, whether active or reserve, four of the defendants were members of the police force, and thus were people charged with enforcing the laws and protecting the citizens.

709. Thirdly, none of the defendants here fall into the category of humanitarian workers whose principal function was to alleviate the prisoner’s miseries as might, for instance, a doctor who came periodically to tend their bodies. The few instances of assisting detainees, such as delivering food to them brought by relatives, although to be considered in sentencing, did not detract from their primary work, which was to ensure the prisoners stayed in their miserable environments and the camp system functioned without disruption or hassle. The defendants worked in the camp from between 17 days to 3 months. If during this time they had relentlessly sought to improve the conditions, prevent crimes, and alleviate the suffering, they would likely escape liability for participating in the persecutory scheme. None of the defendants in this case fits that bill. We have instead a spectrum that runs from actively participating in the physical and mental abuse of prisoners, to watching passively while detainees were abused, to those who pretended everything was normal in the face of emaciated inmates hobbling around with broken bones, black and blue marks, and other indicia of violence and abuse. All three attitudes deserve to be punished. In this case, those directly inflicting the pain and suffering deserve a harsher punishment than those remaining indifferent to the abusive treatment and conditions.

710. The Trial Chamber takes note of the sentencing practices of the Tribunal, in particular the sentences recommended to Trial Chamber III in the *Keraterm* camp case, in which the three accused pleaded guilty to one count of persecution as a crime against humanity. In that case, the Plea Agreements recommend 3-5 years imprisonment and 5-7 years imprisonment for the two accused who were guard shift leaders who did not physically perpetrate crimes.<sup>1181</sup> The Plea

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<sup>1181</sup> Kolundžija was “a shift leader at the Keraterm Camp for a portion of the time relevant to the Indictment”. Before becoming a shift leader, he was a guard at the camp. He was “in a position to influence the day-to-day running of the Keraterm Camp when he was on duty. He had some control over other guards on his shift and could make life more bearable for detainees if he chose to do so.” Significantly, the agreement states that “there is no evidence that the

Agreement for Sikirica, Commander of Security in Keraterm for approximately 6 weeks, recommends a sentence of 10-17 years imprisonment. In the agreement, Sikirica admitted to murdering one detainee.<sup>1182</sup>

711. The Trial Chamber turns now to determine the appropriate sentence to be imposed upon the defendants in view of the factors examined above: the general sentencing practice of the former Yugoslavia for persons convicted of crimes against humanity and war crimes, the gravity of the crimes committed by the accused, and the existence and the weight of any aggravating and/or mitigating circumstances.

### C. DETERMINATION OF SENTENCES

#### 1. Miroslav Kvo-ka

712. Miroslav Kvo-ka, a Bosnian Serb, was 35 years old in 1992, at the time the crimes were committed. He was a professional policeman until his arrest by SFOR on 8 April 1998. Since that date, he has been detained in the UN detention unit in Scheveningen at The Hague in The Netherlands. The Trial Chamber found that Kvo-ka's knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for war crimes and crimes against humanity for persecution, murder and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

713. The crimes for which Kvo-ka is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp, and many of whom did not survive the violence and intense suffering.

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accused personally mistreated or condoned the mistreatment of detainees by others." Indeed, "he frequently prevented guards on his shift from mistreating detainees, and "he also prevented visitors to the Keraterm Camp from abusing the prisoners with varying degrees of success." The Plea Agreement recommends between 3-5 years imprisonment. Došen "exercised some authority in the Keraterm Camp as a Shift Leader. . . . The accused had no role in the effective administration of Keraterm." He was in Keraterm from 3 June to early August 1992. Further "The accused did not hold any rank and was of the same seniority as the guards on his shift." The agreement notes that there is "evidence that when aware that beatings were about to take place, the accused attempted to prevent mistreatment of the detainees" and that he at times asserted "his influence to improve conditions and that he assisted a number of detainees to receive food and medical treatment." The Plea Agreement recommends that he receive between 5-7 years imprisonment. *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Dragan Kolundžija of a Plea Agreement, 30 August 2001, para. 3; *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Damir Došen and Admitted Facts, 6 September 2001, para. 15(a).

714. Kvo-ka holds the highest level of authority of any of the defendants in this case. He was the deputy commander of the camp, a duty officer, and an experienced active duty policeman. Although he was not the architect of the persecutions committed against the non-Serb population confined in Omarska camp, he participated in the persecutions.

715. His participation in the enterprise renders him a co-perpetrator of the joint criminal enterprise. He played a key role in facilitating and maintaining the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved relatives or friends.

716. The Trial Chamber also notes that Kvo-ka gave a voluntary statement to the Prosecution and gave evidence in Court, which are mitigating factors. The Trial Chamber is also persuaded that Kvo-ka is normally of good character. He was described as a competent, professional policeman. His experience and integrity can be viewed as both mitigating and aggravating factors – his job was to maintain law and order and, although he apparently did a fine job of this prior to working in the camp, he failed seriously to perform his duty to uphold the law during his time spent in Omarska camp. Holding a position of respect and trust in the community, his failure to object to crimes and maintaining indifference to those committed in his presence was likely viewed as giving legitimacy to the criminal conduct.

717. The Trial Chamber takes note of the fact that Kvo-ka was not convicted of physically perpetrating crimes.

718. The Trial Chamber notes that Kvo-ka has been held in detention by the Tribunal for approximately 3½ years. The Trial Chamber sentences Miroslav Kvo-ka to 7 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.<sup>1183</sup>

## 2. Dragoljub Prca}

719. Dragoljub Prca}, a Bosnian Serb, was 55 years old at the time the crimes were committed. He was a retired policeman and crime technician who was called upon to assist @eljko Meaki} in Omarska camp, after the departure of Kvo-ka. He was primarily an administrative aide, a pencil

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<sup>1182</sup> *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Duško Sikirica and Admitted Facts, 6 September 2001, para. 10.

<sup>1183</sup> Rule 101 (C).

pusher, in Omarska camp. Prca} was detained by SFOR on 5 March 2000, whereupon he was transferred to the Tribunal detention facility in The Hague.

720. The Trial Chamber found that Prca}'s knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for war crimes and crimes against humanity for persecution, murder, and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

721. The crimes for which Prca} is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp and many of whom did not survive the violence and intense suffering. He called out names of victims and had to know that in doing so, he was sending them to be tortured or killed.

722. The Trial Chamber takes note of the fact that Prca} voluntarily gave a statement to the Prosecution and has not been convicted of physically perpetrating crimes.

723. Prca}'s participated as a co-perpetrator in the crimes ascribed to him as part of the joint criminal enterprise. He facilitated and maintained the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved former colleagues or friends.

724. Prca} spent approximately 22 days in the camp at the end of its existence. The Trial Chamber takes note of the fact that Prca} is the oldest of the defendants, he is in ill health, and he has two disabled children.

725. The Trial Chamber notes that Prca} did not turn himself in. He has been in detention in the custody of the Tribunal for over 19 months.

726. The Trial Chamber sentences Prca} to 5 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.<sup>1184</sup>

### 3. Milojica Kos

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<sup>1184</sup> Rule 101 (C).

727. Milojica Kos was 29 years old in 1992, at the time the crimes were committed. He was arrested by SFOR on 28 May 1998. In 1992, he worked as a waiter until he was mobilized as a reserve policeman to work as a guard shift leader in Omarska camp.

728. The Trial Chamber found that Kos' knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible as a co-perpetrator of war crimes and crimes against humanity for persecution, murder, and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

729. The crimes for which Kos is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp and many of whom did not survive the violence and intense suffering.

730. As a guard shift leader, Kos facilitated and maintained the functioning of the camp, which allowed the crimes to continue. On a few rare occasions he assisted detainees and attempted to prevent crimes.

731. The Trial Chamber notes that Kos has been convicted of perpetrating crimes of physical assault and harassing detainees by demanding money and stealing valuables from them. He exploited the vulnerability of detainees for his own personal gain.

732. The Trial Chamber notes that Kos is the youngest of the defendants, and he was an inexperienced and untrained police officer at the time he took up his duties in the camp, whereas three of the other defendants had extensive training in police matters. Because he did not hold a position of high esteem in the community prior to his position in Omarska, he likely would not have been a role model for the guards and thus his silence would not carry the same degree of complicity in encouraging or condoning crimes as would, for example, Kvo-ka and Prca}, who were treated with considerable respect in the community prior to their participation in the activities in Omarska.

733. Kos stayed in Omarska camp for nearly the entire time the camp was in existence and he made no attempt to leave.

734. Kos was detained by SFOR on 28 May 1998 and thus has been in detention for just under 3½ years.

735. The Trial Chamber sentences Kos to 6 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.<sup>1185</sup>

#### 4. Mlajko Radi}

736. Radi} was 40 years old in 1992, at the time the crimes were committed. He was a professional policeman, employed by the Omarska police station when he was requested by Meaki} to serve in the Omarska camp as a guard shift leader.

737. The Trial Chamber found that Radi}'s knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for war crimes and crimes against humanity for persecution, murder and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

738. The crimes for which Radi} is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp, and many of whom did not survive the violence and intense suffering.

739. Radi}'s participation in the crimes ascribed to him is one of a co-perpetrator of the criminal enterprise. He significantly participated in facilitating and maintaining the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved detainees from the town where he had worked as a policeman for 20 years.

740. The Trial Chamber notes that Radi} is convicted of committing rape and other forms of sexual violence against several women detained in the camp. He grossly abused his position of power in the camp by forcing or coercing the women into sexual activity for his own pathetic gain.

741. The Trial Chamber heard many witnesses recalling the excessive and deliberate cruelty of the guards on Radi}'s shift. By contrast to his colleagues Kvo-ka and Prca}, professional policemen like him who were asked to serve in the camp and who ignored and tolerated the crimes, by all

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<sup>1185</sup> Rule 101 (C).

indications Radi} relished and actively encouraged criminal activity in the camp. He appeared to regard the abuses as entertainment.

