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ANNEX A

AUTHORITY 38

UNITED NATIONS

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

Case No.: IT-97-25-A

Date: 17 September 2003

Original: English / French

IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 September 2003**

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:
Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:
Mr Mihajlo Bakrač
Mr Miroslav Vasić

B. Law applicable to the joint criminal enterprise and aiding and abetting

1. Joint criminal enterprise

28. Article 7(1) of the Statute sets out several forms of individual criminal responsibility which apply to all the crimes falling within the Tribunal's jurisdiction. It reads as follows:

> **Article 7**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

29. This provision lists the forms of criminal conduct which, provided all the other conditions are satisfied, may result in the accused's incurring criminal responsibility if he has committed any one of the crimes provided for by the Statute in one of the ways set out in this provision. Article 7(1) of the Statute does not make explicit reference to "joint criminal enterprise". However, the Appeals Chamber recalls that, after considering the question in the *Tadić* Appeals Judgement,[28] it concluded that participation in a joint criminal enterprise as a form of liability, or the theory of common purpose as the Chamber referred to it, was implicitly established in the Statute and existed in customary international law at the time of the facts, that is in 1992. The Appeals Chamber also specified that the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose:

> 220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. [...].
>
> 226. The Appeals Chamber considers that the consistency and cogency of the case-law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

[28] To reach this finding in the *Tadić* Appeals Judgement, the Appeals Chamber interpreted the Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council. It also considered the specific characteristics of many crimes perpetrated in war. In order to determine the status of customary law in this area, it studied in detail the case-law relating to many war crimes cases tried after the Second World War. It also considered the relevant provisions of two international Conventions which reflect the views of a great many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, adopted by a consensus vote by the General Assembly in its resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998; Article 25 of the Statute of the International Criminal Court, adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome). Moreover, the Appeals Chamber referred to national legislation and case-law stating that it was a matter of specifying that the notion of common purpose, established in international criminal law, has foundations in many national systems, while asserting that it was not established that most, if not all of the countries, have the same notion of common purpose.

> 188. This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission[29] of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.
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> 191. [...] Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.
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> 192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as an aider and abettor might understate the degree of their criminal responsibility.

These findings were recently upheld by the Appeals Chamber in its ruling on Dragoljub Ojdanić's Motion Challenging Jurisdiction:

> 19. As noted in the *Tadić* Appeal Judgment, the Secretary-General's Report provided that "all persons" who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible.[30] Also, and on its face, the list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase "*or otherwise* aided and abetted" suggests. But the Appeals Chamber does not need to consider whether, outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(1). It is indeed satisfied that joint criminal enterprise comes within the terms of that provision.[31]
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> 20. In the present case, Ojdanić is charged as a co-perpetrator in a joint criminal enterprise the purpose of which was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.[32] The Prosecution pointed out in its indictment against Ojdanić that its use of the word "committed" was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. By the term "committing", the Prosecution means participation in a joint criminal enterprise as a co-perpetrator.[33] Leaving aside the appropriateness of the use of the expression "co-perpetration" in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of "commission" pursuant to Article 7(1) of the Statute, rather than as a form of accomplice liability. The Prosecution's approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. Thus, the Appeals Chamber views participation in a joint criminal enterprise as a form of "commission" under Article 7(1) of the Statute.[34]

30. After considering the relevant case-law, relating principally to many war crimes cases tried after the Second World War, the *Tadić* Appeals Judgement sets out three categories of cases regarding joint criminal enterprise:

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[29] It should be noted that the authoritative English version uses the term commission.
[30] *Tadić* Appeals Judgement, para. 190, quoting paragraph 54 of the Secretary-General's Report.
[31] *Ojdanić* Decision.
[32] Indictment, para. 16.
[33] Indictment, para. 16.
[34] Emphasis added.

The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.[35]

[...] The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are Dachau Concentration Camp,[36] decided by a United States court sitting in Germany and Belsen,[37] decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[38] In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design. The convictions of several of the accused appear to have been based explicitly upon these criteria. This category of cases is really a variant of the first category.[39]

[...] The third category concerns cases involving a common design where one of the perpetrators commits an act which, while outside the common design, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (in other words to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those

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[35] *Tadić* Appeals Judgement, para. 196.

[36] *Trial of Martin Gottfried Weiss and Thirty-Nine Others*, General Military Government Court of the United States Zone, Dachau, Germany, 15 November to 13 December 1945, *Law Reports*, vol. XI, p. 5.

[37] *Trial of Josef Kramer and 44 Others,* British Military Court, Luneberg, 17 September to 17 November 1945, *Law Reports,* vol. II, p. 1.

