Case No.: IT-95-8-T

IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge Richard May
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Judgement of:
20 September 2001

PROSECUTOR

v.

DUSKO SIKIRICA
DAMIR DOSEN
DRAGAN KOLUNDZIJA

CORRIGENDUM TO JUDGEMENT ON DEFENCE MOTIONS TO ACQUIT

The Office of the Prosecutor:

Mr. Dirk Ryneveld
Ms. Julia Baly
Mr. Daryl Mundis

Counsel for the Accused:

Mr. Veselin Londrovic and Mr. Michael Greaves, for Dusko Sikirica
Mr. Vladimir Petrovic and Mr. Goran Rodic, for Damir Dosen
Mr. Ivan Lawrence and Mr. Jovan Ostojic, for Dragan Kolundzija

THIS TRIAL CHAMBER 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 International Tribunal"),

Proprio motu,

CONSIDERING its "Judgement on Defence Motions to Acquit" issued on 3 September 2001,

NOTING that there is a typographical error in the said Judgement, which is suitable for rectification,

FOR THESE REASONS,

ORDERS that, in the said Judgement, at page 39, (Registry page no. 9941), footnote 190,

> For *Ibid*., para 15, and annexed footnote 38. The Prosecution relies on the *Tadic* Appeals Judgement, which held that liability under the Statute includes:
>
> Read *Ibid*., para 15, and annexed footnote 38. The Prosecution relies on the *Tadic* Appeals Judgement, which held that liability under the Statute includes:
> [T]hose modes of participating in the commission of crimes which occur where several persons having a *common purpose* embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. *Whoever* contributes to the commission of crimes by the group of persons or some members of the group, in execution of a *common criminal purpose*, may be held to be criminally liable. (*Tadic* Appeals Judgement, para. 190 (emphasis added)).

Done in English and French, the English text being authoritative.

_____
Patrick Robinson
Presiding

Dated this twentieth day of September 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

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-95-8-T

Date: 3 September 2001

Original: English

IN THE TRIAL CHAMBER

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Judge Mohamed Fassi Fihri

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Judgement of: **3 September 2001**

PROSECUTOR

v.

DU[KO SIKIRICA
DAMIR DO[EN
DRAGAN KOLUND@IJA

JUDGEMENT ON DEFENCE MOTIONS TO ACQUIT

The Office of the Prosecutor:

Mr. Dirk Ryneveld
Ms. Julia Baly
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Counsel for the Accused:

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Mr. Vladimir Petrovi} and Mr. Goran Rodi}, for Damir Do{en
Mr. Ivan Lawrence and Mr. Jovan Ostoji}, for Dragan Kolundžija

I. INTRODUCTION

1. This Trial Chamber 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 ("International Tribunal") is seized of motions for acquittal filed, pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), by the three accused in the present case: for Du{ko Sikirica and Damir Do{en, on 8 June 2001 and, for Dragan Kolund`ija, on 15 June ("Motions").[1] The Office of the Prosecutor ("Prosecution") filed its responses on 15 June and 20 June, respectively.[2] The parties were heard by the Trial Chamber on 21 June 2001.

2. At the close of the hearing on 21 June 2001, the Trial Chamber rendered an oral decision in respect of the Motions, and indicated that a written decision would follow. The following constitutes the Judgement for acquittal in accordance with Rule 98 *bis*. To the extent that this Judgement is based on testimony given in closed session, that testimony is released to the extent that it is recited or relied upon herein.

[1] Submission of Du{ko Sikirica under Rule 98 *bis* (confidential), 8 June 2001 ("Sikirica Motion"); Motion for Judgement of Acquittal Filed by the Accused Damir Do{en pursuant to Rule 98 *bis*, 8 June 2001 ("Do{en Motion"); Motion for Judgement of Acquittal under Rule 98 *bis* on Behalf of the Defendant Dragan Kolund`ija, 15 June 2001 ("Kolund`ija Motion").

[2] Prosecution's Response to the Submission of Du{ko Sikirica under Rule 98 *bis*, 15 June 2001 ("Prosecution Response to the Sikirica Motion"); Prosecution's Response to the Submission of Damir Do{en under Rule 98 *bis*, 15 June 2001 ("Prosecution Response to the Do{en Motion"); Prosecution's Response to the Submission of Dragan Kolund`ija under Rule 98 *bis*, 20 June 2001 ("Prosecution Response to the Kolund`ija Motion").

II. RULE 98 *BIS*

A. Arguments of the Parties Regarding the Standard for Review under Rule 98 *bis*

3. The accused Damir Do{en relies for his submission on the standard for review under Rule 98 *bis* on a previous decision in the *Kunarac* case in respect of a motion for acquittal.[3] The decision states thus:

> The test which the Trial Chamber has applied in the present case is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* convict - that is to say, evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. If the evidence does not reach that standard, then the evidence is, to use the words of Rule 98 *bis* (B), "insufficient to sustain a conviction".[4]

He notes that the conclusion of that decision has been reaffirmed by the Judgement in the appeal of *Prosecutor v. Delali} et al.*[5] He submits that similar standards were adopted in other cases before the International Tribunal, including the *Kvo~ka* and *Kordi}* cases.[6] He further submits that

> pursuant to Rule 98*bis,* the Trial Chamber may enter a judgement of acquittal both with regard to an entire count of the indictment and with regard to factual incident or event cited in the indictment in support of the criminal offence.[7]

4. The Prosecution argues that the standard for review under Rule 98 *bis* is "purely a legal determination".[8] It submits that

> the Trial Chamber needs only establish whether as a matter of law there is some evidence, which if accepted by the Trial Chamber as to each count charged in the Indictment, upon which a reasonable Trial Chamber could convict the accused.[9]

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[3] *Prosecutor v. Dragoljub Kunarac et al*., Case No. IT-96-23-T and IT-96-23/1, Decision on Motion for Acquittal, T. Ch. II, 3 July 2000 ("*Kunarac* Decision on Motion for Acquittal"), paras. 2-10, referred to in the Do{en Motion, para.2.
[4] *Ibid*., para. 3.
[5] *Prosecutor v. Zejnil Delali} et al*., Case No. IT-96-21-A, Judgement, 20 Feb. 2001, para. 434, referred to in the Do{en Motion, para. 3.
[6] *Prosecutor v. Miroslav Kvo~ka et al*., Case No. IT-98-30/1-T, Decision on Defence Motions for Acquittal, 15 Dec. 2000, para. 12 ("Kvo~ka Decision on Motions for Acquittal"); *Prosecutor v. Dario Kordi} and Mario ^erkez*, Case No. IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 Apr. 2000 ("*Kordi}* Decision on Motion for Acquittal"), para. 26, both referred to in the Do{en Motion, para. 4.
[7] Do{en Motion, para. 5, relying on the *Kvo~ka* Decision on Motions for Acquittal, para. 9.
[8] Prosecution Response to the Do{en Motion, para.1.
[9] *Ibid*.

It refers for support to a previous decision in the *Kordi}* case,[10] where the Trial Chamber stated that

> The Chamber concludes that the true test to be applied on a motion for acquittal under Rule 98 *bis* is not whether there is evidence which satisfies the Trial Chamber beyond a reasonable doubt of the guilt of the accused, but rather, whether there is evidence on which a reasonable Trial Chamber could convict.

It argues that the test ascertained in that decision is "consistent" with the *Kunarac* Decision on Motion for Acquittal and that this test was again put forward by the Prosecution in the appeal in the *Jelisi}* case.[11] It submits the following four principles for the application of Rule 98 *bis*:

> (a) The test to be applied for the purposes of a decision under Rule 98*bis* is clearly not one of guilt beyond a reasonable doubt, but one of legal sufficiency of the evidence (sufficient evidence upon which a reasonable Trial Chamber could convict).
>
> (b) For the purpose of a decision under Rule 98*bis*, questions of weight or reliability of the evidence are generally not the subject of determination at this stage of the proceedings.
>
> (c) Rule 98*bis* is not a proper procedural setting to discuss fully the law applicable to the facts underpinning the charges brought by the Prosecutor.
>
> (d) The evidence presented by the Prosecution must be taken at its highest for the purposes of the determination under Rule 98*bis*, which means that all reasonable inferences open to the Trial Chamber should be drawn in favour of the Prosecution, despite alternative hypotheses put forward by the Defence.[12]

5. The accused Dragan Kolund`ija relies on the *Kunarac* Decision on Motion for Acquittal for the standard to deal with general cases under Rule 98 *bis* as well as identification cases.[13] In respect of general cases, he refers to the test used in the *Kunarac* Decision on Motion for Acquittal and argues that the Trial Chamber must be satisfied beyond reasonable doubt before it rejects a motion for acquittal under Rule 98 *bis.*[14] As to identification cases, he relies again on that case and the test of proof beyond reasonable doubt.[15]

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[10] *Kordi}* Decision on Motion for Acquittal, para. 26.
[11] *Kunarac* Decision on Motion for Acquittal, para. 3; *Prosecutor v. Goran Jelisi}*, Case No. IT-95-10-A, Prosecution's Appeal Brief, 14 July 2000, ("*Jelisi}* Appeal Brief"), paras. 3.1-3.58.
[12] Prosecution Response to the Do{en Motion, para. 2.
[13] *Kunarac* Decision on Motion for Acquittal, para. 3; *Prosecutor v. Du{ko Sikirica et al*., Hearing, 21 June 2001 ("Hearing"), Transcript page ("T."). 4352-53, 4354.
[14] Kolund`ija Motion, para.2; Hearing T. 4356-57.
[15] *Kunarac* Decision on Motion for Acquittal, para. 8.

6. In response, the Prosecution repeats its arguments in the Prosecution Response to the Do{en Motion.[16]

B. Discussion on the Standard for Review under Rule 98*bis*

7. The issue to be determined by the Trial Chamber is the standard for the application of Rule 98 *bis* of the Rules. Rule 98 *bis* provides:

> (A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A) (ii).
>
> (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

The question lies with the interpretation of the clause "the evidence is insufficient to sustain a conviction on that or those charges".

8. The *Kordi}* Trial Chamber carried out an extensive analysis of the applicable standard under Rule 98 *bis* as to whether the evidence was sufficient to sustain a conviction. It held that:

> the true test to be applied on a motion for acquittal under Rule 98 *bis* is not whether there is evidence which satisfies the Trial Chamber beyond reasonable doubt of the guilt of the accused, but rather, whether there is evidence on which a reasonable Trial Chamber could convict.
>
> […]
>
> The test that the Chamber has enunciated […] proceeds on the basis that generally the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98 *bis*, leaving those matters to the end of the case.[17]

9. This Trial Chamber adopts the test enunciated by the *Kordi}* Trial Chamber, subject to the qualification that, although the latter does not deal explicitly with a situation in which a motion filed under Rule 98 *bis* succeeds because an essential ingredient for a crime was not made out in the Prosecution case, the test also covers that situation. For, if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to

[16] Prosecution Response to the Kolund`ija Motion, paras. 1-2.
[17] *Kordi}* Decision on Motion for Acquittal, paras. 26 and 28.

constitute the crime is missing, that evidence would also be insufficient to sustain a conviction, and the motion filed under Rule 98 *bis* would succeed.

10. Having heard the parties at the oral hearing of 21 June 2001 in respect of this issue, the Trial Chamber reached and announced the following conclusion, which the Chamber now reiterates:

> …the Chamber reaffirms the test set out in *Kordi} and ^erkez* for the application of Rule 98 *bis*, that is, whether there is evidence on the basis of which a reasonable [t]ribunal could convict. It does not understand the reference in *Kunarac* to reasonable doubt to imply that the Trial Chamber must be satisfied beyond a reasonable doubt of the guilt of the accused in a particular case before it can refuse a submission under Rule 98 *bis*. Rather, the reference in *Kunarac* is a gloss on the meaning of "could convict" and there is no contradiction between the two decisions.[18]

[18] Hearing, T. 4415. Shortly after the Chamber's oral decision in this case, the Appeals Chamber conclusively resolved the question of the appropriate standard to be applied on a Rule 98 *bis* motion. It held that the test was correctly stated in the *Kunarac* case as follows: "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* convict – that is to say, evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question." *Prosecutor v. Jelisi}*, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisi}* Appeal Judgement"), para. 36. In the Chamber's opinion, that test does not differ in substance from the test applied in this case.

III. DU[KO SIKIRICA: COUNTS 1 AND 2

11. The accused Du{ko Sikirica is charged in Count 1 of the Second Amended Indictment ("Indictment") with genocide, and in Count 2 with complicity in genocide, punishable under Articles 4(3)(a) and (b), 7(1) and 7(3) of the Statute of the International Tribunal ("the Statute"). Article 4(2) of the Statute provides:

> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.

A. Arguments of the Parties

1. The Defence

12. In its Pre-trial Brief, the Sikirica Defence, in relation to the charge of genocide, submits that since, in its appeal against the *Jelisi}* Trial Judgement, the Prosecution has submitted that the case should be re-tried, this Trial Chamber should ignore any proposition of law which derives solely from that case.[19] Furthermore, because of the acquittal of the accused on the crime of genocide in the *Jelisi}* trial, the Defence did not have a complete opportunity to present its legal arguments, and the matters of law set out in the *Jelisi}* Trial Judgement have never been the subject of representation by the Defence and should therefore not be taken into account.[20]

[19] Pre-trial Brief of the Defendant Du{ko Sikirica, 3 Nov. 2000, ("Sikirica Pre-trial Brief"), p. 48, referring to *Prosecutor v. Goran Jelisi}*, Case No. IT-95-10-T, Judgement, 14 Dec. 1999 ("*Jelisi}* Trial Judgement").
[20] Sikirica Pre-trial Brief, p. 48.