742. The Trial Chamber notes that Radi} worked as a guard shift leader the entire duration of the camp's existence.

743. Radi} gave a voluntary statement to the Prosecution and gave evidence in Court which allowed clarifications of matters and thus expedition of the proceedings against him.<sup>1186</sup>

744. The Trial Chamber notes that Radi} was detained by SFOR on 8 April 1998 and thus he has been in detention for approximately 3½ years.

745. The Trial Chamber sentences Radi} to 20 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.

#### 5. Zoran @igi}

746. Zoran @igi} was 33 years old in 1992, at the time the crimes were committed. Prior to the establishment of Omarska, Keraterm, and Trnopolje camps, @igi} was a taxi driver and was known by the policemen of the Omarska police station as a petty criminal. In 1994, he was tried and convicted by a Bosnian Serb court in Prijedor for murder and sentenced to 15 years imprisonment. In 1998, while he was still serving his sentence, he surrendered to the Tribunal and was subsequently transferred to The Hague. Due to the fact that @igi} was imprisoned in Banja Luka at the time he surrendered to the Tribunal, the Trial Chamber does not consider his surrender to be a mitigating factor.

747. Except for a few week's stint in Keraterm camp, in which his job was essentially that of a delivery man, @igi} is the only defendant who was not a regular employee of the camps. Nonetheless, he did participate in the criminal enterprise of Omarska camp by co-perpetrating persecution, murder, and torture committed in the camp. He also committed, instigated, and aided and abetted serious crimes in Keraterm and Trnopolje camps, including the crimes of murder, torture, cruel treatment, and outrages upon personal dignity. Indeed, the Trial Chamber found that @igi} regularly entered the Omarska and Keraterm camps for the sole purpose of abusing detainees in the camps.

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<sup>1186</sup> As with Kvo-ka, Radi} agreed to be interviewed by the Office of the Prosecutor and gave testimony in Court.

748. The extreme gravity of the crimes committed by @igi} has already been noted by the Trial Chamber. The Defense asserts that many of the crimes were committed when Zigic was intoxicated. The Trial Chamber rejects @igi}'s claim that intoxication should be a mitigating factor and instead finds it an aggravating factor. However, because the issue was not raised by the Prosecution, it declines to treat it as an aggravating factor in this case.

749. @igi} was transferred to the Tribunal on 16 April 1998 and thus he has been in the custody of the Tribunal for just over 3½ years.

750. The Trial Chamber sentences @igi} to 25 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.<sup>1187</sup>

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<sup>1187</sup> @igi} was in Bosnian Serb custody from 1996 until April 1998. This time should not be deducted, as it was served as punishment for another crime.



## VI. DISPOSITION

### A. SENTENCES

751. Based upon the facts and the legal findings as determined by the Trial Chamber and for the foregoing reasons, the Trial Chamber **FINDS** as follows:

#### 1. Miroslav Kvo-ka

752. Miroslav Kvo-ka is **GUILTY** on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War.

753. The following counts are **DISMISSED**:

- Count 2, Inhumane Acts as a Crime against Humanity;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.

754. The Trial Chamber hereby sentences Miroslav Kvo-ka to a single sentence of seven (7) years imprisonment.

#### 2. Dragoljub Prca}

755. Dragoljub Prca} is **GUILTY** on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;

- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War.

756. The following counts are **DISMISSED**:

- Count 2, Inhumane Acts as a Crime against Humanity;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.

757. The Trial Chamber hereby sentences Dragoljub Prca} to a single sentence of five (5) years imprisonment.

### 3. Milojica Kos

758. Milojica Kos is **GUILTY** of the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War.

759. The following counts are **DISMISSED**:

- Count 2, Inhumane Acts as a Crime against Humanity;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.

760. The Trial Chamber hereby sentences Milojica Kos to a single sentence of six (6) years imprisonment.

4. Mla|o Radi}

761. Mla|o Radi} is **GUILTY** on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War;
- Count 16, Torture as a Violation of the Laws or Customs of War.

762. The following counts are **DISMISSED**:

- Count 2, Inhumane Acts as a Crime against Humanity ;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War;
- Count 14, Torture as a Crime Against Humanity;
- Count 15, Rape as a Crime Against Humanity;
- Count 17, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War.

763. The Trial Chamber hereby sentences Mla|o Radi} to a single sentence of twenty (20) years imprisonment.

5. Zoran @igi}

764. Zoran @igi} is **GUILTY** on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 7, Murder as a Violation of the Laws or Customs of War;
- Count 12, Torture as a Violation of the Laws or Customs of War;
- Count 13, Cruel Treatment as a Violation of the Laws or Customs of War.

765. The following counts are **DISMISSED**:

- Count 2, Inhumane Acts as a Crime against Humanity ;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 6, Murder as a Crime against Humanity;
- Count 11, Torture as a Crime against Humanity.

766. The Trial Chamber hereby sentences Zoran @igi} to a single sentence of twenty five (25) years imprisonment.

#### **B. CREDIT FOR TIME SERVED**

767. Pursuant to Rules 101 (C) and 102, the sentences of Miroslav Kvo-ka, Dragoljub Prca}, Milojica Kos, Mla|o Radi} and Zoran @igi} shall begin to run from today and the full amount of time spent in the custody of the Tribunal shall be deducted from the time to be served.

Done on 02 November 2001 in English and in French, the English text being authoritative.  
At The Hague, The Netherlands

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**Judge Fouad Riad**

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**Judge Almiro Rodrigues**

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**Judge Patricia Wald**

**Presiding**

**[Seal of the Tribunal]**



## VII. ANNEXES

### A. PROCEDURAL HISTORY

#### 1. Introduction

768. This annex provides information on the procedural stages in the trial of Miroslav Kvo-ka, Dragoljub Prca}, Milojica Kos, Mla|o Radi} and Zoran @igi}. The trial of Kvo-ka, Radi}, Kos and @igi} opened on Monday, 28 February 2000 in Trial Chamber I of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. The Tribunal was established by the Security Council pursuant to Chapter VII of the Charter of the United Nations. The trial was adjourned on 6 March 2000 following the arrest of a co-indictee, Dragoljub Prca}. It resumed for all five accused on Monday, 2 May 2000 and closed on 19 July 2001. The trial lasted 113 days and was conducted by the Trial Chamber during the same time as the *Krsti}* case was also being heard before Trial Chamber I.<sup>1188</sup>

#### 2. The Accused

##### (a) Arrest of the accused

769. Kvo-ka and Radi} were arrested together on 9 April 1998. @igi} was transferred on 16 April 1998 from Banja Luka where he was serving a three year prison sentence. Kos was arrested on 29 May 1998 and Prca} on 5 March 2000. The accused were arrested by SFOR in compliance with a warrant of arrest issued by Judge Vohrah, and subsequently transferred to the Tribunal detention unit in The Netherlands.

##### (b) Assignment of counsel to the accused

770. Following their transfer to the detention unit in The Hague, the accused were informed in detail of the charges against them and that they were able to engage Defense Counsel of their choosing. Due to the financial situation of the accused, the Tribunal assigned Defense Counsel to each of them in accordance with the provisions of the Directive on Assignment of Defense

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<sup>1188</sup> Generally, the Trial Chamber allocated the first two weeks of each month to the *Kvocka* case.

Counsel.<sup>1189</sup> Each of the accused then appeared before the Trial Chamber and pleaded not guilty to the counts charged against them.

(c) Allegations in the Amended Indictment

771. The Amended Indictment charges the accused with crimes against humanity under Article 5 of the Statute and with violations of the laws or customs of war under Article 3 of the Statute for crimes committed between 1 April and 30 August 1992 in the municipality of Prijedor in the Omarska, Keraterm and Trnopolje detention camps. The Amended Indictment, attached as Annex IV, contains seventeen counts.

772. Counts 1 to 3 charge Kvo-ka, Kos, Radi}, @igi} and Prca} with individual responsibility for the crimes of persecution under Article 5(h), inhumane acts under Article 5(i) and outrages upon personal dignity under Article 3 of the Statute for having participated in the persecution of Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area, on political, racial or religious grounds. The persecution took the form of murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions. Kvo-ka, Kos, Radi} and Prca} are also charged with superior responsibility for these crimes.

773. Counts 4 to 5 charge Kvo-ka, Kos, Radi} and Prca} with individual and superior responsibility for murder under Articles 3 and 5(a) of the Statute for having participated in the murder of prisoners at Omarska camp. The counts state *inter alia* that camp guards and other Serbs authorized to enter Omarska camp killed prisoners, subjected prisoners to torture and beatings that often resulted in death and confined prisoners in inhumane conditions which brought about their physical debilitation or death. Several hundred prisoners lost their life in this way.

774. Counts 6 and 7 charge @igi} with individual responsibility for murder under Articles 3 and 5 of the Statute for having participated in the murder of Bosnian Muslims, Bosnian Croats and other non-Serbs, and their confinement in inhumane conditions inside and outside Omarska, Keraterm and Trnopolje camps. The Amended Indictment states *inter alia* that between about 26 May and 30 August 1992, @igi}, alone or with others, entered Omarska and Keraterm camps and participated in the murder of prisoners there.

775. Counts 8 to 10 charge Kvo-ka, Kos, Radi} and Prca} with individual and superior responsibility for torture under Articles 3 and 5(f) and cruel treatment under Article 3 of the Statute for having participated in the torture and beatings inflicted on prisoners at Omarska camp including those listed in Schedules A-E of the Amended Indictment. According to the Amended Indictment,

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<sup>1189</sup> IT/73/Rev.8.

the prisoners at Omarska camp were subjected to torture and severe beatings on a daily basis. For many of them, the beatings began on their first day in detention and continued throughout their internment. It is stated that the camp guards and other persons who entered the camp used all manner of weapons and implements to inflict the torture and beatings.

