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Case No. 001/18-07-2008/ECCC/OCIJ

ANNEX A

AUTHORITY 43

**UNITED
NATIONS**



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
Original: English

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]**

JUDGEMENT

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Kapila Waidyaratne
Mr. Daniel Saxon

Counsel for the Accused:

Mr. Krstan Simi} for Mr. Kvo-ka
Mr. @arko Nikoli} for Mr. Kos
Mr. Toma Fila for Mr. Radi}
Mr. Slobodan Stojanovi} for Mr. @igi}
Mr. Jovan Simi} for Mr. Prca}

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."³¹⁰

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.³¹¹ The *Furund`ija* Trial Chamber added intent to humiliate to the list of prohibited purposes.³¹²

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.³¹³

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.³¹⁴ The Tribunals have also found instances when torture was inflicted as a means of discriminating on the basis of gender.³¹⁵ 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".³¹⁶

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

³⁰⁹ *Furund`ija* Trial Chamber Judgement, para. 267.

³¹⁰ *Aksoy v. Turkey*, Judgement of 18 Dec. 1996, ECHR.

³¹¹ *Akayesu* Trial Chamber Judgement, para. 594.

³¹² *Furund`ija* Trial Chamber Judgement, para. 162.

³¹³ *Celebi}i* Trial Chamber Judgement, para. 470.

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

³¹⁵ *^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.³¹⁷

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

³¹⁶ ^elebi}i Trial Chamber Judgement, para. 941.

³¹⁷ ^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."³¹⁸ 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.³¹⁹ The *Blaski}i* Trial Chamber, for example, held that the use of human shields constitutes cruel treatment under Article 3 of the Statute.³²⁰

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}i* 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".³²¹

167. The *Kunara}i* 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)

³¹⁸ 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.

³¹⁹ *^elebi}i* Trial Chamber Judgement, para. 510; see also *Kordi}i* 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.

³²⁰ *Blaski}i* Trial Chamber Judgement, para. 700.

³²¹ *Aleksovski* Trial Chamber Judgement, para. 54; *Kunara}i* Trial Chamber Judgement, para. 502.

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."³³³ 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.³³⁴

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."³³⁵ The *Kunara}*

³³³ *Akayesu* Trial Chamber Judgement, para. 688.

³³⁴ *Furund`ija* Trial Chamber Judgement, para. 185.

³³⁵ *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"³³⁶ and the principal focus should be whether there were serious violations of sexual autonomy.³³⁷

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.³³⁸

178. In considering allegations of rape, the *^elebi*}i Trial Chamber stressed that coercive conditions are inherent in situations of armed conflict.³³⁹ Further, the *Furund`ija* Trial Chamber emphasized that "any form of captivity vitiates consent."³⁴⁰ 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.³⁴¹

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."³⁴² Thus, sexual violence is broader than rape and includes such crimes as sexual slavery or molestation.³⁴³ Moreover, the *Akayesu* Trial Chamber emphasized that sexual violence need not necessarily involve physical contact and cited forced public nudity as an example.³⁴⁴

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).

³³⁶ *Kunara*} Trial Chamber Judgement, para. 460.

³³⁷ *Kunara*} Trial Chamber Judgement, para. 440.

³³⁸ *Kunara*} Trial Chamber Judgement, para. 442.

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

³⁴⁰ *Furund`ija* Trial Chamber Judgement, para. 271.

³⁴¹ *Kunara*} Trial Chamber Judgement, para. 460.

³⁴² *Akayesu* Trial Chamber Judgement, para. 688.

³⁴³ 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).

³⁴⁴ *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.³⁴⁵ The *Kupre{ki}* 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."³⁴⁶

185. The Tribunal's caselaw has specified that persecutory acts include those crimes enumerated in other sub-clauses of Article 5,³⁴⁷ crimes found elsewhere in the Statute,³⁴⁸ 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 5.³⁴⁹ 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'".³⁵⁰

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,³⁵¹ unlawful detention of civilians³⁵² or infringement upon individual freedom,³⁵³ murder,³⁵⁴ deportation or forcible transfer,³⁵⁵ "seizure, collection, segregation and forced transfer of civilians to camps",³⁵⁶

³⁴⁵ *Tadić* Trial Chamber Judgement, para. 715.