13. Dealing with the arguments set forth in paragraphs 141-152 of the Sikirica Pre-trial Brief (i.e., the quality or degree of intent required, the scope of the "national, ethnical, racial or religious group" and "to destroy, in whole or in part"), the Sikirica Defence refers to the Oxford English Dictionary which defines "political" as meaning "of or concerning the State or its government, or public affairs generally". Based on this meaning, the Defence submits that political, administrative, religious, and business leaders, as well as academic and intellectuals, all participate in "public affairs generally".[21] The Defence notes that political groups were excluded from the 1948 Genocide Convention[22] and that it is not the law that the killing of such people can be an offence of genocide under international law, including the 1948 Genocide Convention or the Statute.[23] The Defence submits that the United Nations expert study on genocide is merely a United Nations report and, as such, does not constitute the law. As for the Commission of Experts Report, it does not constitute the law either, since it is framed in terms of aspiration.[24] Thus, the Sikirica Defence concludes that although the killing of the leadership of a group may be extermination or persecution, it does not constitute genocide.[25]

14. Finally, the Sikirica Defence submits that the requirement to prove a genocidal plan is the correct law as stated in paragraph 66 of the *Jelisi}* Trial Judgement.[26]

(a) *Actus reus*

15. The Sikirica Defence agrees that there is evidence in relation to the Room 3 massacre, to the ill-treatment of detainees in the summer of 1992, to the poor conditions in Keraterm in 1992, and to the fact that the vast majority of detainees were Bosnian Muslims. The Defence also submits that there is some evidence that women were raped there.[27] In relation to the direct participation of Du{ko Sikirica, the Defence submits that there is

[21] *Ibid.*, p. 55.
[22] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948, UNTS Vol. 78 ("1948 Genocide Convention"), p. 277.
[23] Sikirica Pre-trial Brief, pp. 55-56; Hearing, T. 4408.
[24] Sikirica Pre-trial Brief, p. 56; referring to the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/1994/674) ("Commission of Experts Report").
[25] Sikirica Pre-trial Brief, p. 56.
[26] *Ibid*.
[27] Sikirica Motion, p. 9198 (This document is not paginated; the page reference is to the International Tribunal Registry filing page number).

evidence that he killed detainees, and some evidence that he assaulted perhaps one or two detainees.[28]

16. However, the Sikirica Defence submits that there is no evidence that the accused: (1) instigated the killing of any other person, and otherwise aided and abetted the killing of any person; (2) instigated or otherwise aided and abetted the causing of serious bodily and mental harm to any person; (3) instigated, committed, or otherwise aided and abetted the deliberate infliction on the Bosnian Muslims and Bosnian Croats of conditions of life calculated to bring about the destruction of a part of the Bosnian Muslim or Bosnian Croat populations;[29] and (4) intended, by any act of which there is evidence in the case, to destroy either the Bosnian Muslims or Bosnian Croats, in part, as a national, ethnic or religious group.[30]

(b) *Mens rea*

17. The Sikirica Defence submits that there is no evidence in the case that Du{ko Sikirica had the requisite *mens rea* for either the offence of genocide or the offence of complicity to commit genocide.[31] The Sikirica Defence submits that there is virtually no evidence indicating what was in the Defendant's mind in 1992.[32] The Defence submits that the few passages of evidence where direct speech is attributed to Du{ko Sikirica pertain to the fate of those who would try to escape.[33] Further, the Defence submits that there is no evidence that Du{ko Sikirica was aware of the events outside Keraterm, in particular in Omarska or Trnopolje, except for the allegation that the accused read out a list of persons to be transferred to Omarska at the closing of Keraterm in August 1992.[34] The Defence submits that although evidence shows that those persons were taken to Omarska and probably killed, there is no evidence that Du{ko Sikirica knew that they were taken to Omarska or what their subsequent fate would be.[35] The Defence submits that there is evidence that Du{ko Sikirica had anyway ceased to be the commander of Keraterm by that

[28] *Ibid*., p. 9197.
[29] *Ibid*.
[30] *Ibid*., p. 9196.
[31] *Ibid*., p. 9198.
[32] *Ibid*., p. 9196.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid*.

time and no evidence shows in which capacity he was then acting.[36] More generally, there is no evidence that the Defendant was aware of the existence of detention facilities in Omarska or Trnopolje and, even if he knew that, there is no evidence that he knew what was occurring there.[37]

(c) Knowledge of a genocidal plan

18. The Sikirica Defence submits that if there was a plan to commit genocide, there is no evidence that the defendant knew of the existence of such a plan.[38] Thus, save for the evidence placing Du{ko Sikirica at a checkpoint in May or June 1992 at Hambarine, there is no evidence placing the accused at any other place which would have enabled him to acquire any kind of knowledge that what was going on was an exercise in genocide.[39] According to the Defence, although there is some basis for inferential evidence of genocide being planned or carried out, this evidence is also equally probative of there being a campaign of persecution.[40]

(d) The evidence militates against the occurrence of genocide

19. The Sikirica Defence submits that there is no evidence of genocide being carried out at all.[41] Firstly, there is evidence of a distinct lack of organisation concerning detention and reception at various locations: detainees would be taken to Omarska or Trnopolje and find out, upon arrival, that there was no room for them.[42] Secondly, there is evidence of killings of detainees by persons from outside the camp, in circumstances that had nothing to do with genocide, that is, for personal gain (such as Zoran @igi} or Du}a Kne`evi}) or personal motives such as revenge for another person's death.[43]

20. The Sikirica Defence submits that taking away the detainees' identity cards upon their arrival at Keraterm, and their subsequent restitution to them, does not reflect the concept of genocide.[44]

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[36] *Ibid*., p. 9196-95.
[37] *Ibid*., p. 9195.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.; Hearing, T. 4407-4408.
[41] Sikirica Motion, p. 9195.
[42] *Ibid*., p. 9194.
[43] *Ibid*.
[44] *Ibid*.

21. Furthermore, the Defence refers to Trnopolje, which constituted both a transit and a detention camp, through which the majority of the non-Serb Bosnian population transited on the way to places outside the control of the Serbs.[45] According to the Defence, if genocide was what was planned, people would not have been released, from either Trnopolje or Keraterm.[46] Further, if genocide was intended, then steps of an immediate kind could have been taken to kill the Keraterm, Trnopolje and Omarska inmates: this did not occur, even in Omarska.[47] More specifically, the Defence submits that the nature of Trnopolje wholly undermines the Prosecution's contention of a series of inter-linked genocidal camps.[48] Indeed, according to the Defence, there is evidence that people could come and go much as they pleased, with a person being advised not to leave Trnopolje because this was a safer place than the outside world, and some persons even sought to enter this place, including one person who paid money to be taken there.[49]

22. The Defence submits that there is no evidence of the requisite *mens rea* of genocide in relation to the contention of involuntary deportation.[50] The Defence agrees that people responsible for this exercise may have been reckless as to the consequence of their acts; there is however no evidence that these deportations were carried out with the genocidal *mens rea*.[51] Furthermore, according to the Defence, even if there was genocidal intent, there is no evidence that the Defendant was aware of the existence or scale of such events which would have enabled him to begin, let alone complete, the process of forming the necessary *mens rea* for Counts 1 and 2.[52]

23. The Defence submits that there is no evidence obtained from Du{ko Sikirica by way of interview.[53]

2. The Prosecution

24. Before addressing the elements of the crime, the Prosecution addresses the accused's liability under Article 7(3) of the Statute, which requires establishing that he had effective

[45] *Ibid*., p. 9194-93.
[46] *Ibid*., p. 9193.
[47] *Ibid*.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*., p. 9193-92.
[52] *Ibid*., p. 9192.
[53] *Ibid*.

control over the perpetrators of genocide. The Prosecution states that it has failed to present sufficient evidence of this element and therefore no longer relies on Article 7(3) with respect to the charges of genocide.[54]

25. The Prosecution submits that the crime of genocide is characterised by an objective element requiring the commission of one or more genocidal acts (underlying offence or *actus reus*) as well as a subjective element (*mens rea*).[55]

(a) The subjective element (*mens rea*)

26. The accused must have committed the acts enumerated under Article 4(2), with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[56]

(i) The quality or degree of intent required

27. In its Pre-trial Brief, the Prosecution maintains that proof of any of the following three alternative forms of intent satisfies the requirement of Article 4:

> (a) the accused consciously desired the acts to result in the destruction, in whole or in part, of the group, as such; or
>
> (b) the accused knew his acts were destroying, in whole or in part, the group, as such; or
>
> (c) the accused knew that the likely consequence of his acts would be to destroy, in whole or in part, the group, as such.[57]

The Prosecution disagrees with the finding of the *Jelisi}* Trial Chamber that in order to establish the accused's requisite intent for the crime of genocide, it must be proved beyond reasonable doubt that he "was motivated by the *dolus specialis* of the crime of genocide", that is, option (a).[58] The Prosecution maintains that: 1) the *dolus specialis* requirement reduces the scope of application of the genocide prohibition in a way that undermines the object and purpose of the Statute; 2) the *dolus specialis* requirement contradicts the *Akayesu*

[54] Prosecution Response to the Sikirica Motion, para. 3.
[55] Prosecutor's Second Revised Pre-trial Brief, 13 Oct. 2000, ("Prosecution Pre-trial Brief"), para. 138; Hearing, T. 4387.
[56] The formulation is taken from the chapeau of Article II of the 1948 Genocide Convention.
[57] Prosecution Pre-trial Brief, para. 141.
[58] *Ibid.,* paras. 141-142, citing the *Jelisi}* Trial Judgement, para. 108.

Trial Judgement;[59] and 3) Article 30 of the ICC Statute,[60] on the mental element of the crimes enumerated therein, supports the Prosecutor's interpretation of Article 4.

28. The Prosecutor maintains that the plain and ordinary meaning of Article 4 of the Statute does not exclude options (b) and (c).[61] However, in the present case, the Prosecution submits that the evidence will satisfy the *dolus specialis* requirement, i.e., that Du{ko Sikirica and others consciously desired their acts to lead to the partial destruction of the Bosnian Muslims in Keraterm,[62] although the evidence establishing it will also demonstrate that Du{ko Sikirica knew that his acts were destroying a part of the Bosnian Muslim group in Keraterm which, according to the Prosecution, means that proof of either (a), (b) or (c) is sufficient to establish the intent required for genocide.[63]

29. In the Prosecution Response to the Sikirica Motion, the Prosecution submitted the following slightly modified version of the forms of intent:

> (a) The accused consciously desired the genocidal acts to result in the destruction, in whole or in part, of the group, as such;
>
> (b) The accused, having committed his or her genocidal acts consciously and with will to act, knew that the genocidal acts were actually destroying, in whole or in part, the group, as such; or
>
> (c) The accused, being an aidor and abettor to a manifest, ongoing genocide, knowing that there was such an ongoing genocide and that his or her conduct of aiding and abetting was part of that ongoing genocide, knew that the likely consequence of his or her conduct would be to destroy, in whole or in part, the group, as such.[64]

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[59] *See Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 Sep. 1998 ("*Akayesu* Trial Judgement"), para. 520, whereby the accused is guilty of genocide "because he knew or should have known that the act committed would destroy, in whole or in part, a group."

[60] Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc. A/CONF.183/9, ("ICC Statute"). Article 30 provides: "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

[61] Prosecution Pre-trial Brief, para. 142.

[62] *Ibid*., para. 143.

[63] *Ibid*.

[64] Prosecution Response to the Sikirica Motion, para. 7; see also para. 27 *supra*.

The Prosecution contends that, in the present case, the evidence is sufficient to show at the least, that the accused knew, as an aider or abettor, that the likely consequences of his acts would contribute to the entire or partial destruction of the non-Serb population.[65]

(ii) Destroy, in whole or in part

30. The Prosecution submits that Du{ko Sikirica had the intent to eliminate the group of Bosnian Muslim males in Prijedor in part.[66] Thus, the goal of this genocide was not the total elimination of the Bosnian Muslim or non-Serb population of Bosnia and Herzegovina.[67] According to the Prosecution, destruction in part means the destruction of

> (a) a substantial part of the group in proportional terms; or
>
> (b) a significant part of the group such as its leadership, including its law enforcement and military personnel.[68]

The Prosecution cites the *Akayesu* Trial Judgement which held that the crime of genocide

> does not imply the actual extermination of [the] group in its entirety, but is understood as such once any one of the [enumerated] acts … is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.[69]

and the *Karad`i}* Rule 61 Decision that provides

> the degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices.[70]

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[65] Prosecution Response to the Sikirica Motion, para. 7. The Prosecution refers to evidence that the accused helped a Muslim individual escape certain death at a checkpoint in Hambarine, demonstrating his knowledge of the events that were about to take place: Witness T (T. 3710-3712). Moreover, Witness Z testified about his discussions with Du{ko Kne`evi} concerning the removal of bodies from Keraterm: Witness Z (T. 4205-4210). In fact, the Prosecution observes that the accused Sikirica has admitted that he had a "duty providing reports on personnel to @ivko Kne`evi} (Sikirica Pre-trial Brief, p. 15). The Prosecution contends that this relationship extended beyond merely reporting on personnel matters. The Prosecution also refers to paras. 10-12 and 14-15 of the Prosecution Response to the Sikirica Motion, in relation to the accused's personal participation.

[66] Prosecution Response to the Sikirica Motion, para. 10.

[67] *Ibid*.

[68] Prosecution Pre-trial Brief, para. 152.

[69] *Akayesu* Trial Judgement, para. 497.

[70] *Prosecutor v. Radovan Karad`i} and Ratko Mladi}*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996 ("*Karad`i}* Rule 61 Decision"), para. 92.