776. Counts 11 to 13 charge @igi} with individual responsibility for torture under Articles 3 and 5 and cruel treatment under Article 3 of the Statute for having participated in the torture and beating of prisoners in Omarska, Keraterm and Trnopolje camps.

777. Counts 14 to 17 charge Radi} with personal responsibility for the crimes of torture under Article 5(f), rape under Article 5(g), torture under Article 3 and outrages upon personal dignity under Article 3 of the Statute for having raped and sexually assaulted female prisoners in Omarska camp between about 27 May and 30 August 1992.

(d) Line of defense of the accused

778. Whereas the accused Kos, Radi} and Prca} did not raise any special defenses, Kvo-ka and @igi} offered the defense of alibi for certain crimes pursuant to Rule 67(A) of the Rules. Kvo-ka argued in his Pre-Trial Brief that contrary to the Prosecution's allegations he was only at Omarska camp for about twenty days before then being posted to Tukovi. Although Rule 67(A) of the Rules provides that, under all circumstances, the defense of alibi is to be offered prior to the trial, @igi} filed a motion raising a defense of alibi in respect of allegations of crimes committed on 24 July 1992 in Keraterm camp four months after the trial opened, that is, on 30 June 2000. The Trial Chamber found that @igi}'s lateness in notifying the Court of his intention to offer the Defense of alibi did not mean that this defense was barred, given that Rule 127(A) of the ICTY Rules of Procedure and Evidence authorizes the Trial Chamber to enlarge any time-limit prescribed by the Rules on good cause. The Trial Chamber also held that granting the motion would not occasion any substantial delay in the proceedings. The Trial Chamber therefore authorized @igi} to present his defense of alibi.<sup>1190</sup>

(e) Testimony of the accused

779. Kvo-ka and Radi} chose to testify at the start of the trial in accordance with Rule 85 but were not cross-examined by the Prosecution until after they had finished presenting their respective cases. @igi} chose to give a statement in accordance with Rule 84 *bis* at the beginning of his case while Kos and Prca} stated their intention to remain silent. In addition, shortly after their respective

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<sup>1190</sup> Decision on the Defense of Alibi for the Accused @igi}, 21 July 2000.



arrests, Kvo-ka, Radi} and Prca} gave interviews to the Office of the Prosecution, which were admitted as Exhibits.

(f) Medical evaluations requested by the accused

780. The five accused requested medical evaluations pursuant to Rule 74 *bis* of the Rules. The Trial Chamber decided that medical or psychiatric evaluations of each accused would provide valuable information regarding their past and present physical and mental capacity. It also held that such evaluations would provide information on their current psychological state and on their potential ability to be reintegrated into society so as to allow for suitable recommendations to be made on sentencing. The Trial Chamber further considered that the evaluations would allow appropriate observations to be presented for evaluating their state of mind during the commission of the alleged crimes.<sup>1191</sup>

(g) Detention of the accused

781. Kvo-ka, Kos and Radi} filed motions for provisional release pursuant to Rule 65 of the Rules which Trial Chamber III dismissed on the ground that the accused were not providing the necessary guarantees for the protection of the victims and witnesses and their return for trial.<sup>1192</sup> @igi} submitted a similar motion on the ground that the date for starting the trial had not been set. The accused's Defense withdrew the motion at the status conference of 25 February 2000 following the Trial Chamber 's decision to open the trial on 28 February 2000.

### 3. The main stages of the proceedings

(a) Composition of the Trial Chambers Hearing the Case

782. The case was brought before Trial Chamber I composed of Judges Rodrigues, Riad and Wald pursuant to Vice-President Mumba's order of 3 February 2000 which transferred the case from Trial Chamber III, composed of Judges May, Bennouna, and Robinson, to Trial Chamber I.

783. The Trial Chamber bore in mind *inter alia* the over-riding need for the proceedings to be fair and expeditious. For this reason, Rules 15 *bis* and 71 of the Rules were activated on several occasions so that the temporary unavailability of one of the Trial Chamber's judges would not delay the case being heard even for a few days. The Trial Chamber also informed the parties that, in principle, they had to submit their simple motions orally and that a status conference would be held

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<sup>1191</sup> Decision on Defense Motion to Obtain the Assignment of Experts for the Accused Miroslav Kvo-ka, 12 May 2000; Decision on Defense Request for Assignment of Experts for the Accused Dragoljub Prca}, 18 May 2000; Decision on Defense Request for Assignment of Medical and Psychiatric Experts for the Accused Zoran @igi}, 21 June 2000.

in the afternoon to discuss the motion(s) presented to the Trial Chamber. It went on to explain that, except for urgent matters, no written motion could be filed which the parties had not previously discussed. The parties therefore strove to find a point of agreement or to restrict their points of disagreement<sup>1193</sup> and only complex matters would be the subject of written decisions.

(b) Form of the Amended Indictment

784. The Prosecution's indictment against Kvo-ka, Radi} and Kos under case number IT-94-4-PT was confirmed on 13 February 1995 and originally contained nineteen co-accused, including Du{an Tadi} whose final legal proceedings at the Tribunal concluded on 11 February 2000. An indictment against @igi} under case number IT-95-8-PT was confirmed on 21 July 1995.

785. A second indictment was submitted by the Prosecution on 12 November 1998 with a new case number, IT-98-30-PT. In accordance with Rule 62 of the Rules, the accused appeared on 16 December 1998 and pleaded not guilty to the charges against them in the indictment. However, on 1 February 1999, Kos and @igi} submitted a preliminary motion alleging defects in the form of the amended indictment. In a decision of 12 April 1999, the Trial Chamber granted the motion of the accused and ordered the Prosecution to amend the indictment. Beyond the objection to defects in the form of the indictment, Radi} and Kos challenged the Tribunal's authority to try offences under Article 3 of the Statute. The Trial Chamber dismissed that motion on 1 April 1999.

786. A third amended indictment was filed on 31 May 1999. The Defense then filed another motion based on defects in the form of the third indictment. At the same time, on 8 June 1999, one of the accused specified in the original IT-95-8-PT indictment, Dragan Kolund`ija, was arrested by SFOR. The Prosecution presented a motion for joinder of cases to which the Defense objected. The confirming judge, Judge Vohrah, rejected the motion for joinder of cases on 9 July 1999. Thus, on 8 November 1999, the Trial Chamber was in a position to rule on the defect in the form of the third indictment alleged by the Defense. It dismissed the challenge.

787. Following the arrest of Prca}, one of the accused in indictment IT-95-4, the Prosecution submitted a motion for joinder of cases on 6 March 2000 which the Defense did not challenge. The Prosecution next requested to amend indictment IT-95-4 so that it mentioned only Prca}. The confirming judge, Judge Nieto-Navia, confirmed the indictment on 9 March 2000 and the accused made his initial appearance on 10 March of that same year. Prca} pleaded not guilty to the counts against him.

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<sup>1192</sup> Decision on motion for provisional release of Milojica Kos, 29 January 2000; Decision on motion for provisional

788. On 13 October 2000, the Trial Chamber authorised the Prosecution to file a consolidated Amended Indictment incorporating charges against all five accused. It also granted the Prosecution permission to correct the spelling of Prca's first name and a typographical error in the date given in the confidential Schedules appended to the indictment. The Prosecution replaced the dates 24 May 1992 and 24 July 1992 with the dates 26 May 1992 and 30 August 1992 respectively.<sup>1194</sup>

789. On 22 February 2001, the Trial Chamber rendered a decision lifting the confidentiality of the Schedules appended to the Amended Indictment. @igi challenged the confidential status of the annexes listing the Omarska, Keraterm and Trnopolje camp victims on the ground that there was no reason for them to be confidential. The decision to append confidential Schedules had been taken earlier by Trial Chamber III in order to clarify the nature of the charges against the accused. Responding to @igi's current motion, the Prosecution acknowledged that there was no reason for the identity of many of the victims listed to be confidential. The Trial Chamber therefore decided to lift the confidential status of the victims on the lists except for some who had testified under a pseudonym and whose anonymity had to be safeguarded.<sup>1195</sup>

(c) Evidence of the Parties

(i) Judicial Notice

790. The historical, geographical, military and administrative backdrop to the crimes allegedly committed by the accused was similar to that involved in the prosecution of Du'an Tadi. For this reason, on 11 January 1999, the Prosecution filed a motion for judicial notice to be taken of related facts adjudicated in the Tadi case and, to a lesser extent, the ^elebi case. An annex appended to the motion cited 583 paragraphs from the Tadi and ^elebi Judgements, which were relevant to the Kvo-ka case. The Defense agreed that the Trial Chamber could take judicial notice of the facts contained in 94 of the paragraphs in annex 1 of the Prosecution's 11 January 1999 motion and Trial Chamber III accepted these facts on 19 March 1999. After the appeal judgement of 26 January 2000 in the Tadi case, the Defense agreed that judicial notice could be taken of the facts contained in 444 of the paragraphs in annex 1, including those already adjudicated by Trial Chamber III. In light of these facts accepted by the Defense, the Prosecution filed a subsequent motion for adjudication of the following legal findings concerning the elements common to Articles 3 and 5 of the Statute: that there was an armed conflict and a nexus between that conflict and the crimes ascribed to the

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release of Miroslav Kvo-ka, 2 February 2000.

<sup>1193</sup> Status Conference of 24 February 2000, T. 562-563.

<sup>1194</sup> Decision on Prosecution Request for Leave to File a Consolidated Indictment and to Correct Confidential Schedules, 13 October 2000.

accused; that the victims of the acts and omissions relating to the crimes alleged in the Amended Indictment were not taking an active part in the hostilities within the meaning of Article 3 common to the Geneva Conventions of 1949; that a systematic or widespread attack was directed against the Muslims and Croats at the time and places specified in the Amended Indictment; and, that the acts or omissions alleged in the Amended Indictment formed part of the widespread or systematic attack during an armed conflict, be it international or internal. On 8 June 2000, the Trial Chamber decided that, at the time and places specified in the Amended Indictment, there was a widespread and systematic attack directed against the Muslim and Croatian civilian population living in the municipality of Prijedor which formed part of an armed conflict. It also held that there was a nexus between this conflict and the facts described in the Amended Indictment committed against the said population and, in particular, the detention in the Omarska, Keraterm and Trnopolje camps.