³⁴⁶ *Kupre{ki}* Trial Chamber Judgement, para. 621.

³⁴⁷ *Kupre{ki}* Trial Chamber Judgement, para. 605.

³⁴⁸ *Kordić* Trial Chamber Judgement, para. 193.

³⁴⁹ *Kupre{ki}* Trial Chamber Judgement, para. 619; *Kordić* Trial Chamber Judgement, para. 195.

³⁵⁰ *Kupre{ki}* Trial Chamber Judgement, para. 622.

³⁵¹ *Kupre{ki}* Trial Chamber Judgement, para. 629.

³⁵² *Bla{ki}* Trial Chamber Judgement, para. 234.

³⁵³ *Bla{ki}* Trial Chamber Judgement, para. 220.

³⁵⁴ *Kupre{ki}* Trial Chamber Judgement, para. 629.

³⁵⁵ *Kupre{ki}* Trial Chamber Judgement, para. 631.

comprehensive destruction of homes and property,³⁵⁷ the destruction of towns, villages and other public or private property and the plunder of property,³⁵⁸ attacks upon cities, towns and villages,³⁵⁹ trench-digging and the use of hostages and human shields,³⁶⁰ the destruction and damage of religious or educational institutions,³⁶¹ and sexual violence.³⁶² 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.³⁶³ 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."³⁶⁴ 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.

³⁵⁶ *Tadi* Trial Chamber Judgement, para. 717.

³⁵⁷ *Kupre* Trial Chamber Judgement, para. 631.

³⁵⁸ *Bla* Trial Chamber Judgement, para. 234, *Kordi* Trial Chamber Judgement, para. 205.

³⁵⁹ *Kordi* Trial Chamber Judgement, para. 203.

³⁶⁰ *Kordi* Trial Chamber Judgement, para. 204.

³⁶¹ *Kordi* Trial Chamber Judgement, para. 206.

³⁶² *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.

³⁶³ 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*].

³⁶⁴ *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,³⁶⁵ 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

³⁶⁵ 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.³⁶⁶ 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.³⁶⁷ 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."³⁶⁸ The Amended Indictment also asserts generally that the attack was directed against "Bosnian Muslims, Bosnian Croats and some other non-Serbs"³⁶⁹ or "the Bosnian Muslim and the Bosnian Croat populations of the Prijedor municipality."³⁷⁰ Following the finding of the *Tadić* Trial Chamber Judgement on this point,³⁷¹ a finding cited in both the *Blaskić*³⁷² and *Jelisić*³⁷³ Trial Chamber Judgements and in

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

³⁶⁷ 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.

³⁶⁸ Amended Indictment, paras 24-33.

³⁶⁹ Amended Indictment, paras 5, 6.

³⁷⁰ Amended Indictment, para. 15.

³⁷¹ *Tadić* Trial Chamber Judgement, para. 714.

³⁷² *Blaskić* Trial Chamber Judgement, para. 236.

³⁷³ *Jelisić* Trial Chamber Judgement, para. 71.

accordance with the language adopted in the *Todorovi* Sentencing Judgement,³⁷⁴ 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

³⁷⁴ 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,³⁷⁵ 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).³⁷⁶ The *Kupreški* Trial Chamber emphasized that the *mens rea* required for persecution "is higher than for ordinary crimes against humanity, although lower than genocide."³⁷⁷ *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."³⁷⁸

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."³⁷⁹ 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".³⁸⁰ 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 1993.³⁸¹ The *Kordi* Judgement inferred the discriminatory intent of the accused from their active participation in the common criminal

³⁷⁵ *Kordi* Trial Chamber Judgement, para. 212 (emphasis in original).

³⁷⁶ See *Kordi* Trial Chamber Judgement, paras 211-212.

³⁷⁷ *Kupreški* Trial Chamber Judgement, para. 636.

³⁷⁸ *Kupreški* Trial Chamber Judgement, para. 627.

³⁷⁹ *Kordi* Trial Chamber Judgement, para. 220.

³⁸⁰ *Jelisi* Trial Chamber Judgement, para. 73.

design.³⁸² 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.³⁸³ 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.³⁸⁴

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.³⁸⁵ 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

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

³⁸² *Kordi* Trial Chamber Judgement, paras 829 and 831.