31. The Prosecution refers to the International Law Commission's statement that

> it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.[71]

A United Nations Expert Study on Genocide defines the term "in part" as implying

> a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.[72]

The Commission of Experts Report states that "in part" may include the destruction of the leadership of the group:

> If essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality *per se* may be a strong indication of genocide regardless of the actual numbers killed.[73]

Furthermore the Commission of Experts Report provides:

> The character of the attack on the leadership must be viewed in the context of the fate [of] the rest of the group. If a group had its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, […] the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the [Genocide] Convention in a spirit consistent with its purpose.[74]

The *Jelisi}* Trial Chamber held that genocidal intent could

> consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group "selectively".[75]

32. The Prosecution maintains that Du{ko Sikirica specifically intended to destroy not only a substantial part of the community of Bosnian Muslim detainees in Keraterm and Omarska Camps, but also the leadership of that group, including those members defending

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[71] Report of the International Law Commission on the Work of its Forty-eighth session, 6 May-26 July 1996, G.A.O.R., 51st session, Supplement No. 10 (A/51/10) ("1996 ILC Draft Code"), p. 89.
[72] *Revised and updated report on the question of prevention and punishment of the crime of genocide prepared by B. Whitaker,* E/CN.4/Sub.2/1985/6, 2 July 1985, ("United Nations Expert Study on Genocide") para. 29.
[73] Commission of Experts Report, para. 94.
[74] *Ibid*. The Commission of Experts Report also provides that "the extermination of a group's law enforcement and military personnel may [also] be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature".
[75] *Jelisi}* Trial Judgement, para. 82.

non-Serbs in Prijedor. Furthermore, the accused intended to destroy the leadership of the Bosnian Muslims in the Prijedor municipality.[76]

33. The Prosecution submits that the goal of Du{ko Sikirica was to eliminate the group of Bosnian Muslim males in Prijedor *in part*, that is, the goal of this genocide was not the total elimination of the Bosnian Muslim or non-Serb population of Bosnia and Herzegovina.[77] According to the Prosecution, the evidence supports a finding that a specifically targeted part of the group included the leadership of Prijedor's Bosnian Muslims and non-Serbs, including members of the group that were involved in the defence of the non-Serbs in Prijedor.[78]

(iii) The "national, ethnical, racial or religious group, as such"

34. According to the Prosecution, the distinguishing feature of the international crime of genocide is that the underlying interest protected by the prohibition is the very existence of specific groups.[79] The Prosecution cites the *Akayesu* Trial Judgement, where it was held that

> [T]he act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.[80]

35. The Prosecution concludes that the targeting of the Bosnian Muslim group or the non-Serb group of Prijedor municipality from 30 April 1992 onwards was widespread and systematic to such an extent that it must be inferred that the intent was to affect the entirety of the group. This is even more evident if one considers the group of Bosnian Muslims in

[76] Prosecution Pre-trial Brief, para. 154.
[77] Prosecution Response to the Sikirica Motion, para. 10.
[78] *Ibid*. Referring to the targeting of the non-Serbs who occupied positions of economic or social influence: Witness A (T. 623, 636) regarding beatings of a teacher; Witness C (T. 927) regarding the killing of most educated people; Witness A (T. 636) regarding the local hod`a (Muslim cleric); Hidi} (T. 2354-2355) regarding beating of hod`a; Kenjar (T. 3536-3539) accused of hiding his wealth; Witness F (T. 1445-1446) accused of cooperating with SDA leadership; Witness X (T. 4064) regarding beating to death of man with same name as politician Fikret Abdi}; Witness L (T. 2498-2501) regarding specifically the individuals engaged in the defence of the Brdo area.
[79] Prosecution Pre-trial Brief, para. 145.
[80] *Akayesu* Trial Judgement, para. 521.

the Keraterm and Omarska camps.[81] The Prosecution thus contends that the evidence establishes that the Keraterm detainees were almost exclusively Bosnian Muslims and non-Serbs.[82]

36. The Prosecution argues that the intent to destroy a multitude of persons belonging to a group may amount to genocide even where these persons constitute only part of a group within a given geographical area: a country or a region or a single community. This assertion is supported by the *Akayesu* Trial Judgement, which dealt with a single commune where the accused was bourgemestre,[83] and the *Jelisi}* Trial Judgement, which held that customary international law permits the characterisation of genocide even when the discriminatory intent only extends to "a limited geographic zone".[84] Similarly, the Prosecution maintains that Du{ko Sikirica intended to destroy the Bosnian Muslims not in whole, but in part,[85] in the Keraterm and Omarska camps as well in the Prijedor municipality.

37. In its oral submission, the Prosecution identified the following factors as evidence of both genocide and persecution.[86] The Prosecution first stated that it has submitted evidence of genocidal acts, which are the personal acts committed by the accused, and that such evidence could also go to the proof of murder as acts of persecution.[87] The second area the Prosecution addressed is how to conceptualise the group that the Prosecution alleges was the collective victim of these genocidal acts.[88] For this purpose, the Prosecution considers that it has to identify the members of the group based on very specific characteristics

[81] Prosecution Pre-trial Brief, para. 147.
[82] Prosecution Response to the Sikirica Motion, para. 9; the Prosecution contends that even the beating and killing of one Serb, Jovan Rado~aj, at the camp, was because he was a supporter of the SDA and was married to a Muslim woman: Ante Tomi} (T. 1961-1962). Cf. Witness B (T. 775-777) and Witness D (T. 1079-1081).
[83] *Akayesu* Trial Judgement, paras. 48-49, 129, 675 and 734.
[84] *Jelisi}* Trial Judgement, para. 83. In the Prosecution Pre-trial Brief, para. 148, the Prosecution indicates the two sources to which the *Jelisi}* Trial Judgement referred. Firstly, the United Nations General Assembly's characterisation of the massacres of Sabra and Shatila refugee camps as genocide. Secondly, the *Nikoli}* Rule 61 Decision, which characterised acts in a single region of Bosnia and Herzegovina, mainly in the Vlasenica detention camp, as genocide; see *Prosecutor v. Dragan Nikoli}*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, 20 Oct. 1995, para. 34.
[85] Prosecution Pre-trial Brief, para. 148.
[86] Hearing, T. 4393-4394.
[87] *Ibid*., T. 4394.
[88] *Ibid*.

including national, ethnic, religious or racial grounds. It accordingly characterised the group in this case by reference to their religion, Islam.[89]

38. Once the group has been identified, however, the Prosecution deems it necessary to consider the scope or the size of the group that was being targeted.[90] The Prosecution stated that there certainly is no evidence in this case, nor is there any evidence from which the Trial Chamber could infer, that the intent of the accused Sikirica was to destroy the Bosnian Muslims in total.[91] In both the Pre-trial Brief and the oral argument, the Prosecution has alleged that the group in question is the leadership of the Bosnian Muslim community in the Prijedor municipality.[92] With respect to the question as to whether there was an intent to destroy that group in whole or in part,[93] the Prosecution submits that the accused had the intent to destroy a part of the leadership of that group, the leadership consisting of those individuals who most actively resisted the Serb take-over, such as the Room 3 inmates.[94] In the Prosecution case, evidence was given by people who constituted this group, i.e., those who actively resisted the Serb take-over in the Brdo area as one of the last pockets of resistance to the Serb take-over in Prijedor.[95] However, the Prosecution submits that there were also religious leaders, educators,[96] lawyers,[97] police officers, wealthy individuals or business leaders.[98] The Prosecution contends that those people who resisted in the Brdo area can be analogised to military leaders, in that, because of their active resistance, they were an example to other smaller communities, not only in Prijedor, but in the larger region as a whole.[99] That group could include individuals who would not necessarily be otherwise considered leaders.[100] However, by resisting actively the Serb military take-over, the Prosecution contends that the individuals constituting that group in effect became leaders of the greater Bosnian Muslim community, or they were serving as examples.[101]

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[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid*., T. 4394-4395.
[92] *Ibid*., T. 4395.
[93] *Ibid*.
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*., referring to Witness A, Fikret Hidi} and Witness X.
[97] *Ibid*., T. 4395, referring to Witness C.
[98] *Ibid*., referring to Witness I (T. 2088) and Witness E (T. 1290).
[99] *Ibid*., T. 4396.
[100] *Ibid*.
[101] *Ibid*., T. 4396-4397.

39. The Prosecution further contends that, in light of the Prijedor municipality's general context, targeting this group of leadership was particularly devastating to the Bosnian Muslim community as a whole, and that this was an integral part of the overall campaign of ethnically cleansing Prijedor of its Bosnian Muslim population.[102]

(b) The objective element (*actus reus*) under Article 4

40. The Prosecution claims that Du{ko Sikirica committed genocide through the means set out in Article 4(2)(a), (b) and (c) of the Statute.[103] With regard to Article 4(2)(a) – killing members of the group - referring to the *Akayesu* Trial Judgement, [104] the Prosecution maintains that this provision encompasses all forms of voluntary killings, whether premeditated or not. The Prosecution claims that its evidence shows that Du{ko Sikirica personally killed one individual near the weigh hut, another detainee near the toilets between Rooms 2 and 3, and 18-20 detainees the morning after the Room 3 massacre.[105]

41. In relation to Article 4(2)(b) – causing serious bodily or mental harm to members of the group - the *Akayesu* Trial Judgement held that this provision meant "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution".[106] The Prosecution claims that its evidence shows that Du{ko Sikirica, as the Commander of Keraterm, was responsible for both inhuman and degrading psychological and physical conditions imposed upon the detainees.[107] The Prosecution further notes that there is evidence that Sikirica was responsible for persecutory acts, that is, blatant denial of the fundamental rights of the detainees on discriminatory grounds on the basis of their non-Serb identity.[108] Moreover, the Prosecution refers to its evidence that Du{ko Sikirica raped at least one female detainee

[102] *Ibid*., T. 4396.
[103] *See* the *Akayesu* Trial Judgement, para. 500, whereby the Trial Chamber held that "killing" under the equivalent of Article 4(2)(a) is much broader than "murder" and includes all forms of intentional killing.
[104] Prosecution Pre-trial Brief, para. 156-157.
[105] Prosecution Response to the Sikirica Motion, para. 4.
[106] *Akayesu* Trial Judgement, para. 504. The Judgement cites the *Eichmann Case* (*The Attorney General of Israel v. Adolph Eichmann*, District Court of Jerusalem, 12 Dec. 1961, quoted in the International Law Reports, Vol. 36, 1968, p. 238, para. 199, which holds that serious bodily or mental harm can be caused "by the enslavement, starvation, deportation and persecution, […] detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture."
[107] Prosecution Response to the Sikirica Motion, para. 5.
[108] *Ibid*.

and that his subordinates raped women and sexually assaulted a male detainee at Keraterm.[109]

42. Finally with regard to Article 4(2)(c) - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part - the Prosecution refers to the *Akayesu* Trial Judgement which construed this provision as referring to

> the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.[110]

The Prosecution claims that there is substantial evidence that the detainees in Keraterm had been "systematically" expelled from their homes and had been forced to endure a subsistence diet. The medical care that they received – if any – was below the minimal standards to ensure their physical well-being. In short, the living conditions were totally insufficient.[111]

(c) Relevance of proof of the objective context in which genocidal acts are committed with requisite intent

43. The Prosecution submits that the *mens rea* of the crime of genocide would be determined through both subjective and objective means of proof, the objective context, such as the existence of a genocidal plan, being a means of proof and not an element of the offence.[112] Further, proof of an objective context in which the genocidal acts were committed with the requisite *mens rea* is an essential and integral component of any case of genocide, even where an accused committed genocide in isolation.[113]

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[109] *Ibid*.
[110] *Akayesu* Trial Judgement, para. 505. This includes, "*inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement", para. 506.
[111] Prosecution Response to the Sikirica Motion, para. 6: for the targeting of Muslim citizens of the Prijedor municipality who had been told via radio broadcast to hang white sheets in order to show their loyalty to the Serb-controlled Government, it refers to the following: Witness A (T. 564); Witness K (T. 2254); Witness R (T. 3294-3295); Witness Z (T. 4197-4198); and Edward Vulliamy in *Prosecutor v. Milan Kova~evi}*, Case No. IT-97-24-T, T. 796. On the systematic process of removal from Muslim neighbourhoods, it refers to the following: Witness L (T. 2498-2501); Arifagi} (T. 1544-1549); Sejmenovi} (T. 3973); Witness R (T. 3299-3304); Zubovi} (T. 2572-2583) and Edward Vulliamy (T. 4306). On the poor diet conditions, it relies on: Witness A (T. 590-592); Witness C (T. 907-908, 910-912); and Witness E (T. 1276). Referring to the medical care: Witness F (T. 1427-1430) and Witness C (T. 913-914).
[112] Prosecution Pre-trial Brief, paras. 160 and 163.
[113] *Ibid*., para. 165.

(i) Factors from which the genocidal intent of the accused may be inferred

44. The Indictment alleges the existence of a plan of persecution and expulsion of Bosnian Muslims and Bosnian Croats from the Prijedor municipality and areas of Bosnia and Herzegovina that had been proclaimed Serb territory. However, it does not state that there was a plan to commit genocide against Bosnian Muslims and Bosnian Croats, insofar as the existence of a plan to commit genocide is not an element or requirement of the crime of genocide.[114] The Prosecution disagrees with the *Jelisi}* Trial Judgement that there is an objective element requiring proof of the existence of "a wider plan to destroy the group as such".[115] According to the Prosecution, proof of the existence of a genocidal plan may be relevant to several aspects of genocide prosecution:

> (a) as one of several means of proof through which an accused's requisite genocidal intent can be inferred;
>
> (b) second, in cases where an accused aided or abetted the commission of genocide or was an accomplice in genocide, as one of several means of proof showing that he or she participated in genocide and did not act in isolation; and
>
> (c) third, as a means of proof of planning under Article 7(1).[116]

45. The Prosecution submits that the practice of the *ad hoc* International Tribunals illustrates that proof of the existence of a genocidal plan is not the only means of proof from which genocidal intent can be inferred.[117] Thus, the *Akayesu* Trial Judgement held that the genocidal intent of the accused may be inferred

> from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups can enable the Chamber to infer the genocidal intent of a particular act.[118]

[114] *Ibid*., para. 166.
[115] *Ibid*., para. 167, citing the *Jelisi}* Trial Judgement, para. 66. The Prosecution notes that the *Jelisi}* Trial Chamber reached this conclusion by means of deduction from the subjective or *mens rea* element referred to as "the special intent".
[116] *Ibid*., para. 168.
[117] *Ibid*., para. 169.
[118] *Akayesu* Trial Judgement, para. 523.

Moreover, the *Karad`i}* Rule 61 Decision held that the accused's genocidal intent may be inferred

> from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.[119]

46. The Prosecution contends that, although it is extremely unlikely that there be direct evidence of the accused's intent to commit genocide, such intent can be inferred from the evidence.[120] In its oral arguments, the Prosecution referred to the *Kayishema and Ruzindana* Appeal Judgement oral summary, which held that, regarding a lack of explicit manifestation of intent, the requisite intent may normally be inferred from facts and circumstances.[121] The Appeals Chamber held that, generally, such an intent may be inferred from the words or deeds of the perpetrator and may be demonstrated by a deliberate pattern of conduct. The Appeals Chamber however stated that this persistent pattern of conduct was not an element of the crime of genocide but rather a means of proof so as to demonstrate whether the accused actually possessed the requisite intent.[122] The Prosecution then referred to the *Jelisi}* Appeal Brief, which set the following factors as being relevant to prove the *mens rea* element of genocide:

(a) The general and widespread nature of the atrocities committed;

(b) The general political doctrine giving rise to the acts;

(c) The scale of the actual or attempted destruction;

(d) Methodical way of planning the killings;

(e) The systematic manner of killing and disposal of bodies;

(f) The discriminatory nature of the acts;

(g) The discriminatory intent of the accused.[123]

The history relative to these factors is set out below.[124]

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[119] *Karad`i}* Rule 61 Decision, para. 94.
[120] Prosecution Response to the Sikirica Motion, para. 8. Hearing, T. 4388.
[121] Hearing, T. 4388. See *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Motifs de l'Arrêt, 1 June 2001.
[122] Hearing, T. 4389.