791. As a result of this decision, the Prosecution was able to limit the evidence it tendered in support of its case. It concentrated its proof on the facts concerning the Omarska, Keraterm and Trnopolje camp detention conditions contained in the remaining 139 paragraphs of the Prosecution's annex not accepted by the Defense, and the extent to which the facts were ascribable to individual accused.

(ii) Witnesses

792. The parties filed pre-trial briefs to notify opposing parties of the nature of their case. The Prosecution informed the Trial Chamber in its pre-trial brief that it was intending to call 71 witnesses to prove the allegations against the accused. All of the accused set out their intention to call a substantial number of witnesses.

793. In addition to filing the witness list pursuant to Rule 65 of the Rules, the Trial Chamber requested the parties presenting witnesses to announce a week in advance which witnesses they would call the following week. It further requested the parties to set out in brief the points of fact and law about which each witness would testify and to state precisely the relevant paragraphs of the Amended Indictment on which the testimony would focus.<sup>1196</sup> On 21 August 2000, the Prosecution presented to the Trial Chamber a confidential motion to amend its list of witnesses. The accused challenged the appearance of seven witnesses whose names did not appear on any of the previous prosecution lists, on the ground that granting the Prosecution motion would contravene the principle of equality of arms and violate Article 21(4)(b) of the Statute which establishes the right of the

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<sup>1195</sup> Decision on Zoran @igi}'s Motion for Rescinding Confidentiality of Schedules Attached to the Indictment, 22 February 2001.

accused to have adequate time and facilities for the preparation of his Defense. On 30 August 2000, the Trial Chamber granted the Prosecution's motion but ruled that the seven new witnesses on the amended list could be called only during the last part of the Prosecution's case. Similarly, it ruled that, after the seven new witnesses had been examined and cross-examined, the Defense for each accused could submit to the Trial Chamber any specific and warranted motion for additional relief. Motions could be submitted setting out any prejudice the accused in question suffered from the late notification of the appearance of any of the new witnesses.<sup>1197</sup>

794. An issue as to the cross-examination of Defense witnesses was also raised. Kvo-ka requested that the Trial Chamber limit the Prosecution's cross-examination of an accused's witness to issues concerning that particular accused. The Trial Chamber however decided that Rule 90(H) meant that the Prosecution was authorised to cross-examine a Defense witness on all matters relevant to the Prosecution case within a reasonable time-limit set by the Trial Chamber.<sup>1198</sup> The parties also raised the issue of whether they were entitled to ask the witness additional questions raised by the Judges questions. The Trial Chamber decided that, in principle, the parties may not retake the floor after the Judges except where there has been an obvious material error with respect to the characterization of the testimony given by a witness, or where the witness has provided new information detrimental to the accused. Otherwise, the parties must put forward any opposing arguments through witnesses, closing arguments, or written submissions.<sup>1199</sup>

795. The Trial Chamber reminded the parties that to the extent possible, they should respect the principle that the proceedings before the Trial Chamber be public. In particular, they should not request extreme protective measures such as closed session if the witnesses would be satisfied with lesser measures such as voice and image distortion. Closed sessions were to be called only in exceptional circumstances after the parties provided the Trial Chamber with the full information required to assess why such a measure was vital.<sup>1200</sup> The Trial Chamber heard four witnesses in closed session and accorded pseudonyms and face and/or voice distortions to many others heard in public session.

796. In all, the Trial Chamber heard fifty Prosecution witnesses in fifty-four days. The Defense then had the same number of days to present its witnesses, that is, approximately two weeks for each member of the Defense. Each Counsel arranged for the days it had not used in presenting its

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<sup>1196</sup> The Parties agreed to follow the practice at the status conference of 14 June 2000. This was recalled at the status conference of 4 July 2000, T, 3524.

<sup>1197</sup> Decision on Application for Leave to Appeal, 10 October 2000, IT-98-30/1-AR73.

<sup>1198</sup> Decision on the Request to the Trial Chamber to Issue a Decision on Use of Rule 90H, 11 January 2001.

<sup>1199</sup> Status Conference of 4 July 2000, T, 3524.

<sup>1200</sup> The Trial Chamber orally granted most of the protective measures.

witnesses to be allotted to another member of the Defense. All told, the Trial Chamber heard eighty-nine Defense witnesses in fifty-nine days.

(iii) Witness affidavits and formal statements

797. At the time the trial commenced, Rule 94 *ter* authorised exceptions to the rule that testimony must ordinarily be given in person. The parties were allowed to request the Trial Chamber to admit affidavits or formal statements as evidence to corroborate some witnesses' testimony. Strict conditions applied to the admission of such affidavits and statements: they were to be disclosed to the other party no later than seven days before the appearance of the witness whose testimony was to be corroborated so that the opposing party would have time to prepare to cross-examine the witness; they were to be taken in accordance with the law of the State in which they were signed; and they were required to corroborate a disputed fact. While the Trial Chamber admitted the statements tendered by the Defense, it dismissed the Prosecution's request to admit such statements on the ground that they did not satisfy the conditions set by Rule 94 *ter* of the Rules.<sup>1201</sup> It should be observed that the Tribunal amended Rule 94 *ter* of the Rules, which was difficult to apply, following the plenary session of the Judges on 12 January 2001 Rule 92 *bis* of the Rules replaced Rule 94 *ter*.

(iv) Exhibits

798. The Prosecution tendered a large number of exhibits of which the Trial Chamber admitted 305. It also admitted 184 Defense exhibits. The Trial Chamber set out as a principle that, subject to the provisions of Rule 89 of the Rules, all exhibits offered by a party at a hearing were to be treated as having been admitted into evidence except for witnesses' prior statements. Generally, objections to exhibits were discussed in the afternoon session unless it was absolutely vital to the testimony of the witness or expert being examined.<sup>1202</sup>

(v) Access to the case's confidential evidence

799. The Trial Chamber permitted the transcripts, exhibits and other confidential documents presented in the *Kvo-ka* case to be disclosed to Trial Chamber II hearing the *Tali* and *Br/arin* case for any purpose it deemed fit. Authorisation was granted in accordance with Tribunal practice and subject to measures being taken, in consultation with the Victims and Witnesses Section, affording

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<sup>1201</sup> Decision on Prosecution Notice of Affidavit Evidence, 30 October 2000; Decision on the prosecution motion to file affidavit evidence, 14 December 2000.

<sup>1202</sup> Some decisions regarding status of exhibits were taken: Decision on the Motion for Confirmation and Clarification of Status of Prosecution Exhibits, 14 December 2000; Decision on Defense Motion to Introduce Exhibit Evidence, 17 April 2001.

the witnesses and, as necessary, the documentary and other evidence *mutatis mutandis* the same level of protection.<sup>1203</sup>

(vi) Admissibility of the evidence

800. The Defense sought to have the Prosecution witnesses' prior statements admitted as exhibits to show that Prosecution witnesses' testimony in Court often contradicted the witnesses' prior statements. The Prosecution contended that the witnesses were credible irrespective of the possible contradictions in their prior statements that had sometimes been made several years prior to their giving testimony before the Trial Chamber. The Trial Chamber ruled that the prior statements could be used in the proceedings by the parties to challenge the credibility of the witness but could not be admitted as evidence.<sup>1204</sup> A witness' prior statements could be used during the hearing, the witness' cross-examination or the rebuttal of the party calling the witness but could not be admitted as exhibits.<sup>1205</sup>

801. @igi} alleged that during the Prosecution's examination-in-chief, a protected witness provided information on three facts involving @igi} which did not feature in either the Amended Indictment or the witness prior statements disclosed to the Defense up until that point. @igi} considered that the information included "new prosecution evidence" of which he had not been aware before the witness in question's testimony. On 6 September 2000, the Trial Chamber orally rejected @igi}'s motion to redact the new evidence from the record.<sup>1206</sup> A few weeks later, @igi} questioned the authenticity of a piece of evidence. On 26 September 2000, Husein Gani} was heard by the Trial Chamber as a Prosecution witness and cross-examined on a prior statement the Prosecution alleged he had made to a State commission formally responsible for gathering war crimes information. However, the witness stated that he did not remember making such a statement and denied writing and signing the thirty-eight page hand-written document.<sup>1207</sup> On 27 September 2000, the Trial Chamber ruled that @igi} could attempt to authenticate the hand-written document during presentation of his case,<sup>1208</sup> on the ground that the issue of verifying a prior statement's authenticity after the witness had testified affected the Trial Chamber's ability to establish the facts. At the request of @igi}, the Trial Chamber subsequently authorized a graphology expert to be appointed.<sup>1209</sup>

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<sup>1203</sup> Decision on Defense Request for Release of Confidential Material, 3 October 2000.

<sup>1204</sup> Oral Decision of 4 July 2000, T. 3520-3523.

<sup>1205</sup> Oral Decision of 4 July 2000, T. 3520-3523.

<sup>1206</sup> The Trial Chamber rejected @igi}'s Motion for Leave to Enter an Interlocutory Appeal from the Decision: Decision on Motion of the Accused Zoran @igi} for Leave to Appeal, 27 October 2000, IT-98-30/1-AR73.2.

<sup>1207</sup> T. 5793.

<sup>1208</sup> T. 5810.

<sup>1209</sup> Decision on Zoran @igi}'s Motion for Delivery of Hand-written Documents, 12 March 2001.