³⁸³ 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.*

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

³⁸⁵ 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.³⁸⁶ 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.³⁸⁷

(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.³⁸⁸ Relying on the definition given in the *Bla{ki}* Judgement,³⁸⁹ 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.³⁹⁰

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).³⁹¹ The Trial Chamber notes that the African Charter on Human and Peoples' Rights (Article 5)³⁹² similarly prohibits inhuman treatment.

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

³⁸⁶ 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.

³⁸⁷ 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."

³⁸⁸ *Tadi}* Trial Chamber Judgement, para. 729, *Kupre{ki}* Trial Chamber Judgement, para. 566.

³⁸⁹ *Bla{ki}* Trial Chamber Judgement, para. 243.

³⁹⁰ *Kordi}* Trial Chamber Judgement, paras 271, 272.

³⁹¹ *Kupre{ki}* Trial Chamber Judgement, para. 566.

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

³⁹³ *Tadi}* Trial Chamber Judgement, para. 730.

³⁹⁴ *Bla{ki}* Trial Chamber Judgement, para. 239.

³⁹⁵ *Kupre{ki}* Trial Chamber Judgement, para. 566, *Krsti}* Trial Chamber Judgement, para. 523.

³⁹⁶ *Kupre{ki}* Trial Chamber Judgement, para. 566.

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'.⁴²²

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.⁴²³

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."⁴²⁴

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,⁴²⁵ 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.⁴²⁶

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

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

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

⁴²⁵ *Kordi}* Trial Chamber Judgement, para. 376.

⁴²⁶ *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.⁴²⁷ 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).⁴²⁸ It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement.⁴²⁹ 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.⁴³⁰

(b) Aiding or Abetting

253. Aiding and abetting are forms of accessory or accomplice liability.⁴³¹ 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.⁴³² The *mens rea* required is the knowledge that these acts assist or facilitate the commission of the offence.⁴³³

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."⁴³⁴

255. There is no requirement that the aider or abettor have a causal effect on the act of the principal.⁴³⁵ 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.⁴³⁶ 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.⁴³⁷ In the *Aleksovski* case,

⁴²⁷ *Akayesu* Trial Chamber Judgement, para. 482; *Blaski*} Trial Chamber Judgement, para. 280.

⁴²⁸ *Kordi*} Trial Chamber Judgement, para. 387.

⁴²⁹ *Kordi*} Trial Chamber Judgement, para. 387.

⁴³⁰ *Akayesu* Trial Chamber Judgement, para. 482.

⁴³¹ *Kunara*} Trial Chamber Judgement, para. 393.

⁴³² *Furundzija* Trial Chamber Judgement, para. 249; *Kunara*} Trial Chamber Judgement, para. 391.

⁴³³ *Furund'ija* Trial Chamber Judgement, para. 249. See also *Tadi*} Appeals Chamber Judgement, para. 229.

⁴³⁴ *Akayesu* Trial Chamber Judgement, para. 484.

⁴³⁵ *Furund'ija* Trial Chamber Judgement, para. 233; *Aleksovski* Trial Chamber Judgement, para. 61.

⁴³⁶ *Tadi*} Trial Chamber Judgement, para. 674; *^elebi*}i Trial Chamber Judgement, para. 326; *Aleksovski* Trial Chamber Judgement, para. 61.

⁴³⁷ *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.⁴³⁸

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.⁴³⁹ To aid or abet by omission, the failure to act must have had a significant effect on the commission of the crime.⁴⁴⁰

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.⁴⁴¹ 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.⁴⁴²

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.⁴⁴³ 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.⁴⁴⁴

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.⁴⁴⁵ This holding is particularly notable because the defendant was a low level

⁴³⁸ *Aleksovski* Appeals Chamber Judgement, para. 162.

⁴³⁹ *Aleksovski* Trial Chamber Judgement, para. 62.

⁴⁴⁰ *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.

⁴⁴¹ *Kunara* Trial Chamber Judgement, para. 393; see also *Tadić* Trial Chamber Judgement, para. 689; *Aleksovski* Trial Chamber Judgement, para. 64.

⁴⁴² *Aleksovski* Trial Chamber Judgement, para. 65; *Akayesu* Trial Chamber Judgement, para. 693.

⁴⁴³ *Aleksovski* Trial Chamber Judgement, para. 87.