(ii) The application of the factors to the Sikirica case

47. In the light of the above-mentioned, the Prosecution contends that the reference in the Indictment to the plan to expel Bosnian Muslims and Bosnian Croats from the Prijedor municipality, and from areas of Bosnia and Herzegovina that had been proclaimed Serb territory, describes the context in which the genocidal acts were committed in Keraterm under Du{ko Sikirica's command.[125] Proof of this context is relevant, *inter alia*, to inferring the requisite genocidal intent of the accused, and to his complicity in genocide.[126] In Keraterm, the context in which the genocidal acts were committed was that of the execution of an expulsion plan, amounting to a campaign of persecution and a manifest pattern of conduct similar to the genocidal acts.[127] A functional interdependence existed between the persecution and expulsion campaign and the detention camps in Prijedor on the one hand, and between those detention camps on the other hand.[128] This campaign was executed in the Prijedor municipality in a detailed and logistically well-organised manner, drawing on infrastructure available for the transport and detention of those populations, with Keraterm as an integral part of this operation.[129] The conditions in Keraterm and Omarska went beyond contributing to the persecution and expulsion campaign.[130] With the intent to partially destroy the detained Muslims as such, genocidal acts were committed by persons under the command of Du{ko Sikirica or with his complicity,[131] while in the Prijedor municipality, Bosnian Muslims and Bosnian Croats were executed, beaten, sexually assaulted and detained in a widespread, systematic and protracted manner.[132] Such acts

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[123] Prosecution Response to the Sikirica Motion, para. 8, citing *Jelisi}* Appeal Brief, para. 4.44, with authorities.
[124] In identifying these seven factors, the Prosecution has drawn from the *Akayesu* Trial Judgement, para. 523 and from *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema* Trial Judgement"), para. 93, wherein the Trial Chambers set forth several factors from which the requisite intent may be inferred. *Jelisi}* Appeal Brief, paras. 4.42–4.44. The Appeals Chamber in *Jelisi}* held that in the absence of direct evidence, proof of specific intent may be inferred from "a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts." *Jelisi}* Appeal Judgement, para. 47.
[125] Prosecution Pre-trial Brief, para. 171.
[126] *Ibid*.
[127] *Ibid*.
[128] *Ibid*., para. 172.
[129] *Ibid*., para. 173.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.

were committed in Omarska to which Keraterm detainees were being sent, under Sikirica's command.[133] Thus, there was a connection between the responsibility of Du{ko Sikirica for the genocidal acts committed under his command in Keraterm or with his complicity, and the execution of the persecution and expulsion campaign in the Prijedor municipality.[134]

48. The Prosecution maintains that even if the Trial Chamber construes Article 4 as requiring proof of the existence of a genocidal plan, the evidence will meet that standard as well, beyond all reasonable doubt.[135]

49. The Prosecution contends that the application of the factors listed in paragraph 46 above to the present case are sufficient to establish Du{ko Sikirica's *mens rea*.[136] In respect of (a) - the general and widespread nature of the atrocities committed - the Prosecution submits that unlike the widespread or systematic element of crimes against humanity under Article 5 of the Statute, this factor is not, however, an element of genocide but simply a means of proving the intent by inference.[137] The Prosecution maintains that in the present case, it has adduced much evidence concerning the general and widespread nature of the atrocities committed throughout the Prijedor municipality during the relevant time periods of the Indictment.[138] According to the Prosecution, the following communities were particularly hard hit by the Serb campaign: Kozarac, Hambarine, Ljubija, Brdo, Cvici, Trnopolje, Puharska, Tukovi, ^rkvica, Rakov~ani and Rizvanovi}i.[139]

50. With respect to (b) - the general political doctrine giving rise to the acts - the Prosecution cited paragraphs 230 and 234 of the *Tadi}* Appeal Judgement confirming the *Tadi}* Trial Judgement and specifically paragraph 660 thereof, where the Trial Chamber found that Du{ko Tadi} participated in the armed conflict taking place between May and December 1992 in the Prijedor municipality, where "an aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a greater Serbia."[140]

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[133] *Ibid*.
[134] *Ibid*.
[135] *Ibid*., para. 174.
[136] Prosecution Response to the Sikirica Motion, para. 8, citing *Jelisi}* Appeal Brief, para. 4.44, with authorities.
[137] Hearing, T. 4389.
[138] *Ibid*.
[139] *Ibid*.
[140] *Ibid*., T. 4390.

51. In relation to (c) - the scale of the actual or attempted destruction - the Prosecution referred to three documents. Firstly, the expert demographic report[141], which demonstrates the decrease of 87.6 per cent in Prijedor's Bosnian Muslim population between 1991 and 1993, from 49,351 to 6,124.[142] During the same period, the population of Serbs living in Prijedor increased, in terms both of percentage (12.7 per cent) and of actual numbers (from 47,581 to 53,637).[143] Exhibits 66-9 tabs 9.16 and 9.17 demonstrate, in the Prosecution's view, that officials in Banja Luka, the self-declared capital of Republika Srpska, took an active interest in the census data, requiring the Prijedor officials to provide them with precise and current census data.[144]

52. In relation to (d) – methodical way of planning the killing - the Prosecution submits that there is proof of several examples, which would lead the Trial Chamber to draw the necessary inference with respect to the accused's intent.[145] The Prosecution cites the Room 3 massacre and the preparations for it as an example. According to the Prosecution, Room 3 was prepared for the Brdo area men through a process of emptying the room of its detainees.[146] Machine-gun nests were set up outside the room,[147] in the afternoon when Du{ko Sikirica was typically in the camp.[148] Search lights were set up outside the room in anticipation of the night-time attack on that room, and tear gas was thrown into the room in order to incapacitate and to disorient the detainees.[149] The Prosecution views this as an attempt to force those individuals in that room to flee, thereby giving the attackers the excuse that the detainees in that room were trying to escape.[150] Finally, the Prosecution refers to the fact that additional soldiers and guards were brought into the camp on the evening of the massacre.[151]

53. In respect of (e) - the systematic manner of killing and disposal of bodies - the Prosecution submits that the methodical and systematic disposal of the bodies certainly could lead to an inference with respect to intent and, in that respect, refers to the testimony

[141] *See* Prosecution's Supplemental Filing of Expert Reports pursuant to Rule 94 *bis*, 23 Apr. 2001.
[142] Hearing, T. 4391.
[143] *Ibid*.
[144] *Ibid*., T. 4391-4392.
[145] *Ibid*., T. 4392.
[146] *Ibid*.; Witness A, T. 619-620.
[147] Hearing, T. 4392; referring to T. 891, 921-923, 974-976, 1594.
[148] *Ibid*.; referring to T. 2580, 2662.
[149] *Ibid*.
[150] *Ibid*.
[151] *Ibid*., T. 4392-4393; referring to Witness L (T. 2509) and Witness B (T. 818).

of numerous witnesses concerning the loading of bodies on to a truck following the massacre and the disposal of bodies at the Pasinac cemetery.[152]

54. Finally, the Prosecution submits that certain of the Sikirica Defence contentions as to the elements the Prosecution must establish in order to prove genocide are incorrect: (i) the Defence has confused intent with motive;[153] (ii) the Defence has indicated that the Prosecution has failed to establish that there was a "plan to carry out a campaign of genocide";[154] and (iii) the Defence has indicated that there is no evidence to support the "contention that involuntary deportation was done with the intent to destroy in whole or in part the protected group".[155] The Prosecution considers that none of these submissions goes to the elements of the crime.[156]

B. Discussion

55. Article 4(2) of the Statute repeats verbatim Article II of the 1948 Genocide Convention.[157] Although the Nuremberg Tribunal's final judgement did not use the word "genocide", the indictment of 8 April 1945 against the German major war criminals referred to "genocide".[158] This term was also used in some of the trials under *Control Council Law No. 10*.[159] The Chamber notes that the 1948 Genocide Convention reflects customary international law.[160]

56. The Chamber will now consider the first element of the offence, *mens rea*, that is, the requirement that the acts of genocide be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

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[152] *Ibid*., T. 4393; referring to Witness M (T. 2710-2711) and Witness Q (T. 3251-3252).
[153] Sikirica Motion, p. 9194.
[154] *Ibid*., p. 9195; Hearing, T. 4397.
[155] Sikirica Motion, p. 9193; Hearing, T. 4397.
[156] Prosecution Response to the Sikirica Motion, para. 11.
[157] In force as of January 1951, the Convention was ratified by the Socialist Federal Republic of Yugoslavia on 29 August 1950.
[158] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, (Nuremberg: International Military Tribunal, 1947), Vol. I, pp. 43-44.
[159] *Trial of War Criminals before Nuernberg Military Tribunals, under Control Council Law No. 10, (Nuernberg, October 1946-April 1949)*, see for example case No. 8 (The *RuSHA* case), Vol. IV and V.
[160] *Case of the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Rec. 1951, p. 23; see also the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), para. 45.

1. The requisite intent

57. The Trial Chamber notes the Prosecution submission that evidence that satisfies any of the following three standards meets the requirement of Article 4 that the accused must have committed the act "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

> (a) The accused consciously desired the genocidal acts to result in the destruction, in whole or in part, of the group, as such;
>
> (b) The accused, having committed his or her genocidal acts consciously and with will to act, knew that the genocidal acts were actually destroying, in whole or in part, the group, as such; or
>
> (c) The accused, being an aidor and abettor to a manifest, ongoing genocide, knowing that there was such an ongoing genocide and that his or her conduct of aiding and abetting was part of that ongoing genocide, knew that the likely consequence of his or her conduct would be to destroy, in whole or in part, the group, as such.[161]

The Prosecution further submits that the evidence adduced satisfies all three standards.[162]

58. In the Trial Chamber's opinion, the submissions by the Prosecution on this question have for the most part complicated what is a relatively simple issue of interpretation of the chapeau of Article 4(2). In contradistinction to the manner in which many crimes are elaborated in treaties and, indeed, in the domestic law of many States, Article 4 expressly identifies and explains the intent that is needed to establish the crime of genocide. This approach follows the 1948 Genocide Convention[163] and is also consistent with the ICC Statute.[164] It is an approach that is necessary if genocide is to be distinguished from other species of the *genus* to which it belongs. Genocide is a crime against humanity, and it is easy to confuse it with other crimes against humanity, notably, persecution. Both genocide and persecution have discriminatory elements, some of which are common to both crimes. Thus, Article 5(h) of the Statute proscribes "persecutions on political, racial and religious grounds", while, in respect of genocide, what is required is an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

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[161] Prosecution Response to the Sikirica Motion, para. 7; see also paras. 27 and 29 *supra*.
[162] Prosecution Response to the Sikirica Motion, para. 7.
[163] 1948 Genocide Convention, Article II.
[164] ICC Statute, Article 6.

59. An examination of theories of intent is unnecessary in construing the requirement of intent in Article 4(2). What is needed is an empirical assessment of all the evidence to ascertain whether the very specific intent required by Article 4(2) is established, that is, the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[165]

60. The first rule of interpretation is to give words their ordinary meaning where the text is clear.[166] Here, the meaning of intent is made plain in the chapeau to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent. It is, however, important to understand the part of the chapeau that elaborates on and explains the required intent, that is "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

61. As the Chamber has indicated before, the requisite intent for the crime of genocide will have to be inferred from the evidence. The seven factors enumerated by the Prosecution are relevant.[167] However they are by no means the only factors relevant to prove the required intent. The Chamber stresses that all the evidence must be examined. Moreover, before embarking on an examination of the evidence, it is important to understand what it is that Article 4(2) requires to be proved by way of evidence in order to establish the requisite *mens rea*. There are two elements in the chapeau of Article 4(2), which the Prosecution is required, as a matter of law, to establish. First, it must establish the intent to destroy in whole or in part the Bosnian Muslim or Bosnian Croat populations in Prijedor; secondly, it must also establish an intention to destroy the Bosnian Muslim or Bosnian Croat group as such. These two elements are cumulative, that is to say, the

[165] Shortly after the oral decision on the motion to acquit in this case, the Appeals Chamber delivered its Judgement in the *Jelisi}* case. In relation to the intent required for the crime of genocide, the Appeals Chamber held that "the specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such." *Jelisi}* Appeal Judgement, para. 46.
[166] Article 31(1) of the Vienna Convention on the Law of Treaties (22 May 1969, 1155 U.N.T.S. 331) provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
[167] *See* para. 46 *supra*.

Prosecution must not only establish an intention to destroy the Bosnian Muslim or Bosnian Croat populations in whole or in part, but it must also establish the intention to destroy those groups as such. The Sikirica Motion will succeed if the Prosecution fails to establish either of these two ingredients of the *mens rea*.

62. The Chamber notes the Defence argument that the existence of a plan or policy to commit genocide is a legal ingredient of the crime. The Prosecution disputed that contention, arguing that while the existence of a plan or policy of genocide may be relevant to the proof of the intent required, it is not a legal ingredient of the crime. This issue has now been settled by the *Jelisi}* Appeal Judgement where it was held that "the existence of a plan or policy is not a legal ingredient of the crime", although "in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases."[168]

2. Intent to destroy in whole or in part the Bosnian Muslim or Bosnian Croat populations in Prijedor

63. Obviously, the relevant portion of this phrase that calls for analysis is "destroy… in part" and, indeed, the Prosecution's submissions are so confined. Hence the question is: what is meant by the destruction in part of a group, which, in the context of this case, would be the groups of Bosnian Muslims and Bosnian Croats in Prijedor.[169] This is essentially an exercise in treaty interpretation. Here again, it is necessary to refer to Article 31(1) of the Vienna Convention on the Law of Treaties.[170] Essentially, therefore, the question is what is the ordinary meaning that should be given to the phrase "destroy in whole or in part" in its context and in the light of the object and purpose of the 1948 Genocide Convention.