(d) Dismissal of Some Counts after the Prosecution Case

802. Pursuant to the provisions of Rule 98 *bis* of the Rules, Radi}, Kos, @igi}, and Prca} filed a motion for acquittal on all the counts against them on the ground that the Prosecution evidence tendered in support of the allegations was not sufficient for the accused to be found guilty beyond a reasonable doubt. The Trial Chamber rendered a decision on the Defense motion for acquittal acquitting Kvo-ka, Radi}, Kos, and Prca} of the crimes allegedly committed in Keraterm and Trnopolje camps and of those said to have been committed against some of the victims listed in Annex 1 of the decision on the Defense motion for acquittal.<sup>1210</sup> The Trial Chamber also acquitted @igi} of the charges relating to some victims whose name are listed in Annex 3 of the Decision on the Defense motion for acquittal.<sup>1211</sup>

(e) Concurrent Proceedings at the Tribunal and the ICJ

803. On 24 October 2000, @igi} filed a motion regarding concurrent proceedings before the International Criminal Tribunal and the International Court of Justice (hereinafter "the ICJ") dealing with the same procedural questions. The accused requested that the Trial Chamber interrupt the trial until the jurisdictional issue had been ruled on by the ICJ. The Trial Chamber rejected the motion on 5 December 2000 and the Appeals Chamber upheld this dismissal on 26 May 2001 on the ground that the Tribunal and the ICJ are independent of one another and that neither has primacy over the other.<sup>1212</sup>

## **B. SHORT CHRONOLOGY**

- 9 January 1992 The Republic of the Serbian People of Bosnia and Herzegovina declares to come into force upon any international recognition of the Republic of Bosnia and Herzegovina, later known as the *Republika Srpska*.
- 6 and 7 April 1992 The European Community and the United States of America recognize the Republic of Bosnia and Herzegovina.
- 30 April 1992 The town of Prijedor is attacked and taken over by Serbian forces.
- 22 May 1992 The Republic of Bosnia and Herzegovina becomes a member of the United

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<sup>1210</sup> The list of the victims features in confidential annex 1 of the Decision on Defense Motions for Acquittal, 14 December 2000.

<sup>1211</sup> The list of the victims features in confidential annex 3 of the Decision on Defense Motion for Acquittal and relates only to @igi}, Decision on Defense Motion for Acquittal, 14 December 2000.

<sup>1212</sup> Decision on Interlocutory Appeal by the Accused Zoran @igi} Against the Decision of Trial Chamber I dated 5 December 2000, 25 May 2001, IT-98-30/1-AR73.5.



Nations.

<u>22 May 1992</u>	Shooting incident at the Muslim Hambarine checkpoint, which led to the attack of Hambarine by Serbian forces.
<u>24 May 1992</u>	Kozarac is attacked and taken over by Serbian forces.
<u>27 May 1992</u>	The Omarska, Keraterm and Trnopolje camps begin to be set up.
<u>30 May 1992</u>	Unsuccessful attempt by non-Serbs to regain control of Prijedor.
<u>End of August 1992</u>	The Omarska camp is closed.

### C. GLOSSARY - LEGAL CITATIONS AND MAIN ABBREVIATIONS

<b>Additional Protocol I</b>	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
<b>Additional Protocol II</b>	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
<b>Akayesu Trial Chamber Judgement</b>	<i>Prosecutor v. Jean-Paul Akayesu</i> , Case No. ICTR-96-4-T, Judgement, 2 September 1998
<b>Akayesu Sentencing Decision</b>	<i>Prosecutor v. Jean-Paul Akayesu</i> , Case No. ICTR-96-4-T, Decision on Sentence, 2 October 1998
<b>Aleksovski Trial Chamber Judgement</b>	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT 95-14/1-T, Judgement, 25 June 1999
<b>Aleksovski Appeals Chamber Judgement</b>	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT 95-14/1-A, Judgement, 24 March 2000
<b>Amended Indictment</b>	<i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No. IT-98-30-PT, Further Amended Indictment, 26 October 2000
<b>Bagilishema Trial Chamber Judgement</b>	<i>Prosecutor v. Ignace Bagilishema</i> , Case No. ICTR-95-1A-T, Judgement, 7 June 2001
<b>Blaškić Trial Chamber Judgement</b>	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, Judgement, 3 March 2000

<b>^elebi}i Trial Chamber Judgement</b>	<i>Prosecutor v. Zejnil Delali} et al.</i> , Case no. IT-96-21-T, Judgement, 16 November 1998
<b>^elebi}i Appeals Chamber Judgement</b>	<i>Prosecutor v. Zejnil Delali} et al.</i> , Case No. IT-96-21-A, Judgement, 20 February 2001
<b>Commission of Experts Report</b>	Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/1994/674)
<b>Common Article 3</b>	Article 3 of Geneva Conventions I through IV of 12 August 1949
<b>Decision on Defense Motions for Acquittal</b>	<i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T, Decision on Defense Motions for Acquittal, 15 December 2000
<b>Decision On Judicial Notice</b>	<i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T, Decision on Judicial Notice, 8 June 2000
<b>Kvo-ka Final Trial Brief</b>	<i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T, Closing Statement of the accused Mr. Kvo-ka, 27 June 2001, filed on 29 June 2001; Final Trial Brief Submission by the Defence of the Accused Mlado Radi} "Krkan", 28 June 2000, filed on 29 June 2000; Final Written Submissions of Milojica Kos, 29 June 2001; Final Trial Brief- Defense for the Accused Zoran @igi}, 29 June 2001; Final Trial Brief Submissions by the Defense of the accused Dragoljub Prca}, 28 June 2001, filed on 2 July 2001
<b>Kos Final Trial Brief</b>	
<b>Radi} Final Trial Brief</b>	
<b>@igi} Final Trial Brief</b>	
<b>Prca} Final Trial Brief</b>	
<b>Kvo-ka Pre-trial Brief</b>	<i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-PT, Pre-trial Brief, (Kvo-ka) 13 January 2000; Defense Pre-trial Brief (Radi}), 21 February 2000; Pre-trial Brief from the Defense of the Accused Milojica Kos, 20 February 2001; Defense Pre-trial Brief, (@igi}), 19 September 1999; Pre-trial Brief of the Defense Pursuant to Rule 65 ter (E) (i), (Prca}) 5 April 2001
<b>Kos Pre-trial Brief</b>	
<b>Radi} Pre-trial Brief</b>	
<b>@igi} Pre-trial Brief</b>	
<b>Prca} Pre-trial Brief</b>	
<b>Erdemovi} Appeals Chamber Judgement</b>	<i>Prosecutor v. Dra`en Erdemovi}</i> , Case No. IT-96-22-A, Judgement, 7 October 1997
<b>Erdemovi} Sentencing Judgement</b>	<i>Prosecutor v. Dra`en Erdemovi}</i> , Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996
<b>Erdemovi} Sentencing Judgement II</b>	<i>Prosecutor v. Dra`en Erdemovi}</i> , Case No. IT-96-22-T <i>bis</i> , Sentencing Judgement, 5 March 1998
<b>et seq.</b>	Et sequitur ("and what follows")

<b><i>Furund`ija</i> Trial Chamber Judgement</b>	<i>Prosecutor v. Anto Furund`ija</i> , Case No. IT-95-17/1-T, Judgement, 10 December 1998
<b><i>Furund`ija</i> Appeals Chamber Judgement</b>	<i>Prosecutor v. Anto Furund`ija</i> , Case No. IT-95-17/1-A, Judgement, 21 July 2000
<b>Geneva Convention I</b>	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
<b>Geneva Convention II</b>	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
<b>Geneva Convention III</b>	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
<b>Geneva Convention IV</b>	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
<b>Geneva Conventions</b>	Geneva Conventions I through IV of August 12, 1949
<b>Hague Convention IV</b>	The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land
<b>Hague Regulations</b>	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV
<b>ICCPR</b>	International Covenant on Civil And Political Rights, adopted by the United Nations General Assembly on 16 December 1966
<b>ICRC Commentary (GC IV)</b>	Pictet (ed.)-Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958)
<b>ICRC Commentary (Additional Protocol I)</b>	Sandoz <i>et al.</i> (eds.)-Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949
<b>ICC Statute</b>	Rome Statute of the International Criminal Court, Adopted at Rome on 17 July 1998 (PCNICC/1999/INF/3)
<b>1991 ILC Report</b>	Report of the International Law Commission on the work of its 43rd session, 29 April-19 July 1991, supplement no. 10 (A/46/10)
<b>1996 ILC Report</b>	Report of the International Law Commission

	on the work of its 48th session, 6 May-26 July 1996, supplement no. 10 (A/51/10)
<b>Jelisi} Trial Chamber Judgement</b>	<i>Prosecutor v. Goran Jelisi}</i> , Case No. IT-95-10-T, Judgement, 14 December 1999
<b>Jelisi} Appeals Chamber Judgement</b>	<i>Prosecutor v. Goran Jelisi}</i> , Case No. IT-95-10-A, Appeals Judgement, 5 July 2001
<b>Kambanda Trial Chamber Judgement</b>	<i>Prosecutor v. Jean Kambanda</i> , Case No. ICTR 97-23-S, Sentencing Judgement, 4 September 1998
<b>Kayishema Trial Chamber Judgement</b>	<i>Prosecutor v. Clément Kayishema and Obed Ruzindana</i> , Judgement and Sentence, Case No. ICTR-95-1-T, 21 May 1999
<b>Kayishema Sentencing Judgement</b>	<i>Prosecutor v. Clément Kayishema and Obed Ruzindana</i> , Judgement and Sentence, Case No. ICTR-95-1-T, 21 May 1999 (Sentence appended to the Judgement)
<b>Kordi} Trial Chamber Judgement</b>	<i>Prosecutor v. Dario Kordi} and Mario ^erkez</i> , Case No. IT-95-14/2-T, Judgement, 26 February 2001
<b>Kunara} Trial Chamber Judgement</b>	<i>Prosecutor v. Dragoljub Kunara}, Radomir Kova- and Zoran Vukovi}</i> , Case No. IT-96-23-T, Judgement, 22 February 2001
<b>Kupre{ki} Trial Chamber Judgement</b>	<i>Prosecutor v. Zoran Kupre{ki} et al.</i> , Case No. IT-95-16-T, Judgement, 14 January 2000
<b>Law Reports</b>	Law Reports of Trials of War Criminals (the United Nations War Crimes Commission)
<b>Musema Trial Chamber Judgement</b>	<i>Prosecutor v. Alfred Musema</i> , Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000
<b>Prosecution Final Trial Brief</b>	<i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30-T, Prosecutor's Final Trial Brief, 29 June 2001
<b>Prosecution Pre-Trial Brief</b>	<i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30-PT, Prosecutor's Filing Pursuant to Rule 65 ter (E) / Prosecutor's Pre-Trial Brief Pursuant to Rule 65 ter (E) (i), 14 February 2000
<b>Report of the Secretary-General</b>	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), (S/25704)