[38] See the *Dachau Concentration Camp* case, *Law Reports*, vol. XI, p. 14:
"It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute acting in pursuance of a common design to violate the laws and usages of war. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary". In this case, the Judge Advocate summarised with approval the legal argument of the Prosecution in the following terms: "The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force. In one way or another, in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender satisfied that they were doing so , then they must, each and every one of them, assume responsibility for what happened." (*Belsen* case, *Law Reports*, vol. II, p. 121). In particular, the accused Kramer appears to have been convicted on that basis. See *ibid.*, p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held*" (emphasis added).

[39] *Tadić* Appeals Judgement, paras. 202 and 203.

> civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk [...]. The case law in this category concerned first of all cases of mob violence, that is situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. The cases most illustrative of this category are *Essen Lynching* and *Borkum Island*.[40]

31. The same Judgement then sets out the constituent elements of the *actus reus* and *mens rea* of this form of liability. The Appeals Chamber declares that the *actus reus* of this mode of participation in one of the crimes provided for in the Statute is common to each of the three categories of cases set out above and comprises the following three elements:

> (i) *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is demonstrated clearly by the *Essen Lynching* and the *Kurt Goebell* cases.
>
> (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
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> (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[41]

32. The Appeals Chamber considered that the *mens rea* differs according to the category of common design under consideration:

- The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).
- For the second category which, as noted above, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.
- The third category requires the *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of

[40] *Tadić* Appeals Judgement, para. 204.
[41] *Ibid.*, para. 227.

the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*[42]

2. Differences between participating in the joint criminal enterprise as a co-perpetrator and aiding and abetting

33. Also in the *Tadić* Appeals Judgement, the Appeals Chamber made a clear distinction between acting in pursuance of a common purpose or design to commit a crime and aiding and abetting the commission of a crime.

> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
>
> (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
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> (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.
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> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.[43]

[42] *Ibid.*, para. 228.
[43] *Ibid.*, para. 229.

IV. THE PROSECUTION'S APPEAL

A. The Prosecution's first ground of appeal: definition of participation in a joint criminal enterprise and its application in this instance

64. The first ground of appeal raised by the Prosecution alleges errors of law in the Trial Chamber's definition of the constituent elements of participation in a joint criminal enterprise[89] and in the application of this definition to the facts of the case. The Prosecution considers that, had the definition of joint criminal enterprise been applied correctly, Krnojelac would have been found guilty as a co-perpetrator and not as an aider and abettor to the crimes of persecution (imprisonment and inhumane acts) and cruel treatment (living conditions), pursuant to counts 1 and 15 of the Indictment. The Prosecution therefore asks for the verdict to be amended and the sentence increased.[90]

1. Alleged errors of law in the definition of participation in a joint criminal enterprise

65. The Prosecution relies on the definition of participation in a joint criminal enterprise as a form of "commission" within the meaning of Article 7(1) of the Statute as set out in the *Tadić* Appeals Judgement. It argues that this was followed in the *Krstić* and *Kvočka* Judgements,[91] while conceding that certain first instance decisions do not follow it.[92] According to the Prosecution, the "commission" of a crime under Article 7(1) of the Statute means not only that the accused actively committed the various constituent elements of the crime but also that he committed them with others as co-perpetrator, through participation in a joint criminal enterprise.[93]

66. The Prosecution submits that the Trial Chamber committed four errors of law in defining the elements of responsibility arising from participation in a joint criminal enterprise.

(a) Identification of a third category of "participant"

67. The Prosecution maintains that the Trial Chamber committed an error of law when it classified the responsibility of a participant in a joint criminal enterprise as a form of "accomplice liability" distinct from the commission of the crime.[94] According to the Prosecution, this approach

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[89] On this point the Prosecution Notice of Appeal refers, in particular, to paragraphs 72 and 73 of the Judgment (Prosecution Notice of Appeal, p. 2).
[90] Prosecution Notice of Appeal, p. 3.
[91] Prosecution Brief, paras. 2.3 to 2.8.
[92] *Ibid.*, para. 2.9. The Prosecution specifically quotes *The Prosecutor v. Brđanin and Talić,* Decision on Motion by Tihomir Talić for Provisional Release, case no. IT-99-36-T, Trial Chamber II, 28 March 2001, paras. 42 to 43.
[93] Prosecution Brief, para. 2.4, referring to the *Tadić* Appeals Judgement and para. 2.10.
[94] *Ibid.*, para. 2.14.