64. There is no case law as to the construction of the phrase, "in part", except for the *Kayishema* Trial Judgement, which held that this phrase "requires the intention to destroy a considerable number of individuals who are part of the group."[171]

65. The United Nations Expert Study on Genocide defines the term "in part" as implying "a reasonably significant number, relative to the total of the group as a whole, or

[168] *Jelisi}* Appeal Judgement, para. 48.
[169] *See* paragraph 33 of the Indictment.
[170] *See* footnote 166, *supra*.
[171] *Kayishema* Trial Judgement, para. 97.

else a significant section of a group such as its leadership".[172] This definition means that, although the complete annihilation of the group is not required, it is necessary to establish "the intention to destroy at least a substantial part of a particular group".[173] The Chamber believes that it is more appropriate to speak of a "reasonably substantial" rather than a "reasonably significant" number. This part of the definition calls for evidence of an intention to destroy a reasonably substantial number relative to the total population of the group. According to this definition, if that criterion is not met, the *mens rea* may yet be established by evidence of an intention to destroy a significant section of the group, such as its leadership. While the Chamber does not reject that aspect of the definition, which sees the two elements as being alternative, there may be situations in which the inference as to the intent can not be drawn on the basis of the evidence in relation to each element in isolation, but when the evidence in relation to each is viewed as a whole, it would be perfectly proper to draw the inference.

66. In determining whether the requisite intent can be inferred from the evidence, the Chamber proposes, first, to examine the evidence as to the destruction of the group within the terms of Article 4(2)(a), (b) and (c), in relation to the two criteria of "substantial number" as well as "significant section".

(a) Evidence as to the destruction of a reasonably substantial number of the group relative to its total population

67. As to this criterion, the relevant evidence would be that which relates to the number of Bosnian Muslims or Bosnian Croats who were killed (Article 4(2)(a)), or suffered bodily or mental harm (Article 4(2)(b)), or on whom were deliberately inflicted conditions of life calculated to bring about the destruction of the group as such (Article 4(2)(c)). Of course, ultimately, it would still have to be shown that these acts were committed by Du{ko Sikirica with the required intent, and on one of the recognised legal bases: (1) direct personal responsibility; (2) complicity; or (3) common design.[174] But, for the moment, the analysis will take place without taking those requirements into account.

[172] United Nations Expert Study on Genocide, para. 29.
[173] 1996 ILC Draft Code, p. 89.
[174] Command responsibility would also be a basis for criminal liability. However, the Prosecution no longer relies on Article 7(3) in relation to genocide.

68. The Chamber agrees with the Prosecution's submission that the intent to destroy a multitude of persons belonging to a group may amount to genocide, even where these persons constitute only part of a group within a given geographical area: a country or a region or a single community. The Chamber also agrees that, as is argued by the Prosecution, this approach is supported by the *Akayesu* Trial Judgement, which dealt with a single commune where the accused was bourgemestre,[175] and the *Jelisi}* Trial Judgement, where it was held that customary international law permits the characterisation of genocide even when the discriminatory intent only extends to "a limited geographic zone".[176] Whether the group belongs to a country or a region or a single community, it is clear that it must belong to a geographic area, limited though it may be. Thus, the proper basis for comparison is between those Bosnian Muslims or Bosnian Croats who were victims within the terms of Article 4(2)(a), (b) or (c), and those groups as a whole in the Prijedor municipality. The comparison should not be between Bosnian Muslims and Bosnian Croats who were victims within the terms of Article 4(2)(a), (b) or (c) while detained in the Keraterm camp and the total number that constituted those groups in Keraterm.

69. According to the 1991 census, the Prijedor municipality had a total population of 112,543: 49,351 (43.9%) identified themselves as Muslims; 47,581 (42.3%) identified themselves as Serbs; and 6,316 (5.6%) identified themselves as Croats. The Chamber will, therefore, examine the evidence in order to ascertain the number of Bosnian Muslims and Bosnian Croats in Prijedor as a whole who were victims within the terms of Article 4(2) (a), (b), and (c). This involves the examination of evidence as to those who were victims both within and outside the Keraterm camp.

70. For the purpose of determining the number of Bosnian Muslims and Bosnian Croats who were victims within the Keraterm camp, it is reasonable to treat the entire camp population of 1000-1400 persons as victims.

[175] *Akayesu* Trial Judgement, paras. 48-49, 129, 675 and 734.
[176] *Jelisi}* Trial Judgement, para. 83.

71. It remains now to identify the number of Bosnian Muslims and Bosnian Croats who were victims outside the Keraterm camp for the purpose of Article 4(2)(a), (b) and (c). Although there is evidence of several camps in the Prijedor municipality, there is no evidence in the present case as to the number of people detained in those camps except Keraterm.

72. For the purpose of determining the number of victims within the terms of Article 4(2)(a), (b) and (c), one is, therefore, left with a number of approximately 1000-1400 Muslims out of a total of 49,351 in the Prijedor municipality. This would represent between 2% and 2.8% of the Muslims in the Prijedor municipality and would hardly qualify as a "reasonably substantial" part of the Bosnian Muslim group in Prijedor. It also needs to be borne in mind that not all the detainees at Keraterm were Muslims.

73. Although the analysis has mainly dealt with Bosnian Muslims, the Indictment also alleges that Bosnian Croats were targeted. However, the evidence shows that the number of Bosnian Croats who were the victims of acts covered by Article 4(2)(a), (b), and (c) was very small.

74. On the whole, the number of Bosnian Muslims and Bosnian Croats detained in the Keraterm camp, and who were victims within the terms of Article 4(2)(a), (b), and (c), is negligible.

75. The fact that the evidence does not establish that a substantial number of Bosnian Muslims or Bosnian Croats were victims within the terms of Article 4 (2)(a), (b) and (c) of the Statute, does not necessarily negate the inference that there was an intent to destroy in part the Bosnian Muslim or Bosnian Croat group. However, in the Chamber's view, when that fact is considered along with other aspects of the evidence, it becomes clear that this is not a case in which the intent to destroy a substantial number of Bosnian Muslims or Bosnian Croats can properly be inferred.

(b) Evidence as to the destruction of a significant section of the group, such as its leadership

76. If the quantitative criterion is not met, the intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership.

77. The Chamber finds persuasive the analysis in the *Jelisi}* Trial Judgement that the requisite intent may be inferred from the "desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such."[177] The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimisation within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such.

78. In examining the evidence to determine whether leaders were targeted, one is looking for Bosnian Muslims who, whether by reason of their official duties or by reason of their personality, had this special quality of directing the actions or opinions of the group in question, that is those who had a significant influence on its actions.

79. The Prosecution submitted that Sikirica specifically intended to destroy not only a substantial part of the Bosnian Muslims detained in the Keraterm and Omarska camps, but a particular component of that group, viz. its leadership, including the members of this group involved in the defence of non-Serbs in Prijedor.[178]

80. Notwithstanding that submission, very little evidence has been adduced as to the leadership status of those who were detained in Keraterm. There is evidence that among those detained were taxi-drivers, schoolteachers, lawyers, pilots, butchers and café owners.[179] But there is no specific evidence that identifies them as leaders of the community. Indeed, they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and

[177] *Jelisi}* Trial Judgement, para. 82.
[178] Prosecution Pre-trial Brief, para. 154; Prosecution Response to the Sikirica Motion, para. 10; Hearing, T. 4395-4397.
[179] *See*, e.g., Witness A, T. 599-600 (who testified that a butcher was detained in Keraterm); Witness G, T. 1735; Witness C, T. 918-919 (who heard that there was a pilot in the camp); Fikret Hidi}, T. 2318 (who

therefore could be called up for military service. The Chamber notes the Prosecution submission that the Serbs targeted those Bosnian Muslims from the Brdo area who were active in the defence of their villages, and that it was appropriate to treat them as soldiers, and thus an important element of the leadership, since their elimination would have a significant impact on the survival of the group. Further, according to the Prosecution, the evidence is that most of the Brdo detainees were in Room 3, and therefore were among those killed in the Room 3 massacre.

81. While the Trial Chamber acknowledges that the necessary intent can be established on that basis, it is unable to conclude that any action within the terms of Article 4(2)(a), (b) or (c) on the part of the Bosnian Serbs in relation to a limited number of Bosnian Muslims of military age, acting in defence of their villages, would have a significant impact on the survival of the Muslim population as a whole in Prijedor. There is no evidence as to the specific number of the detainees from the Brdo region, and there is evidence that they were all placed in Room 3, which had somewhere between 150-200 people. There is, further, little evidence as to the targeting of specific individuals within the Prijedor area, apart from those who were brought and placed in Keraterm. The Chamber rejects the submission that all those Bosnian Muslims, whether from the Brdo area or elsewhere, and who were active in the resistance of the take-over of their villages, should be treated as leaders. Acceptance of that submission would necessarily involve a definition of leadership so elastic as to be meaningless.

82. With regard to the situation outside the Keraterm camp, no evidence has been led to show that the disappearance of those who were targeted by Bosnian Serbs would have a significant impact on the survival of the population[180] in Prijedor to which they belonged by reason of their leadership status or for any other reason.

83. Although the analysis has mainly dealt with Bosnian Muslims, the Indictment also alleges that Bosnian Croats were targeted. However, as stated in paragraph 73 *supra*, the evidence shows that the number of Croats who suffered from acts covered by Article

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identified himself as a teacher in Kozarac); and Witness F, T. 1376 (who was a taxi-driver and then a café-owner in Prijedor).

[180] This formulation is adopted from the *Jelisi}* Trial Judgement, para. 82.

4(2)(a), (b), and (c) was very small, and there is no evidence as to their significance within the group.

84. In light of the foregoing, the Chamber does not consider that there is a sufficient evidential basis for inferring an intention to destroy a significant section of the Bosnian Muslim or Bosnian Croat population, such as its leadership, whether in or outside the Keraterm camp.

85. Therefore, the Chamber concludes that the intent to destroy in part the Bosnian Muslim or Bosnian Croat group cannot be inferred on the basis of the evidence, with reference either to the criterion of the intent to destroy a significant number of the group relative to its totality or to the intent to destroy a significant section of the group, such as its leadership.

86. On that basis alone, the Sikirica Motion would succeed. The Chamber will, however, proceed to consider the other requirement in relation to the intent, that is, to destroy a "national, ethnical, racial or religious group as such".

3. Intent to destroy a national, ethnical, racial or religious group, as such

87. The *Kayishema* Trial Chamber held that the phrase "to destroy the group, *as such*" "speaks to specific intent (the requisite *mens rea*)".[181] The *Akayesu* Trial Chamber held that "the victim of the crime of genocide is the group itself and not only the individual".[182] Thus, "the victim is chosen not because of his individual identity, but rather" because he is "a member of a group, chosen as such".[183]

88. In the *Jelisi}* case, the Trial Chamber held that

> [it] is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[184]

89. This Chamber concurs with that analysis. In particular, it wishes to emphasise that it is the mental element of the crime of genocide that distinguishes it from other crimes that

[181] *Kayishema* Trial Judgement, para. 99.
[182] *Akayesu* Trial Judgement, para. 521.
[183] *Ibid*.
[184] *Jelisi}* Trial Judgement, para. 70.

encompass acts similar to those that constitute genocide. The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase "as such" in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. This is what differentiates genocide from the crime against humanity of persecution. Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds. It is this factor that establishes a demarcation between genocide and most cases of ethnic cleansing. Practically every case prosecuted before the International Tribunal has involved ethnic cleansing, in which particular groups have been specifically targeted for various kinds of abuse and mistreatment, including murder and detention. However, it is noteworthy that in none of the other cases involving the detention of persons in camps in the Prijedor municipality (with which this case is concerned), has the Prosecution alleged genocide. That by itself, of course, does not serve to invalidate the specific allegations of genocide in this case, and in no way relieves the Chamber of its duty to determine whether the legal ingredients of genocide have been established in this particular case. However, the Chamber sees no essential difference between this case and the other trials for ethnic cleansing in the Prijedor municipality. No evidence has been adduced to show that there was a specific intent to target the Bosnian Muslims or Bosnian Croats as such, that is, as a group, as distinct from the individual members of that group.

90. The Chamber concludes that the evidence has not established that Du{ko Sikirica possessed the very specific intent required by Article 4(2) to destroy in part the Bosnian Muslims or Bosnian Croats as a group, even though it may establish the mistreatment of the members of that group on political, racial or religious grounds, in which event the relevant crime is persecution, not genocide. Therefore, even if the evidence established an intention to destroy a part of the Bosnian Muslim or Bosnian Croat population, the Sikirica Motion would still succeed because what was targeted was not the group as such, but individual members of the group. As the Chamber has indicated earlier, the two elements as to the requirement of intent in the chapeau of Article 4(2) – the intention to destroy in part and the

intention to destroy the group as such - are cumulative. However, neither element has been satisfied on the Prosecution case.

4. Factors identified by the Prosecution in relation to the *mens rea* of genocide

91. The Chamber will now consider the factors identified by the Prosecution as evidence from which, in its submission, the intent to destroy in whole or in part the Bosnian Muslim or Bosnian Croats may be inferred.

92. The Prosecution has alleged that the victimisation of non-Serb civilians in the Prijedor municipality took place as part of a wider plan implemented by the Bosnian Serb authorities in the region to expel the Bosnian Muslim and Bosnian Croat populations from that municipality. While the Prosecution has adduced evidence which might suggest that the Bosnian Serb authorities' general political doctrine gave rise to a campaign of persecution against the non-Serb population of Prijedor, there is no evidence that this doctrine sought to promote genocide.

93. The Prosecution has referred to the general and widespread nature of the atrocities committed as well as the scale of the actual or attempted destruction as evidence from which the requisite intent may be inferred.

94. While the general and widespread nature of the atrocities committed may be evidence of a plan of persecution, the Chamber holds that, in the circumstances of this case, it is not sufficient to satisfy the specific intent required for the crime of genocide. As for the scale of the actual or attempted destruction, the analysis in paragraphs 69-74 shows that it was only a small percentage of the Bosnian Muslim or Bosnian Croat group that were victims within the terms of Article 4(2)(a), (b) and (c) of the Statute. The Chamber is unable to infer from this evidence an intent to target a substantial number of Bosnian Muslims or Bosnian Croats.