<b>Report of the Preparatory Commission for the ICC</b>	Report of the Preparatory Commission for the International Criminal Court, 6 July 2000, (PCNICC/2000/INF/3/Add.2)
<b>Rules</b>	Rules of Procedure and Evidence of the International Tribunal
<b><i>Serushago</i> Sentence</b>	<i>Prosecutor v. Serushago</i> , Case No. ICTR-98-39-S, Sentencing Judgement, 5 February 1999
<b>Statute</b>	Statute of the International Tribunal, annexed to the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), (S/25704)
<b><i>Tadić</i> Trial Chamber Judgement</b>	<i>Prosecutor v. Du{ko Tadić}</i> , Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997
<b><i>Tadić</i> Appeals Chamber Judgement</b>	<i>Prosecutor v. Du{ko Tadić}</i> , Case No. IT-94-1-A, Judgement, 15 July 1999
<b><i>Tadić</i> Jurisdiction Decision</b>	<i>Prosecutor v. Du{ko Tadić}</i> , Case No. IT-94-1/AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
<b><i>Tadić</i> Sentencing Judgement of 14 July 1997</b>	<i>Prosecutor v. Du{ko Tadić}</i> , Case No. IT-94-1-T, Judgement in Sentencing, 14 July 1997
<b><i>Tadić</i> Sentencing Judgement of 11 November 1999</b>	<i>Prosecutor v. Du{ko Tadić}</i> , Case No. IT-94-1-A and IT-94-1-Abis-R117, Sentencing Judgement, 11 November 1999
<b><i>Tadić</i> Sentencing Judgement of 26 January 2000</b>	<i>Prosecutor v. Du{ko Tadić}</i> , Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000
<b><i>Talić</i> Decision on Amended Indictment</b>	<i>Prosecutor v. Momir Talić and Radoslav Br anin</i> , Case No. IT-99-36-PT, Decision on the Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001
<b><i>Todorović</i> Sentencing Judgement</b>	<i>Prosecutor v. Stevan Todorović</i> , Case No. IT-95-9/1-S, 31 July 2001
<b>TWC</b>	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10

## GLOSSARY – MAIN ABBREVIATIONS

<b>AbiH</b>	Armed Forces of the Republic of Bosnia and Herzegovina
<b>BiH</b>	Bosnia and Herzegovina
<b>D</b>	Defense Exhibit admitted by the Trial Chamber in the case <i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T
<b>ECHR</b>	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1959
<b>FRY</b>	Federal Republic of Yugoslavia (Serbia and Montenegro)
<b>ICC</b>	International Criminal Court
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTR</b>	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
<b>ICTY</b>	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
<b>ILC</b>	International Law Committee
<b>IMT</b>	International Military Tribunal sitting at Nuremberg, Germany
<b>IMTFE</b>	International Military Tribunal for the Far-East sitting at Tokyo, Japan
<b>JNA</b>	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
<b>P</b>	Prosecution Exhibit admitted by the Trial Chamber in the case <i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T
<b>p</b>	Page
<b>pp</b>	Pages
<b>Para.</b>	Paragraph

<b>Paras</b>	Paragraphs
<b>Parties</b>	The Prosecutor and the Defense in <i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T
<b>SFRY</b>	Socialist Federal Republic of Yugoslavia
<b>T.</b>	Transcript of hearing in <i>Prosecutor v. Miroslav Kvo-ka et al.</i> , Case No. IT-98-30/1-T

## D. AMENDED INDICTMENT

### THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

#### THE PROSECUTOR

v.

MIROSLAV KVO^KA  
DRAGOLJUB PRCA]  
MILOJICA KOS  
MLA\O RADI]  
ZORAN @IGI]

### AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("the Statute of the Tribunal"), charges:

**Miroslav KVO^KA, Dragoljub PRCA] , Milojica KOS, Mla|o RADI] and Zoran @IGI]**

with **Crimes Against Humanity** and **Violations of the Laws or Customs of War**, as set forth below:

#### **Background:**

1. Prijedor Municipality (*op{tina}*) is located in northwestern Bosnia and Herzegovina. According to the 1991 census, it had a total population of 112,543: 49,351 (43.9%) identified themselves as Muslims; 47,581 (42.3%) identified themselves as Serbs; 6,316 (5.6%) identified themselves as Croats; 6,459 (5.7%) identified themselves as Yugoslavs; and 2,836 (2.5%) were identified as other nationalities. The Municipality is situated along one of the main east-west travel corridors in the former Yugoslavia. It was considered a strategic location by Serbian leaders because that corridor linked the Serbian-dominated area of the Croatian Krajina in the west with the Republic of Serbia in the east.

2. In 1991, after Slovenia and Croatia declared independence from Yugoslavia and war broke out, it appeared increasingly likely that Bosnia and Herzegovina would also declare its independence. Bosnian Serb leaders, however, wanted Bosnia and Herzegovina to remain a part of Yugoslavia. As time went by, and it became clear they would not be able to hold Bosnia and Herzegovina in the Yugoslav federation, the Bosnian Serb authorities, led by the Serbian Democratic Party (SDS), began in earnest the creation of a separate Serbian territory in Bosnia and Herzegovina.



3. As viewed by the SDS leaders, a major problem in the creation and control of the Serbian territory was the significant Bosnian Muslim and Bosnian Croat population that also lived in the areas being claimed. Thus, a significant aspect of the plan to create a new Serbian territory was the permanent removal or "ethnic cleansing" of nearly all of the Bosnian Muslim and Bosnian Croat population, allowing for the presence of only a small number of non-Serbs who would agree to the conditions for living in a Serb-dominated State.

4. During the early morning hours of 30 April 1992, Serbian forces seized physical control of the town of Prijedor. The takeover initiated a series of events that, by year's end, would result in the death or forced departure of most of the Bosnian Muslim and Bosnian Croat population of the Municipality.

5. Immediately after the takeover of Prijedor town, severe restrictions were imposed on all aspects of life for Bosnian Muslims, Bosnian Croats and some other non-Serbs, including freedom of movement and the right to employment. The effect of those restrictions was the containment of Bosnian Muslims and Bosnian Croats in the villages and areas in the Municipality where they lived. Beginning in late May, those areas were then subjected to extremely violent, large-scale attacks by the Serb military, paramilitary, and police forces. The Bosnian Muslims and Bosnian Croats who survived the initial artillery and infantry attacks were seized by the Serb forces and transferred to camps and detention facilities established and operated under the direction of the Bosnian Serb authorities.

6. Between 24 May 1992 and 30 August 1992, Bosnian Serb authorities in the Prijedor municipality unlawfully segregated, detained and confined more than 6,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area in the Omarska, Keraterm, and Trnopolje camps. In Omarska camp the prisoners included military-aged males and political, economic, social and intellectual leaders of the Bosnian Muslim and Bosnian Croat population. There were about 37 women detained in the camp. At the Keraterm camp, the majority of the prisoners were military-aged males. At the Trnopolje camp the majority of prisoners were Bosnian Muslim and Bosnian Croat women, children, and the elderly, although men were also interned there either with their families or alone.

7. The Omarska camp was located in a former mining complex in the village of Omarska, approximately 20-25 kilometres from the town of Prijedor. The prisoners were generally confined in four locations: the administration building where interrogations took place and most of the women were confined; the garage or hangar building; a building known as the '*white-house*', where virtually every prisoner was tortured or severely beaten; and a cement courtyard area between the buildings known as the '*Pista*'. There was another small building known as the '*red-house*' where prisoners were taken, but rarely emerged alive. The Keraterm camp was located on the site of a ceramics factory located on the Prijedor-Banja Luka road, just outside the centre of the town of Prijedor. Prisoners were confined in four storage rooms which faced the road.

8. Living conditions at Omarska and Keraterm were brutal and inhumane. The two camps were operated in a manner that resulted in the physical debilitation or death of the non-Serb prisoners. The general living conditions were abject. Prisoners were crowded together so badly in the various rooms of both camps, that often they could not sit or lie down. There were little or no toilets or facilities for personal hygiene. The inadequate supply of water the prisoners received at both camps was usually foul. They had no change of clothing, no bedding, and virtually no medical care. The prisoners were fed starvation rations once a day. In addition, in Omarska, they were given approximately three minutes to get into the canteen area, eat, and get out. The trip to the canteen was often accompanied by beatings and other abuse.

9. Severe beatings, torture, killings, sexual assault, and other forms of physical and psychological abuse were commonplace at Omarska and Keraterm. The camp guards and others who came to the camps used all types of weapons and instruments to beat and otherwise physically abuse the prisoners. At a minimum, hundreds of prisoners, whose identities are known and unknown, did not survive the camps.

10. Interrogations were conducted on a daily basis at the Omarska and Keraterm camps. The interrogations were regularly accompanied by beatings and torture. Non-Serbs who were considered as extremists or to have resisted the Bosnian Serbs were often killed. In addition, Bosnian Muslim and Bosnian Croat political and civic leaders, intellectuals, and the wealthy, were especially subjected to malicious beatings, torture, and/or killed.