⁴⁴⁴ *Aleksovski* Trial Chamber Judgement, para. 88.

⁴⁴⁵ *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.⁴⁴⁶

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.⁴⁴⁷

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."⁴⁴⁸ 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."⁴⁴⁹

264. The "common purpose doctrine", also referred to as "joint criminal enterprise" theory, will be examined next.

⁴⁴⁶ *Akayesu* Trial Chamber Judgement, para. 693.

⁴⁴⁷ *Furundzija* Trial Chamber Judgement, para. 274.

⁴⁴⁸ *Kordi}* Trial Chamber Judgement, note 536.

⁴⁴⁹ *Kordi}* Trial Chamber Judgement, para. 802.

absence of information -- that would suggest the need to inquire further.⁵²⁴ 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."⁵²⁵ 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.⁵²⁶ 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.

⁵²⁴ *^elebi}i* Appeals Chamber Judgement, para. 238; *^elebi}i* Trial Chamber Judgement, para. 393.

⁵²⁵ *^elebi}i* Appeals Chamber Judgement, para. 238.

⁵²⁶ Prosecution Pre-Trial Brief, paras 109 and 112. The Trnopolje camp is not mentioned in these paragraphs.

administration building, near the cafeteria), given some food and protected against mistreatment so that "nothing stupid happened to them".⁶⁵³

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,⁶⁵⁴ and to report abuses to @eljko Meaki}.⁶⁵⁵

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.⁶⁵⁶

(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,⁶⁵⁷ 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

⁶⁵³ Miroslav Kvo-ka, T. 8165-8166.

⁶⁵⁴ Miroslav Kvo-ka, T. 8381-8382.

⁶⁵⁵ Miroslav Kvo-ka, T. 8378-8379.

⁶⁵⁶ Miroslav Kvo-ka, T. 975.

⁶⁵⁷ Branko Rosi}, T. 7488-7491; Milenko Rosi}, T. 7509-7517; Ljuban Andi}, T. 7540-7548.

trusted men to use the phone and to inform him about the events in the camp, so consequently three shift leaders were appointed.⁶⁰¹ Kos (Krlje), Gruban (Ckalija), and Radi} (Krkan).⁶⁰² 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.⁶⁰³ Later, however, Kvo-ka contradicted himself and said that there were no shift leaders in the camp.⁶⁰⁴

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.⁶⁰⁵

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.⁶⁰⁶

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,⁶⁰⁷ 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"⁶⁰⁸ and his acknowledgement that the general impression in the camp might well be that he was the commander when @eljko Meaki} was absent.⁶⁰⁹

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:

⁶⁰⁰ Exhibit P 3/203, p 59.

⁶⁰¹ Miroslav Kvo-ka, T. 8156.

⁶⁰² Exhibit P 3/203, p 59.

⁶⁰³ Miroslav Kvo-ka, T. 969-970.

⁶⁰⁴ Miroslav Kvo-ka, T. 8155.

⁶⁰⁵ Miroslav Kvo-ka, T. 8408-8409.

⁶⁰⁶ Exhibit D43/1 (Chart 3).

⁶⁰⁷ Miroslav Kvo-ka, T. 8387.

⁶⁰⁸ 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.⁶¹⁰

(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.⁶¹¹

(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.⁶¹²

(d) Sifeta Susi}, a former colleague, testified that Kvo-ka had been the deputy commander in the Omarska police station⁶¹³ and that he was the deputy of @eljko Meaki} in the Omarska camp.⁶¹⁴

(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.⁶¹⁵

(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.⁶¹⁶

⁶⁰⁹ Miroslav Kvo-ka, T. 8381.

⁶¹⁰ Mirsad Ali{i}, T. 2538.

⁶¹¹ Witness A, T. 5469.

⁶¹² Witness AJ, T. 1647.

⁶¹³ Sifeta Su{i}, T. 2978.

⁶¹⁴ Sifeta Su{i}, T. 3007.

⁶¹⁵ Azedin Okop-i}, T. 1758-1759.

⁶¹⁶ Witness AI, T. 2106.

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.¹¹⁸⁴

3. Milojica Kos

¹¹⁸⁴ Rule 101 (C).

- 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

Judge Fouad Riad

Judge Almiro Rodrigues

Judge Patricia Wald

Presiding

[Seal of the Tribunal]

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**