95. The Prosecution has also referred to the methodical way in which the killings were planned as well as the systematic manner of killing and the disposal of bodies. The evidence does not support the conclusion that there was any particular system in disposing of bodies. Indeed, apart from the Room 3 massacre, the killings appear to have been sporadic. The Room 3 massacre of about 120 people is an episode, which, by itself, would

not necessarily signify a particular system of killing.

96. Although the factors raised by the Prosecution have been examined on an individual basis, the Chamber finds that, even if they were taken together, they do not provide a sufficient basis for inferring the requisite intent.

97. In sum, the Chamber finds that, on the basis of the evidence adduced by the Prosecution, the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" can not be inferred. On this ground the Sikirica Motion succeeds.

IV. REMAINING COUNTS AGAINST DUŠKO SIKIRICA

98. The Indictment also charges Du{ko Sikirica with Count 3 (persecution), Count 4 (inhumane acts) and Count 5 (outrages upon personal dignity). He is also charged with Count 8 and Count 9 (murder), or in the alternative, Count 10 (inhumane acts) and Count 11 (cruel treatment).

A. Arguments of the Parties in Relation to Counts other than Genocide

1. The Defence

99. The Sikirica Defence submits that there is no evidence to support the allegations of torture set forth in paragraph 14 of the Indictment. In relation to the allegations involving the Omarska and Trnopolje camps, the Defence submits that all references to these places in the Indictment and its Confidential Attachment ("Attachment A") should be excised. The Defence submits that the Prosecution has failed to present any evidence relating to certain individuals named in Attachment A.

(a) Torture

100. The Defence submits that there is no evidence to support any allegation of torture according to paragraph 14 of the Indictment.[185]

(b) Omarska and Trnopolje camps

101. The Defence submits that the Prosecution has failed to present evidence on the link between Du{ko Sikirica and the events that were taking place in the Omarska and Trnopolje camps, and therefore requests that any reference to these camps be excised.[186]

[185] Sikirica Motion, p. 9192.
[186] *Ibid*., p. 9192.

(c) Individuals named in the Indictment

102. The Defence concedes that there is some evidence to support Du{ko Sikirica's personal participation in the killings of one individual near the weigh hut, of one individual near the toilets and of 18 - 20 people outside Room 3, and in beatings of a number of individuals. Beyond that, it is submitted, there is no evidence of any other personal participation by the Defendant in any of the crimes alleged.[187]

103. In particular, the Sikirica Defence submits that the Prosecution has presented no evidence in respect of certain of the individuals listed in Attachment A.[188]

2. The Prosecution

104. The Prosecution acknowledges that Du{ko Sikirica should be acquitted in relation to Counts 12 and 13 of the Indictment. The Prosecution concedes that there is no evidence in relation to some of the individuals listed in Attachment A who have been cited by the Defence.

(a) Torture

105. The Prosecution acknowledges that, in light of the lack of evidence, the accused should be acquitted of liability under Article 7(3) of the Statute for the offences set forth in paragraph 14 and Counts 12-13 of the Indictment (torture).[189]

(b) Omarska and Trnopolje camps

106. The Prosecution submits that the campaign of persecution that "cleansed" Prijedor of its Muslim and Croat population in 1992 involved the coordinated and systematic efforts of hundreds of individuals, including Du{ko Sikirica. Criminal liability, it is submitted, attaches under Article 7(1) to actions perpetrated by a collectivity of persons in furtherance of a common criminal design.[190]

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[187] *Ibid*., p. 9191.
[188] *Ibid*.: Jasmin Cepic, Suvad ^ehic, Velid Dizdarevic, Vehidin Elezovic, Ismet Gredelj, Sabahudin Grozdanic, (FNU) Halilovic, Nijaz Huremovic, Faudin Hrustic, Dževad Karabegovic, Murat Mahmuljin, Refik Oru~, and Ervin Ramic.
[189] Prosecution Response to the Sikirica Motion, para. 14.
[190] *Ibid*., para 15, and annexed footnote 38. The Prosecution relies on the *Tadic* Appeals Judgement, which held that liability under the Statute includes:

107. The Prosecution submits that evidence has been put forward establishing that "in 1992 Bosnian Serb forces constructed a system of concentration camps in and around Prijedor that was essential to the Serbian plan to persecute Muslims and Croats and thereby rid the Prijedor area of non-Serbs".[191]

108. These camps, in the Prosecution's submission, constituted a system of repression to which Du{ko Sikirica was formally attached.[192] As the commander of the Keraterm camp, the Prosecution submits that Du{ko Sikirica held a position of superior and ultimate authority at one of these concentration camps, Keraterm, during mid-1992.[193] In the Prosecution's submission, there is evidence of the interlocking nature of these camps, which is demonstrated by several factors, including the frequent transfer of detainees between the camps.[194]

109. Moreover, the Prosecution contends that Du{ko Sikirica, as the commander of Keraterm, had the inherent authority to control access to the camp:[195] it is submitted that during the relevant time-period outsiders frequently entered the camp to harass, torture and kill the detainees.[196] This pattern, in the Prosecution's submission, is similar to the pattern that emerged in the Omarska camp, where some of the same "outsiders", individuals such as Zoran @igic and Duca Kneževic, entered the Omarska camp to harass, torture and kill the detainees there.[197]

> [T]hose modes of participating in the commission of crimes which occur where several persons having a *common purpose* embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. *Whoever* contributes to the commission of crimes by the group of persons or some members of the group, in execution of a *common criminal purpose*, may be held to be criminally liable. (*Tadic* Appeals Judgement, para. 190 (emphasis added)).

[191] Prosecution Response to the Sikirica Motion, para. 16 and annexed footnote 39. The Prosecution relies on the evidence of Witness C (T. 877, 879). Moreover, it is submitted that many of the detainees were aware of the existence of other camps, notwithstanding the fact that they were detained in Keraterm. Witness B (T. 769, 781-784); Witness C (T. 927, 990) and Witness E (T. 1239-1240, 1263). Given this knowledge, the Prosecution states that it may be inferred that Sikirica must have also been aware of the other camps and what occurred there.
[192] Prosecution Response to the Sikirica Motion, para. 16. The Prosecution refers to paras. 6-12 of the Indictment and paras. 18-36 of the Prosecution Pre-trial Brief in para. 17.
[193] Prosecution Response to the Sikirica Motion, para. 16.
[194] *Ibid*., para. 17 and annexed footnote 40.
[195] *Ibid*., para. 17.
[196] *Ibid*.
[197] *Ibid*.

110. Finally, the Prosecution submits that evidence has been adduced that Du{ko Sikirica read out a list of people to be transferred to Omarska at the closing of Keraterm in August 1992.[198]

111. The Prosecution therefore maintains that Du{ko Sikirica participated in the common criminal purpose, or the common design of the Serb authorities, to cleanse the Prijedor municipality of non-Serbs. The Keraterm camp, in conjunction with the Omarska and Trnopolje camps, was operated as part of a common criminal enterprise for the brutal confinement of Bosnian Muslims and Bosnian Croats until they were either killed or expelled from Prijedor.[199]

(c) Individuals named in the Indictment

112. The Prosecution acknowledges that no evidence was adduced with respect to six of the individuals listed in Attachment A and set forth in the Defence motion.[200] However, contrary to the assertions of the Defence in the Sikirica Motion, there has been evidence adduced that certain of these individuals were detained in Keraterm.[201]

B. Discussion

1. Counts 12 and 13 (torture)

113. Although counsel raised the issue of Du{ko Sikirica's liability under these Counts, he is not charged thereunder and hence, no question arises in relation to Rule 98 *bis.*

2. Omarska and Trnopolje

114. In relation to Du{ko Sikirica's responsibility for events in the Omarska and Trnopolje camps, many witnesses testified that, the day the Keraterm camp was closed, Du{ko Sikirica read out a list of 120 names of people who were subsequently transferred to

[198] *Ibid*. and annexed footnote 41.
[199] *Ibid*., para. 18.
[200] *Ibid*., para. 19 and annexed footnote 42, namely, Jasmin Cepic, Suvad ^ehic, Velid Dizdarevic, Faudin Hrustic, Refik Oru~, (FNU) Halilovic.
[201] Vehidin Elezovic, Ismet Gredelj, Sabahudin Grozdanic, Nijaz Huremovic, Dževad Karabegovic, Murat Mahmuljin, Ervin Ramic.

the Omarska camp.[202] Some of these witnesses also testified that later that same day the remaining Keraterm population was sent to the Trnopolje camp.[203] Moreover, the Prosecution's case is that the camps at Omarska, Trnopolje and Keraterm were central to the execution of the common design of the Bosnian Serbs to ethnically cleanse Prijedor of Bosnian Muslims and Bosnian Croats. There is, therefore, evidence in relation to Omarska and Trnopolje that meets the test as to the sufficiency of evidence for the purposes of Rule 98 *bis*.[204]

3. Individuals named in the Indictment

115. With regard to those individuals named in Attachment A, in respect of whom the Prosecution concedes it has presented no evidence, the Trial Chamber finds that the following names should be deleted from Attachment A: Jasmin Cepic, Suvad ^ehic, Velid Dizdarevic, Faudin Hrustic, Refik Oru~ and Fajzo Halilovic.

[202] Senad Kenjar (T. 3544-45); Salko Saldumivic (T. 3455); Witness A, who also testified that the detainees were beaten while boarding the buses (T. 651); Witness F (T.1434); Witness H (T. 1818); and Witness V (T. 3758).
[203] Witness A (T. 653); Witness F (T. 1434); Witness H (T. 1818); and Witness V (T. 3758).
[204] *See*, para. 10, *supra*.

V. DAMIR DO[EN

A. Arguments of the parties

1. The Defence

116. The Defence for Damir Došen seeks a judgement of acquittal in relation to Counts 3, 4 and 5 and Counts 12, 13, 14 and 15 of the Indictment. In relation to the allegations involving the Omarska and Trnopolje camps, the Defence submits that all references to these places in the Indictment and Attachment A should be excised. The Defence further submits that the Prosecution has failed to present any evidence relating to certain individuals listed as alleged victims in Attachment A.

(a) Counts 3, 4 and 5

(i) Došen's role as shift commander

117. The Došen Defence submits that the Prosecution failed to prove that the accused "discharged any kind of function within Keraterm that would allow him to exert any impact on the fact that people were detained there, to influence on the detention conditions or to exert any influence in his alleged capacity of shift commander, which he never was, on the behaviour within Keraterm."[205] The Defence, therefore, asks the Chamber to enter a judgement of acquittal in favour of Damir Došen in relation to Counts 3, 4 and 5.[206]

(ii) Omarska and Trnopolje camps

118. The Defence submits that the Prosecution, in seeking to demonstrate the participation of Damir Došen in the persecutory plan against Muslims and other non-Serbs in the Prijedor area, has failed to prove Damir Došen's involvement in the Omarska and Trnopolje camps.[207] The Došen Defence, therefore, asks the Chamber to enter a judgement of acquittal in favour of the accused in relation to those parts of paragraphs 35 to 42 of the

[205] Došen Motion, para. 21.
[206] *Ibid*., para. 22.
[207] *Ibid*., para. 19.

Indictment that include the Omarska and Trnopolje camps as part of the persecution charge.[208]

(iii) Individuals named in the Indictment

119. The Defence submits that, in relation to some of the individuals listed in Attachment A,[209] there is no evidence that they were subjected by Damir Došen to persecutions, inhumane acts and outrages upon personal dignity, as alleged in Counts 3, 4 and 5 of the Indictment. The Došen Defence, therefore, seeks a judgement of acquittal in favour of Damir Došen limited to those alleged victims, in relation to Counts 3, 4 and 5 of the Indictment.[210]

(b) Counts 12, 13, 14 and 15

120. In relation to the incident described in paragraph 45 of the Indictment, which underlies these Counts, the Došen Defence submits that the Prosecution has failed to demonstrate the occurrence of such an event,[211] or any of the circumstances therein alleged,[212] including in particular the involvement of Damir Došen.[213] In the Defence's submission, the evidence presented in the Prosecution case does not even meet any minimum standard pursuant to Rule 98 *bis*.[214] The Defence therefore asks the Chamber to enter a judgement of acquittal in favour of Damir Došen in relation to Counts 12, 13, 14 and 15.[215]

121. In particular, the Defence draws the Chamber's attention to those persons listed in Attachment A as alleged victims of the beatings described in paragraph 45 of the Indictment, who, in the Defence submission, were not mentioned in the Prosecution case either in connection with this or any other event.[216] The Defence, therefore, seeks a

[208] *Ibid*.
[209] *Ibid*., para. 17: Hasan Basic, Adem Behlic, Adem Brdar, Ferid Brkic, Refik Demirovic, [efik Ferhatovic, Raif Hopovac, Mujo Pasic, Senad Resic, Mustafa [vraka, Osman Karupovic, Suvad Cehic, Jasmin Cepic, Velid Dizdarevic, Agan Duratovic, Vehidin Elezovic, Ismet Gredelj, Sabahudin Grozdanic, Fajzo Halilovic, Fahrudin Hrustic, Fajzo Mujkanovic, Refik Oru~ and Nijaz Huremovic.
[210] *Ibid*.
[211] *Ibid*., para. 8.
[212] *Ibid*., para. 9-11, 13.
[213] *Ibid*., para. 12.
[214] *Ibid*., para. 14.
[215] *Ibid*., para. 22.
[216] *Ibid*., para. 18: Ahmet Melkic, Mustafa Kapetanovic, Fahrudin Mujkanovic, Ismajil Besic, Sejdo Besic, (FNU) Sehovic.

judgement of acquittal in favour of Damir Došen at least in relation to these individuals in respect of Counts 12 through 15 of the Indictment.[217]

2. The Prosecution

122. The Prosecution argues that sufficient evidence has been presented in order to support Counts 3, 4 and 5 of the Indictment. It concedes that there is no evidence in relation to some of the individuals listed as victims in Attachment A and cited in the Do{en Motion. In relation to Counts 12, 13, 14 and 15 of the Indictment, the Prosecution acknowledges that Damir Došen should be acquitted due to a lack of sufficient evidence.