11. The Trnopolje camp was located in the village of Trnopolje, approximately ten kilometres from the town of Prijedor. Prisoners were detained in a cluster of buildings, including a school, cultural hall and cinema, and on the surrounding grounds. The conditions in the Trnopolje camp were also abject and brutal. The general living and hygiene facilities were grossly inadequate. Minimal rations were only provided on a sporadic basis. At various points, prisoners were allowed to leave the camp to forage for food in the surrounding area. Both male and female prisoners were killed, beaten and otherwise physically and psychologically maltreated by the camp personnel and others who were allowed into the camp for the purpose of inflicting serious bodily and mental harm on the prisoners.

12. In addition, many of the women detained at the Trnopolje camp were raped, sexually assaulted, or otherwise tortured by camp personnel, who were both police and military personnel, and by others, including military units from the area who came to the camp for that specific purpose. In many instances, the women and girls were taken from the camp and raped, tortured, or sexually abused at other locations. Some of the Bosnian Muslims and Bosnian Croats who were detained at Trnopolje had fled to the camp because they believed they were even less likely to survive if they stayed in their own homes and villages. Trnopolje camp served as the staging point for most of the convoys that were used to forcibly transfer or deport the Bosnian Muslims, Bosnian Croats and other non-Serbs from Prijedor municipality.

## **GENERAL ALLEGATIONS**

13. Unless otherwise set forth below, all acts and omissions set forth in the counts of this Indictment took place between 1 April 1992 and 30 August 1992.

14. In each paragraph charging torture, the acts were committed by, or at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity, and for one or more of the following purposes: to obtain information or a confession from the victim or a third person; to punish the victim for an act the victim or a third person committed or was suspected of having committed; to intimidate or coerce the victim; and/or for any reason based upon discrimination of any kind.

15. In each paragraph charging Crimes Against Humanity, the alleged acts or omissions were part of a widespread or systematic attack directed against a civilian population, specifically the Bosnian Muslim and Bosnian Croat populations of the Prijedor municipality.

16. **Miroslav KVO^KA, Dragoljub PRCA] , Milojica KOS, Mla|o RADI] and Zoran @IGI]** are individually responsible for the crimes charged against them in this indictment, pursuant to Article 7(1) of the Statute of the Tribunal. As defined by Article 7(1), individual criminal responsibility includes planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below. The term "participation", as used in the Counts hereunder is intended to incorporate any and all forms of individual criminal responsibility as set forth in Article 7(1).

17. **Miroslav KVO^KA, Dragoljub PRCA] , Milojica KOS and Mla|o RADI]** are also, or alternatively, criminally responsible for acts of their subordinates with respect to the crimes charged in the indictment by virtue of their positions of superior authority in the camp, pursuant to Article 7(3) of the Statute of the Tribunal. As defined by Article 7(3), a person in a position of superior authority is responsible for the criminal acts of his subordinates if the superior knew or had reason to know that his subordinates were about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the subordinates.

18. Paragraphs 1 through 17 are re-alleged and incorporated into each of the charges described below:

#### **ACCUSED:**

19. **Miroslav KVO^KA:** Born on 1 January 1957 in the village of Mari}ka, Prijedor municipality, Bosnia and Herzegovina. He was a police officer in Prijedor municipality prior to the conflict and was the first commander of the Omarska camp. During June 1992, he was replaced by @eljko Mejaki} as the commander and thereafter held responsibility as a deputy commander of the camp. As a commander, he was in a position of authority superior to everyone in the camp. As a deputy commander, he was in a position of authority superior to everyone in the camp other than the camp commander.

20. **Dragoljub PRCA]:** Born on 18 July 1937 in the village of Omarska, Prijedor municipality, Bosnia and Herzegovina. He served as a policeman in Croatia and then was a Criminal Technician for the Public Security Service in Prijedor municipality for several years prior to the conflict. He was the second Deputy Commander of the Omarska camp. During June 1992, he replaced Miroslav KVO^KA as the deputy commander of the camp. As a deputy commander, he was in a position of authority superior to everyone in the camp other than the camp commander.

21. **Milojica KOS, a.k.a. Krle:** Born on 1 April 1963 in the village of Lamovita, Prijedor municipality, Bosnia and Herzegovina. He was a reserve policeman who had been called to full-time duty at the time of his involvement in the Omarska camp. He was appointed as one of three shift commanders of guards at the Omarska camp. As a shift commander, and when present in the camp, he was in a position of superior authority to all camp personnel, other than the commander or deputy commander, and most visitors.

22. **Mla|o RADI] , a.k.a. Krkan:** Born on 15 May 1952 in the village of Lamovita, Prijedor municipality, Bosnia and Herzegovina. He was a police officer in Prijedor municipality prior to the conflict and served as one of three shift commanders of guards at the Omarska camp. As a shift commander, and when present in the camp, he was in a position of superior authority to all camp personnel, other than the commander or deputy commander, and most visitors.

23. **Zoran @IGI] , a.k.a @iga:** Born on 20 September 1958 in the village of Balte, Prijedor municipality, Bosnia and Herzegovina. Prior to the conflict he was a taxi driver in the Prijedor

area. During the period of 26 May to 30 August 1992, he entered all three camps for the purpose of abusing, beating, torturing and/or killing prisoners.

**COUNTS 1 to 3  
(PERSECUTIONS; INHUMANE ACTS; and  
OUTRAGES UPON PERSONAL DIGNITY)**

24. Between 24 May 1992 and 30 August 1992, **Miroslav KVO^KA, Dragoljub PRCA], Milojica KOS, Mla|o RADI]** and **Zoran @IGI]** participated in persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, on political, racial or religious grounds.

25. The persecution included the following means:

a. the murder of Bosnian Muslims, Bosnian Croats and other non-Serbs in Prijedor municipality, including many of those detained in the Omarska, Keraterm and Trnopolje camps, amongst whom were the persons listed in the attached confidential schedules of additional particulars (hereinafter Schedules A-E) ;

b. the torture and beating of Bosnian Muslims, Bosnian Croats and other non-Serbs in Prijedor municipality, including many of the people detained in the Omarska, Keraterm and Trnopolje camps in addition to those listed in Schedules A-E;

c. the sexual assault and rape of Bosnian Muslims, Bosnian Croats and other non-Serbs in Prijedor municipality, including prisoners detained in the Omarska, Keraterm and Trnopolje camps, amongst whom were those persons listed in Schedules A-E;

d. the harassment, humiliation and psychological abuse of Bosnian Muslims, Bosnian Croats and other non-Serbs in Prijedor municipality, including all the people detained in the Omarska, Keraterm and Trnopolje camps, as represented by those persons set forth in Schedules A-E; and

e. the confinement of Bosnian Muslims, Bosnian Croats and other non-Serbs, including those persons set forth in Schedules A-E, in inhumane conditions in the Omarska, Keraterm and Trnopolje camps.

26. **Miroslav KVO^KA** instigated, committed or otherwise aided and abetted the persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, on political, racial or religious grounds, as well as the commission of the other crimes charged in this indictment, through his direct participation in crimes and through his approval, encouragement, acquiescence, and assistance in the development and continuation of the conditions in the camp and the on-going commission of crimes as described in paragraph 25 against the prisoners in the Omarska camp, including those set forth in Schedule A.

27. As the Camp Commander and then Deputy Commander, **Miroslav KVO^KA** had the authority to alter the conditions of confinement that existed in the camps. He had the authority to control the conduct of the guards in the camp and to prevent or control the conduct of any visitors to the camp. He had the authority to set the daily regime of the prisoners and to grant them more freedoms and rights within the camp, including access to potable water, reasonable living conditions and hygienic standards, and contact with their families or friends to receive clothing, hygienic supplies, food and medicines. In addition, as an active duty policeman, **Miroslav**

**KVO^KA** had an independent duty to uphold the laws in force on the territory of Bosnia and Herzegovina and to safeguard the lives and property of civilians.

28. **Dragoljub PRCA]** instigated, committed or otherwise aided and abetted the persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, on political, racial or religious grounds, as well as the commission of the other crimes charged in this indictment, through his direct participation in crimes and through his approval, encouragement, acquiescence, and assistance in the development and continuation of the conditions in the camp and the on-going commission of crimes as described in paragraph 25 against the prisoners in the Omarska camp, including those set forth in Schedule E.

29. As the Deputy Commander of the camp, **Dragoljub PRCA]** had the authority to alter the conditions of confinement that existed in the camps. He had the authority to control the conduct of the guards in the camp and to prevent or control the conduct of any visitors to the camp. He had the authority to set the daily regime of the prisoners and to grant them more freedoms and rights within the camp, including access to potable water, reasonable living conditions and hygienic standards, and contact with their families or friends to receive clothing, hygienic supplies, food and medicines. In addition, as a policeman on active duty, **Dragoljub PRCA]** had an independent duty to uphold the laws in force on the territory of Bosnia and Herzegovina and to safeguard the lives and property of civilians.

30. **Milojica KOS** and **Mla|o RADI]** instigated, committed or otherwise aided and abetted the persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, on political, racial or religious grounds, as well as the other crimes charged in this indictment, by their direct participation in the various crimes and by their instigation, approval, encouragement, acquiescence, and assistance in the development and continuation of the conditions in the camp and the on-going commission of crimes as described in paragraph 25, against the prisoners in the Omarska camp, including those listed in Schedules B and C.

31. As Shift Commanders in the Omarska camp, **Milojica KOS** and **Mla|o RADI]** had the authority to alter the conditions of confinement that existed in the camps during the times they were on duty. They had the authority to control the conduct of the guards assigned to their shifts and to prevent or control the conduct of any visitors to the camp. They had the authority to grant the prisoners more freedoms and rights within the camp, including access to potable water, reasonable living conditions and hygienic standards, and contact with their families or friends to receive clothing, hygienic supplies, food and medicines. In addition, as policemen, **Milojica KOS** and **Mla|o RADI]** had an independent duty to uphold the laws in force on the territory of Bosnia and Herzegovina and to safeguard the lives and property of civilians.