(a) Counts 3, 4 and 5

(i) Došen's role as shift commander

123. The Prosecution contends that there is ample evidence that Damir Došen was employed as a shift commander at Keraterm and, in particular, that: (a) he was in a position of authority within the personnel hierarchy at Keraterm;[218] (b) in holding this position, he was superior to at least 10 guards and subordinate only to the camp commander;[219] (c) he had the power to assert considerable influence over the conditions which prevailed at Keraterm;[220] (d) on several occasions he in fact did assert his authority to alter the detention conditions,[221] although on other occasions he failed to relieve the suffering of the detainees.[222]

124. The Prosecution submits that there is also evidence that the accused himself was directly involved or present when acts of persecution, inhumane acts and outrages upon personal dignity took place.[223]

125. For the foregoing reasons, the Prosecution contends that there is evidence upon which a reasonable court could convict Damir Došen of persecutions, inhumane acts and

[217] *Ibid*., para. 22.
[218] Prosecution Response to the Došen Motion, para. 11.
[219] *Ibid*., para. 11.
[220] *Ibid*.
[221] *Ibid*.
[222] *Ibid*.
[223] *Ibid*.

outrages upon personal dignity under: (a) Article 7(1) of the Statute, on the basis of the common purpose doctrine; and (b) Article 7(3) of the Statute.[224]

(ii) Omarska and Trnopolje camps

126. The Prosecution relies on the same background allegations set forth in paragraphs 106-108 *supra* in relation to Du{ko Sikirica.[225]

127. The Prosecution submits that Damir Došen, as one of the shift commanders at Keraterm, held a position of superior authority at the Keraterm camp in mid-1992.[226]

128. In the Prosecution's submission, there is evidence of the interlocking nature of the Omarska, Keraterm and Trnopolje camps, which is demonstrated by several factors, including the frequent transfer of detainees between camps.[227] In addition, the Prosecution submits that there is evidence that the general conditions in the three camps were similar.[228]

129. The Prosecution contends that during the relevant time-periods, while Damir Došen was a shift commander at Keraterm, outsiders frequently entered the camp to harass, torture and kill the detainees.[229]

130. In the Prosecution's submission, evidence has been adduced that Damir Došen was involved in the reading out of a list of people to be transferred to Omarska at the closing of Keraterm in August 1992.[230] It is submitted that there is evidence to show that none of these people were seen or heard from again and that the remains of some of these individuals were later exhumed from a mass gravesite in Hrastova Glavica.[231]

131. Moreover, in the Prosecution's submission, there is evidence that Damir Došen knew of the fate of the persons who were to be sent to Omarska, namely that they would be beaten to death.[232]

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[224] *Ibid*., para. 12.
[225] *Ibid*., para. 7-9.
[226] *Ibid*., para. 8.
[227] *Ibid*., para. 9.
[228] *Ibid*.
[229] *Ibid*.
[230] *Ibid*.
[231] *Ibid*.
[232] *Ibid*.

132. The Prosecution, in relation to Damir Došen, draws the same conclusions as set forth in paragraph 111 *supra* in relation to Du{ko Sikirica.[233]

(iii) Individuals named in the Indictment

133. The Prosecution acknowledges that no evidence has been adduced with respect to seven individuals.[234] However, the Prosecution submits that evidence has been adduced that some of the individuals listed in the Do{en Motion were detained in the Keraterm camp.[235] The Prosecution contends that these individuals were subjected to persecution, inhumane acts and outrages upon personal dignity whilst detained at the Keraterm camp and argues that there is abundant evidence that all detainees were detained in adverse conditions and were ill-treated during their detention. The Prosecution relies on this evidence in support of its allegations that all detainees suffered persecution, inhumane acts and outrages upon personal dignity.[236]

(b) Counts 12, 13, 14 and 15

134. The Prosecution contends that there is evidence that the incident alleged in these Counts did in fact take place;[237] however, it is conceded that the only evidence connecting Damir Došen to the alleged incident is exculpatory in nature.[238] The Prosecution, therefore, acknowledges that the accused Damir Došen should be acquitted on Counts 12, 13, 14 and 15 of the Indictment.[239]

[233] *Ibid*., para. 10.
[234] *Ibid*., para. 4, namely, Jasmin Cepic, Suvad ^ehic, Velid Dizdarevic, Fahrudin Hrustic, Refik Oru~, Fajo Halilovic, Agan Darutovi}.
[235] *Ibid*., para. 5, namely, Hasan Basic, Adem Behlic, Adem Brdar, Ferid Brkic, Refik Demirovic, [efik Feratovic, Raif Hopovac, Mujo Pasic, Senad Resic, Mustafa [vraka, Osman Karupovic, Vehidin Elezovic, Ismet Gredelj, Sabahudin Grozdanic, Fajzo Mujkanovic, Nijaz Huremovic.
[236] *Ibid*., para. 6.
[237] *Ibid*., para. 3.
[238] *Ibid*.
[239] *Ibid*.

B. Discussion

1. Count 3 (persecutions)[240]

135. The Indictment identifies the following means through which Damir Došen is alleged to have committed the crime of persecutions: murder; torture and beating; sexual assault and rape; harassment, humiliation and psychological abuse; and confinement in inhumane conditions.

136. At the outset, the Trial Chamber will consider the issue of the general conditions in the camp, for which Damir Došen, among others, is alleged in the Indictment to have had responsibility.

137. Before examining the evidence, the Chamber reiterates that it is not seeking to identify evidence that satisfies it beyond reasonable doubt of the guilt of the accused; rather, it is seeking to ascertain whether there is evidence on the basis of which a reasonable Chamber could convict, leaving issues of credibility and reliability to the close of the case.

(a) Confinement of detainees in inhumane conditions in the Keraterm camp

138. The Indictment alleges that Damir Došen had the authority to alter the allegedly inhumane conditions in the Keraterm camp and it is on this basis that his responsibility in this regard arises. There is ample evidence that Damir Do{en was a shift leader in the Keraterm camp.[241]

139. There is evidence that the conditions which the detainees were forced to endure in the camp amounted to inhuman treatment. Many witnesses testified as to the meagre portions of food they received in the Keraterm camp and some testified as to the extent of their weight loss over the period they remained in detention.[242] Furthermore, there is

[240] It is assumed that, to the extent the charge of persecutions can be maintained, the charges of inhumane acts in Count 4 and outrages against personal dignity in Count 5, as crimes which are essentially lesser included offences of the crime of persecutions, may also be maintained.
[241] Salko Saldumovic, who testified that Došen introduced himself to the new inmates as one of the commanders of the camp (T. 3462); Witness A (T. 742); Witness C (T. 891).
[242] Witness A (T. 590–592); Witness B (T. 764); Witness C (T. 906–908); Witness E (T. 1276–1277); Witness F (T. 1398–1401); Witness G (T. 1704); Witness I (T. 2049–2050); Witness M (T. 2700); Jusuf Arifagi} (T. 1570–1571, 1601).

evidence that the toilet facilities were inadequate and that the detainees were forced to sleep in overcrowded rooms on wooden pallets.[243]

140. In addition, there is evidence that Damir Došen contributed to or had knowledge of the particularly inhumane conditions in which the detainees from the Brdo area were kept. Upon their arrival at the Keraterm camp, they were kept locked in Room 3 for several days without food or water.[244]

141. There is evidence that the poor physical conditions to which most of the detainees were subjected were accompanied by a perpetual atmosphere of terror.[245] There is evidence that beatings, mistreatment and murder, as discussed below, took place on a routine basis in the Keraterm camp.[246]

142. Witnesses have testified that, at its peak, there were over 1000 detainees being held in the Keraterm camp, all of whom, except one, were non-Serbs, and the majority of whom were of Muslim ethnicity.[247]

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[243] Witness A (T. 580, 586); Witness E (T. 1277); Witness F (T. 1398); Witness I (T. 2049-2050); Jusuf Arifagi} (T. 1571).

[244] Witness A (T. 637-638). In this regard, Witness N testified that during his first day in Room 3, he and the other inmates did not get any food. During the second day, they got some "transparent" slices of bread. As it was not enough for all the prisoners, they let the under-age prisoners have it, one slice each. The others did not receive anything. Witness N (T. 2843). Witness L testified that the conditions in Room 3 were 'dramatic': "You could not go to the toilet. You had no food. It was closed and it was very hot. So that it was unbearable." Witness L (T. 2505).

[245] Witness C (T. 913); Jusuf Arifagi} (T. 1571).

[246] Witness M: it is impossible to give an accurate number of the beatings that took place; by day, they happened on a daily basis. Whoever wanted to beat some detainees could do so. They happened less frequently during Došen's and Kolundžija's shifts, while Sikirica tolerated them a little bit more. (T. 2700). Witness G stated that "something was happening every night. Some people were taken out, some were killed, and others were beaten up". (T. 1706). Hajrudin Zubovic confirmed that "there wasn't really much difference between the shifts as regards the treatment of the prisoners…. [P]risoners got beaten regardless of the shift." (T.2572).

[247] Witness A testified that about 1350 people were detained in the Keraterm camp (T. 586); Witness B said that there was only one Serb detained at Keraterm (T. 777); he also testified that over 1000 were detained (T. 764); Witness F testified that between 1000 and 1200 people were detained (T. 1462). *See e.g.* Witness D (T. 1078).

(b) Further evidence against Damir Do{en

143. In addition to the facts discussed under heading (a) above, there is evidence that the accused Do{en was involved in specific incidents of murder, rape and mistreatment at the Keraterm camp.[248]

144. In relation to the fatal beatings of several of the detainees in the Keraterm camp, some witnesses have identified Do{en (by his nickname Kajin) as either being present, or as being in charge during the relevant period (i.e., the witness recalls that the incident took place on Damir Do{en's shift).[249] Many witnesses recalled an incident in which Jovo Rado~aj, the only Serb detained at the Keraterm camp, was subjected to a fatal beating.[250]

145. There is ample evidence linking Do{en to several other beatings that took place in the Keraterm camp.[251]

[248] Witness V reported that the morning after the Room 3 massacre, he was working with Damir Došen to remove the dead bodies from Room 3. At some point, they heard a moan coming from the toilet. Damir Došen, escorted by another guard, went into the WC. Witness V saw Damir Došen pulling out a pistol when he went in; then a shot was heard; and then Witness V saw Damir Došen coming out. He returned the pistol to his holster and said: "You have another one in the toilet". (T. 3760, 3840-3841).

[249] Witnesses B, D and I unanimously testified that the murder of Drago Tokmad`i} and the prolonged beatings of Esad Islamovi} and Edin Islamovic took place during Damir Do{en's shift and/or while he was present. Witness B (T. 775-778); Witness D (T. 1081-1085); Witness I (T. 2052-2055). Witness B testified that Ismet Kljajic and other detainees were also beaten up that night. (T. 775-778). Witness Z, the Prijedor head undertaker, testified that Drago Tokmadzic's body had received the worst beating of all the bodies that were brought to the cemetery from Keraterm. (T.4213). In relation to the alleged fatal beating of Sead Jusufagi}, known as ^ar, Witness E testified that he believes Kajin was present at the scene of that beating. (T. 1320–1325).

[250] Witness B (T. 775–777); Witness E (T. 1250–1251); Witness I (T. 2051). Witness D testified that, from his vantage point in Room 4, he was able to hear Damir Do{en say to Jovo Rado~aj "What Serb dick could make you?" before telling the guards to take him away, saying "We'll give him his tonight". Later that night, Witness D heard Kajin calling Jovo Rado~aj out and cursing him. He went out and the witness heard the sound of someone being beaten. When Rado~aj was returned to the room he was badly bruised and he died some hours later. (T. 1079–1080).

[251] Witness B testified that he was beaten on two occasions, the second of which took place on Damir Do{en's shift (he knows this because the beating stopped when Damir Do{en arrived) (T. 774, 837). Witness D testified that he was beaten on the same occasion as Drago Tokmadzic: he recalls asking Damir Do{en, the shift commander, for help, who then told the guards to stop beating him. (T. 1085). Fikret Hidi} testified that Damir Do{en once called him out of Room 1 and he was subjected to a severe beating by the Banovic brothers. The witness testified that Kajin was initially present, although he did not participate in the beating, but thereafter, he left. (T. 2338–2340). Anto Tomic testified about one incident during which Duca and one other soldier were beating prisoners from Room 3; they were also forced to beat each other. After Duca left and the situation had calmed down a little, Tomic and the others went out. In the witness's words: "(Kajin) was walking about among the prisoners. He was there a couple of minutes after Duca and the others left. The people from Room number 3 were still screaming with pain from the injuries they sustained, but he was outside with the other guards." (T. 1955-1956). Witness W reported that, on 20 July, Zigic and Kondic beat him all over his body, and Damir Došen was in the immediate vicinity. (T. 3880).

146. Witness X testified that Damir Došen and the guards on his shift entertained themselves by mistreating the detainees in various ways. For example, the guards and Damir Došen would order one inmate to chase another and if he did not catch that inmate, the soldiers would hit him. These types of incidents occurred regularly. The guards would also make the detainees sing Chetnik songs.[252]

147. There is also evidence that Damir Došen was involved in an incident of rape: Witness V testified that he overheard a woman called Dika telling another woman detained in Keraterm that she had been taken by Damir Do{en to the upper floor and raped there.[253]

(c) Omarska and Trnopolje camps

148. There is evidence that Damir Došen was aware of the situation at the Omarska and Trnopolje camps. In this regard, Salko Saldumovic testified that, upon arrival at the camp, he was met by Damir Došen, who introduced himself as one of the commanders; Damir Došen also told the new inmates that they were to be interrogated and that they had to tell everything they knew, otherwise they would be brought to Omarska and beaten until they told the truth.[254] Senad Kenjar testified about 120 detainees whose names were read out on 5 August and who were eventually taken to the Omarska camp: Kenjar said that he already knew that there were 120 names on the list because Damir Do{en had come to their room a few nights before, allegedly under the influence of alcohol, and said that about 120 men in the camp were responsible and that the others were not guilty and should not pay for the others.[255]

149. On the basis of the foregoing, the Chamber finds that there is evidence in relation to the crime of persecution against Damir Do{en that meets the test as to the sufficiency of evidence for the purposes of Rule 98 *bis.*

(d) Individuals named in the Indictment

150. The names of those individuals in Attachment A in respect of whom the Prosecution has conceded that it produced no evidence, will be deleted from Attachment A. This relates

[252] Witness X (T. 4022).
[253] Witness V (T. 3855).
[254] Salko Saldumovi} (T. 3462).
[255] Senad Kenjar (T. 3543-3544).

to the following: Jasmin Cepic, Suvad ^ehic, Velid Dizdarevic, Faudin Hrustic, Refik Oru~, Fajo Halilovic, and Agan Duratovi}.

2. Counts 12-15 (torture, inhuman acts and cruel treatment)

151. In relation to Counts 12-15 of the Indictment, the Trial Chamber confirms the Prosecution's position that there is no evidence linking Damir Do{en to the incident alleged in paragraph 45 of the Indictment.[256]

[256] Prosecution Response to the Došen Motion, para. 3.

VI. DRAGAN KOLUND@IJA

A. Arguments of the parties

1. The Defence

152. The Kolundžija Defence, for the purpose of the Motion under Rule 98 *bis*, concedes that there is sufficient evidence that (a) during the period set out in the Indictment, Keraterm was a detention camp in which killings and beatings took place and inhumane conditions existed; (b) Kolundžija was a guard leader on shift duty during much of that period and particularly on the night of the "Room 3 massacre";[257] (c) a large number of detainees were machine-gunned to death in Room 3 that night.[258]

(a) Counts 3, 4 and 5

153. In relation to the killing, beating or mistreatment of any detainees, the Kolund`ija Defence submits that, save for the evidence of two witnesses whose testimony is unreliable, there is no evidence, direct or by hearsay, that Dragan Kolundžija: (a) committed such acts; (b) was present and permitting such acts; or (c) planned, ordered, instigated, encouraged, assisted, acquiesced in or otherwise aided and abetted such acts.[259] The Defence submits that, on the contrary, there is much evidence that Dragan Kolundžija did not participate in any of the ways set out above.[260]

154. Moreover, the Kolun`ija Defence submits that there is no evidence that Dragan Kolundžija demonstrated an intention to do harm to any Muslim or other detainee.[261] The Defence contends that, on the contrary, it is unlikely that Dragan Kolundžija had the requisite *mens rea*, since there is abundant evidence that his intention was to help detainees.[262] In particular, it is submitted, *inter alia*, that there is evidence that: (a) Dragan

[257] Kolundžija Motion, p. 3.
[258] *Ibid*., p. 7.
[259] *Ibid*., p. 3.
[260] *Ibid*., p. 3.
[261] *Ibid*., p. 3.
[262] *Ibid*., pp. 4 and 5.

Kolundžija's shift was the best; (b) Dragan Kolundžija disagreed with what was going on at Keraterm; (c) he helped to improve conditions at the camp for detainees.[263]

155. In the Defence submission, the Prosecution has failed to prove that a shift leader in Dragan Kolundžija's position was officially accorded any power to discipline or punish those who offended on his shift.[264]

156. The Defence finally submits that there is no evidence that Dragan Kolundžija was a party to any plan to ethnically cleanse Muslims or Croats or even that he knew what was going on in other detention camps.[265]

157. In relation to the testimony of two witnesses, the Kolundžija Defence submits that the evidence of Witness N is flawed and is a case of mistaken identity,[266] and the evidence of Witness O fell short of proving the allegation in relation to which the witness testified.[267]

(b) Counts 6 and 7

158. The Defence submits that: (a) there is evidence that a large number of soldiers, substantially out-numbering the camp guards, came into the camp from outside before the shooting;[268] (b) there is evidence that the soldiers carried out the shooting;[269] (c) there is evidence that the machine-gun was placed outside Room 3 before Dragan Kolundžija's shift

[263] In particular the Defence submits that Dragan Kolundžija prevented beatings from taking place; permitted families to bring food, medicines, blankets to the camp; made food available when possible; allowed enough eating time; allowed the detainees to wash themselves and their clothes; permitted them to telephone their families and to meet them at the gate; regularly permitted them to spend the day-time in the open air, and to use the toilet when needed, even at night; permitted them to visit their friends in the other rooms; and locked them in at night for their protection against violent intruders.
[264] Kolund`ija Motion, p. 5.
[265] *Ibid*., p. 7.
[266] *Ibid*., pp. 5-7. The Defence adduces, *inter alia*, the following reasons in support: (a) there has been no identification of Dragan Kolundžija, save for the name; (b) it is unlikely that Dragan Kolundžija would have been on the same shift on 23 July as Damir Došen who, the witness said, was present and threatening to shoot anyone who looked up; (c) there is evidence that on the date of the beating (whether 25 or 26 July) Dragan Kolundžija had not yet returned to Keraterm (T. 3232); (d) no other witness to these events has given evidence that Dragan Kolundžija was present on any of the three occasions and Witness N could not recall anyone who had told him that the guard was Dragan Kolundžija; (e) Witness R, who was present in Room 3 when Ismet Duratovic was called out and seemingly shot with others, gave evidence that he thought that the guard who called the victim out was Faca and not Dragan Kolundžija; (f) Witness N's evidence was unreliable as demonstrated by inconsistencies between his testimony and his prior statements; (g) evidence of Dragan Kolundžija being party to such violence runs counter all the other evidence in the case.
[267] *Ibid*., p. 7. The Defence submits that the witness said that when the beating started, possibly some 50 metres away, Dragan Kolundžija told the witness to leave; the witness left and so had no idea whether Dragan Kolundžija tried to stop the beating or not.
[268] *Ibid*., p. 8.
[269] *Ibid*.

came on duty;[270] (d) it can be inferred from the evidence that Dragan Kolundžija must have lost any control that he may have had over the running of the camp during the firing of the machine-gun.[271] The Defence contends that, on the contrary, there is evidence that Dragan Kolundžija: (a) tried to stop the shooting once it had started;[272] (b) after the incident he left the camp in disgust and did not return for several days.[273]

159. In the event of the Chamber deciding against the submission of no case to answer on Counts 6 and 7, the Kolundžija Defence asks the Prosecution to make their election as to which Count they wish to proceed upon, considering that, in the Defence's submission, both Counts arise from the same facts.[274]

(c) Breakdown of the Prosecution's case

160. In the light of the above, the Defence argues that, although the *Kordi}* Decision on Motion for Acquittal held that, generally, the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98 *bis,* it did go on to say that there was one situation in which the Chamber was obliged to consider such matters, and that was where the Prosecution case had completely broken down as to the reliability and credibility of witnesses as a result of cross-examination.[275] The Defence submitted that the Prosecution case had completely broken down and, consequently, Dragan Kolund`ija should be acquitted.

2. The Prosecution

(a) Counts 3, 4 and 5

161. The Prosecution notes that the Defence has acknowledged that Dragan Kolundžija was a shift commander, and that there is overwhelming evidence that such a position was a position of authority within the hierarchy at Keraterm camp, which enabled him *de jure* and *de facto* to assert considerable influence over the conditions which prevailed at Keraterm;[276] in addition, that there is evidence that he did in fact assert his authority to alter conditions.

[270] *Ibid*.
[271] *Ibid*.
[272] *Ibid*.
[273] *Ibid*., p. 9.
[274] *Ibid*., p. 2.
[275] T. 4357-58.
[276] Prosecution Response to the Kolund`ija Motion, para. 6.

The Prosecution contends that there is evidence that (a) Dragan Kolundžija did not extend privileges to all detainees, even though he had the opportunity to do so;[277] (b) although conditions under Dragan Kolundžija's shift may have been better than during other shifts, they were still inhumane;[278] (c) there is evidence that Dragan Kolundžija was present when acts of persecutions, inhumane acts or outrages upon personal dignity were committed;[279] (d) Dragan Kolundžija failed to report or complain to the camp commander, and continued to act in his capacity as shift commander despite his knowledge that the prisoners were subjected to persecution and inhumane treatment during the entire time that he was engaged in his position at Keraterm.[280] The Prosecution also submits that there is evidence regarding specific incidents of mistreatment which underlie the persecution charge against Dragan Kolundžija.[281]

162. The Prosecution therefore contends that, in the light of the above, there is evidence on the basis of which the Trial Chamber could convict Dragan Kolundžija for Counts 3, 4 and 5.[282]

(b) Counts 6 and 7

163. The Prosecution contends that there is evidence in relation to Dragan Kolundžija's participation in the massacre. In particular, and contrary to the submission of the Defence, the Prosecution submits that evidence has been presented that Dragan Kolundžija knew what was going to happen[283] and that he had influence over the people who were conducting the shooting.[284] In light of the above, the Prosecution therefore maintains that

[277] *Ibid*., para. 4.
[278] *Ibid*.
[279] *Ibid*., para.10. The Prosecution submits that there is evidence that Dragan Kolundžija was present and took part in the Room 3 massacre.
[280] *Ibid*., para.8.
[281] *Ibid*., para.10. In particular the Prosecution submits that: (1) there is evidence that Kolundžija was present on the occasion when people from the Brdo area were beaten as they got off the bus; (2) there is evidence that Dragan Kolundžija was present and took part in the Room 3 massacre; (3) Witness N testified that on one occasion Dragan Kolundžija and his group arrived to the camp and started beating prisoners from Room 3; (4) there is evidence that on the afternoon prior to the Room 3 massacre, 20 prisoners were beaten during Dragan Kolundžija's shift; and (5) given the shift structure, it can be inferred from the evidence that the prolonged mistreatment of the prisoners from Brdo continued also during Dragan Kolundžija's shift.
[282] *Ibid*., para. 11.
[283] *Ibid*., para.15. The Prosecution stresses that, according to the evidence, Dragan Kolundžija ordered Room 3 to be emptied, that he participated in the unusual treatment of the people from Brdo locked in Room 3; and that, after his shift began that day, he participated in the preparation of the shooting.
[284] *Ibid*., paras.18-20. The Prosecution submits that the evidence in relation to the words used by Dragan Kolundžija on the occasion of the shooting unanimously shows that he tried to stop the firing, *but only* at Rooms 1 and 2 and that the soldiers obeyed his orders. In the oral arguments, the Prosecution underlined that,

Dragan Kolundžija acquiesced in the shooting at the prisoners in Room 3 and is therefore guilty as party to murder under Counts 6 and 7.[285]

B. Discussion

1. Counts 3, 4 and 5

164. Before examining the evidence, the Chamber reiterates that it is not seeking to identify evidence that satisfies it beyond reasonable doubt of the guilt of the accused; rather, it is seeking to ascertain whether there is evidence on the basis of which a reasonable Chamber could convict, leaving issues of credibility and reliability to the close of the case.

165. Dragan Kolundžija is charged in the Indictment, along with Damir Došen, with responsibility for the inhumane conditions at the Keraterm camp. The evidence in relation to these Counts has been discussed above in paragraphs 138-142. The Chamber therefore reiterates its findings in this regard in relation to Dragan Kolundžija. The Trial Chamber also notes that there is evidence that Dragan Kolund`ija was a shift leader at the Keraterm camp.[286]

166. In addition to the facts discussed in the preceding paragraph, Dragan Kolund`ija is alleged to have participated in the massacre of the Room 3 detainees at the Keraterm camp. This act, while charged separately as murder under Counts 6 and 7, also underlies the charge of persecutions in Count 3. As the Kolund`ija Defence conceded, this incident took place on the evening of 24 July 1992, when Dragan Kolund`ija's shift was on duty.[287] There is evidence that Dragan Kolund`ija knew that the shooting was about to start, that he talked with the soldiers beforehand, that he asked the soldiers not to shoot without his order,[288] that he was, at one stage, present while the shooting was going on, and that he ordered the soldiers, who obeyed,[289] not to shoot, at least into Rooms 1 and 2.[290]

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before the shooting started, six hours went by since Dragan Kolundžija's shift took over, and therefore he must have known what preparation was going on.

[285] *Ibid*., para. 20.

[286] *See* Witness M (T. 2689); Hajrudin Zubovi} (T. 2569).

[287] Kolundžija Motion, p. 3.

[288] Witness C (T. 921, 923-924).

[289] Witness V (T. 3865).

[290] Witness A (T. 642–644); Witness B (T. 789); Witness F (T. 1431–1434).

167. There is also evidence relating to the incident involving Dragan Kolund`ija in the beating of 20 detainees on the afternoon prior to the Room 3 massacre.[291] There is evidence that this incident took place on Dragan Kolund`ija's shift.[292]

168. In addition, there is evidence of detainees being beaten or mistreated either in Dragan Kolundžija's presence[293] or during his shift.[294]

2. Counts 6 and 7

169. The evidence relating to this incident and to the participation of Dragan Kolundžija in it has been dealt with in paragraphs 166-168 above.

170. With regard to the submission that the Prosecution must elect between Counts 6 and 7, the Chamber endorses the finding in the *Kunarac* case that issues as to cumulative charges are to be dealt with at the end of the case on the basis of an assessment of all the evidence.[295]

171. The Trial Chamber rejects the submission that the Prosecution case had completely broken down on the basis of cross-examination, and finds that there is evidence on the basis of which a reasonable Chamber could convict Dragan Kolund`ija.

[291] Hajrudin Zubovi} (T. 2580-82); Witness B (T.786-88). Witness M (T. 2704-06) who testified that he could see that the detainees were beaten to death; in addition, some of them were forced to perform sexual acts upon each other.
[292] Hajrudin Zubovi} (T. 2582); Witness M (T. 2704-06); Witness S (T. 3624-26).
[293] Fikret Hidic (T.2354-55); Witness N (T. 2875-77).
[294] Witness W (T. 3943); Witness N (T. 2849-2853, 2872-2875); Witness O, who testified as to seeing new inmates who arrived from the Brdo area being beaten in Dragan Kolundžija's presence (T. 3030).
[295] *Kunarac* Decision on Motion for Acquittal, para. 27.

VII. DISPOSITION

172. For the foregoing reasons, the Trial Chamber

(1) **GRANTS** the Motions to the extent that Counts 1 and 2 of the Indictment are dismissed in respect of the accused Du{ko Sikirica, that Counts 12 to 15 of the Indictment are dismissed in respect of the accused Damir Do{en, and that the names of Jasmin Cepic, Suvad ^ehic, Velid Dizdarevic, Faudin Hrustic, Refik Oru~, Fajo Halilovic, and Agan Duratovi} are deleted from Attachment A of the Indictment; and

(2) **DISMISSES** the rest of the Motions.

Done in both English and French, the English text being authoritative.

_____
Patrick Robinson
Presiding

_____ _____
Richard May Mohamed Fassi Fihri

Dated this third day of September 2001
At The Hague
The Netherlands

[**Seal of the Tribunal**]