32. **Zoran @IGI]** instigated, committed or other wise aided and abetted the persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, including those set forth in Schedule D, on political, racial or religious grounds, as well as the other crimes charged in this indictment, by his direct and continuing participation in the various crimes and his instigation, approval, encouragement, acquiescence, and assistance in the development and continuation of the conditions in the camp and the on-going commission of crimes as described in paragraph 25.

33. In addition, between 24 May 1992 and 30 August 1992, **Miroslav KVO^KA**, **Dragoljub PRCA]**, **Milojica KOS** and **Mla|o RADI]** knew or had reason to know that persons subordinate to them in the Omarska camp were about to participate in the persecution of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, including those persons listed in Schedule A, on political, racial or religious grounds, or had done so, and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

By their involvement in the above acts and omissions, **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS, Mla|o RADI]** and **Zoran @IGI]** committed:

**Count 1:** persecutions on political, racial or religious grounds, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(h) and 7(1) of the Statute of the Tribunal.

**Count 2:** inhumane acts, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(i) and 7(1) of the Statute of the Tribunal;

**Count 3:** outrages upon personal dignity, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(c) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

In addition, **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS** and **Mla|o RADI]**, are criminally responsible for the crimes set forth in **Counts 1 to 3** pursuant to Article 7(3) of the Statute of the Tribunal.

#### **COUNTS 4 & 5 (MURDER)**

34. Between 24 May 1992 and 30 August 1992, **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS** and **Mla|o RADI]** participated in the murder of prisoners at the Omarska camp, including those listed in Schedules A-E. During that period, camp guards and other Serbs allowed into the Omarska camp, who were subject to the authority and control of **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS**, and **Mla|o RADI]**, murdered prisoners in the Omarska camp, subjected prisoners to torture and beatings that often resulted in death, and/or confined prisoners in inhumane conditions which resulted in their physical debilitation or death.

35. **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS**, and **Mla|o RADI]** instigated, committed or otherwise aided and abetted the murder of Bosnian Muslim and Bosnian Croat prisoners by their approval, encouragement, acquiescence, assistance and, in certain instances, direct participation in the acts described above and in Schedules A-E.

36. In addition, between 24 May 1992 and 30 August 1992, **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS**, and **Mla|o RADI]** knew or had reason to know that persons subordinate to them in the Omarska camp were about to participate in the murder of Bosnian Muslim, Bosnian Croat and non-Serb prisoners in the Omarska camp, or had done so, and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

By their participation in the acts or omissions described in the above paragraphs, the accused **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS** and **Mla|o RADI]** committed:

**Count 4:** murder, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(a) and 7(1) and 7(3) of the Statute of the Tribunal; and,

**Count 5:** murder, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.

## COUNTS 6 & 7 (MURDER)

37. Between 24 May 1992 and 30 August 1992, **Zoran @IGI**, alone or with others, entered the Omarska and Keraterm camps and directly participated in the murder of prisoners, including:

a. During late June 1992, at the Keraterm camp, **Zoran @IGI** and others, including Du{an Kne`evi}, severely beat a group of prisoners, including Emsud Bahonji} and a man named Sead Jusufagi}, known by the nickname "Car", over a period of several days. Bahonji} and "Car" were particularly subjected to violent beatings and various degrading and humiliating and/or painful acts, such as being forced to lie on broken glass, to repeatedly jump from a truck, and to commit fellatio with another prisoner. Bahonji} and "Car" died several days later as a result of the injuries received from the beatings.

b. During mid-July 1992, at the Keraterm camp, **Zoran @IGI**, along with camp guards, including Predrag Banovi}, and others, brutally beat many prisoners, including Jasmin Izeiri, "[pija" Me{i} and Drago Tokmad`i} in the area in front of the detention rooms. Jasmin Izeiri, "[pija" Me{i} and Drago Tokmad`i} died as a result of the injuries suffered during those beatings.

c. During June 1992, in the White House at the Omarska camp, **Zoran @IGI** and others, including Du{an Kne`evi}, brutally beat Be}ir Medunjanin to death over a two day period.

d. Around 20 July 1992, Bosnian Muslim, Bosnian Croat and other non-Serb men from an area of the Prijedor municipality known as "Brdo", that included the villages Hambarine, ^arakovo, Rakov-ani, Bi{}ani and Rizvanovi}i, were brought to the Keraterm camp and confined in Room 3. During the evening of 24 July 1992, Serb forces, including **Zoran @IGI**, fired at Room 3 with machine guns resulting in the killing of the majority of the prisoners therein.

By his participation in the above acts, **Zoran @IGI** committed:

**Count 6:** murder, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(a) and 7(1) of the Statute of the Tribunal; and,

**Count 7:** murder, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

## COUNTS 8 to 10 (TORTURE and CRUEL TREATMENT)

38. Between 24 May 1992 and 30 August 1992, **Miroslav KVO^KA, Dragoljub PRCA**, **Milojica KOS**, and **Mla|o RADI** participated in the torture and beating of Bosnian Muslim, Bosnian Croat and other non-Serb prisoners in the Omarska camp, including those prisoners listed in Schedules A-E. During that time period, prisoners at the Omarska camp were subjected to torture and/or severe beatings on a daily basis. For many prisoners, the beatings began upon their arrival at the camp and continued throughout their detention. Camp guards and others who came to the camp used all kinds of weapons and implements to inflict the torture and/or beatings. Many prisoners were tortured and/or beaten on repeated occasions.

39. **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS**, and **Mla|o RADI]** instigated, committed or otherwise aided and abetted the torture and beating of Bosnian Muslim and Bosnian Croat prisoners by their approval, encouragement, acquiescence, assistance and, in certain instances, direct participation in the acts described above and in Schedules A-E.

40. In addition, during the relevant time frame, **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS** and **Mla|o RADI]** knew or had reason to know that persons subordinate to them in the Omarska camp were about to participate in the torture and/or beating of Bosnian Muslim, Bosnian Croat and other non-Serb prisoners in the Omarska camp, or had done so, and failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

By their participation in the acts or omissions described above, **Miroslav KVO^KA, Dragoljub PRCA]**, **Milojica KOS** and **Mla|o RADI]** committed:

**Count 8:** torture, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(f) and 7(1) and 7(3) of the Statute of the Tribunal;

**Count 9:** torture, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1), and 7(3) of the Statute of the Tribunal.

**Count 10:** cruel treatment, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.

#### **COUNTS 11 to 13 (TORTURE and CRUEL TREATMENT)**

41. Between 24 May 1992 and 30 August 1992, **Zoran @IGI]** and others participated in the torture and/or beating of Bosnian Muslim, Bosnian Croat and other non-Serb prisoners in the Omarska, Keraterm and Trnopolje camps, including:

- a. During the first part of June 1992, at the Keraterm camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, brutally beat and cut Fajzo Mujkanovi};
- b. Between 1 and 7 June 1992, at the Keraterm camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, brutally beat Senahid ^irki};
- c. Between 5 and 15 June 1992, in the Omarska camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, severely beat Emir Beganovi}, Rezak Hukanovi}, Asef Kapetanovi} and [efik Terzi};
- d. Between 14 June 1992 and 5 August 1992 at the Keraterm camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, beat Fikret Ali};
- e. Between 20 and 25 June 1992, at the Keraterm camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, brutally beat a group of prisoners in Room 3, including Faudin Hrusti};
- f. Between 22 and 27 June 1992, at the Keraterm camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, brutally beat a group of prisoners confined in Room 2, including Red`ep Grabi}; and,



g. Between 27 May 1992 and 5 August 1992, at the Keraterm camp, **Zoran @IGI]** and others, including Du{an Kne`evi}, brutally beat Jasmin Ramadanovi}, known as "Sengin".

h. Between 26 May 1992 and 30 August 1992, at the Trnopolje camp, **Zoran @IGI]** beat Hasan Karaba{i}.

By his participation in the acts described above, **Zoran @IGI]** committed:

**Count 11:** torture, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(f) and 7(1) of the Statute of the Tribunal;

**Count 12:** torture, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

**Count 13:** cruel treatment, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

**COUNTS 14 to 17**  
**(RAPE; TORTURE; and**  
**OUTRAGES UPON PERSONAL DIGNITY)**

42. Between 24 May 1992 and 30 August 1992, at the Omarska camp, **Mla|o RADI]** raped and sexually assaulted female prisoners, including the rape of witness A on five occasions during June and July 1992, the rape of witness K on one occasion around the middle of July, the sexual assault of witness E between 22 June 1992 and 26 June 1992, the sexual assault of witness F between 1 June 1992 and 3 August 1992, the sexual assault of witness J on several occasions between 9 June 1992 and 3 August 1992, and the sexual assault of witness L between 22 June 1992 and 3 August 1992.

By the foregoing acts **Mla|o RADI]** committed:

**Count 14:** torture, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(f) and 7(1) of the Statute of the Tribunal;

**Count 15:** rape, a **CRIME AGAINST HUMANITY**, punishable under Articles 5(g) and 7(1) of the Statute of the Tribunal;

**Count 16:** torture, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(a) of the Geneva Conventions of 1949 punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

**Count 17:** outrages upon personal dignity, a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, as recognised by Article 3(1)(c) of the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

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Graham Blewitt  
Deputy Prosecutor

Dated this twenty-first day of August 2000  
The Hague, The Netherlands

**E. MAP OF EASTERN BOSNIA AND PHOTOGRAPHS**

1. Map of Bosnian Serb Autonomous Areas

2. Photograph of the Omarska camp, showing the Administrative Building and the White House

3. Aerial Photograph of the Omarska Camp, showing (from left to right):  
the Administrative Building, the White House and the Hangar

4. Photograph of detainees from the Trnololje camp (Exhibit P3/172D)