is tantamount to finding three types of responsibility: the principal offender who physically commits the crime, the co-perpetrator who participates in the joint criminal enterprise without physically committing it and the aider and abettor who knowingly contributes to the criminal enterprise without sharing the intent.[95] The Prosecution argues that this distinction between the principal offender and the co-perpetrator runs contrary to the *Tadić* Appeals Judgement, which does not differentiate between those who perform the *actus reus* of the crime and those who significantly contribute to it and share the intent.[96] The Prosecution also challenges the Trial Chamber's findings in paragraphs 75 to 77 of the Judgment which, in the Prosecution's view, provides that it is not necessary to distinguish between the different types of participant in the crime when it comes to sentencing.[97]

68. In support of its argument, the Prosecution refers to paragraph 77 of the Judgment, of which the relevant part of the authoritative English version reads as follows:

> [...] This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice. This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadić*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice. For convenience, however, the Trial Chamber will adopt the expression "co-perpetrator" (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender.[98]

69. Krnojelac contends that this submission is mere speculation since he was not found guilty as a participant in a joint criminal enterprise but as an aider and abettor. He adds that, even if the Prosecution's theoretical submissions with regard to the joint criminal enterprise are valid, it has not been proved that he shared the intent of the participants in the joint criminal enterprise and therefore, if the Prosecution's argument is accepted, he should be found guilty as a co-perpetrator.[99] In reply to this argument the Prosecution states that "this issue was raised for the purpose of having an erroneous legal finding corrected by the Appeals Chamber, and did not strictly relate to the Respondent's conduct and the crimes attributed to him."[100]

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[95] *Ibid.*, para. 2.11, referring to para. 73 of the Judgment, footnote 236 and para. 2.13.
[96] *Ibid.*, para. 2.11, referring to para. 73 of the Judgment, and para. 2.14.
[97] *Ibid.*, para. 2.13.
[98] Emphasis added. The corresponding section of the French version of the Judgment reads as follows: "[...] En outre, la présente Chambre conteste la validité de la distinction que la Chambre de première instance I a tenté d'établir entre un co-auteur et un complice. Elle préfère suivre l'avis de la Chambre d'appel *Tadić*, pour laquelle le participant à une entreprise criminelle commune qui n'était pas l'auteur principal est responsable au même titre qu'un complice. Cependant, par commodité, la Chambre de première instance adoptera le terme "coauteur" (au sens de *accomplice)* lorsqu'elle parlera d'un participant à une entreprise criminelle commune qui n'était pas l'auteur principal".
[99] Defence Response, para. 16.
[100] Prosecution Reply, para. 2.3.

70. The Appeals Chamber considers that the Prosecution's argument raises the question of the meaning given to the term *accomplice* by the Trial Chamber. The Appeals Chamber notes first of all that, in the case-law of the Tribunal, even within a single judgement, this term has different meanings depending on the context and may refer to a *co-perpetrator* or an *aider and abettor*.[101]

71. The Appeals Chamber notes that, although the French version of the *Tadić* Appeals Judgement faithfully reflects the meaning given by the Appeals Chamber to the term *accomplice* depending on the context, the same cannot be said of the French version of the Judgment under appeal. Thus, in paragraph 77 of the French version of the Judgment, even though footnote 230 specifies that an *accomplice* in a joint criminal enterprise is a person who shares the intent to carry out the enterprise and whose acts facilitate the commission of the agreed crime,[102] the term *accomplice* was translated by *complice* instead of *coauteur* in the body of the paragraph.

72. The Appeals Chamber will now consider the question whether or not the Trial Chamber erred in its use of the terms *accomplice* and *co-perpetrator*, that is *"coauteur"*, with regard to the participants in a joint criminal enterprise other than the principal offender. The Appeals Chamber notes that, in so doing, the Trial Chamber used the terminology of the *Tadić* Appeals Judgement. The Trial Chamber noted in paragraph 77 of the Judgment under appeal that "for convenience [...] the Trial Chamber will adopt the expression '*co-perpetrator*' (as meaning a type of *accomplice*) when referring to a participant in a joint criminal enterprise who was not the principal offender." Footnote 230 then clarifies that an *accomplice* in a joint criminal enterprise is a person who shares the intent to carry out the enterprise and whose acts facilitate the commission of the agreed crime. The Appeals Chamber holds that the Trial Chamber has not therefore erred in its use of the terms *accomplice* and *co-perpetrator*.

73. The Appeals Chamber will next consider whether or not the Trial Chamber committed an error of law in deciding that the notion of "commission" within the meaning of Article 7(1) of the

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[101] Thus, the *Tadić* Appeals Judgement concludes in paragraph 220 that: "[...] the notion of common design as a form of accomplice liability is firmly established in customary international law [...]." This sentence was correctly translated in the French version of the Appeals Judgement as: "[...] la notion de dessein commun en tant que forme de responsibilité au titre de coauteur est fermement établie en droit international coutumier [...]". In fact, given the context of the passage, the Appeals Chamber is clearly referring to this notion in the sense of co-perpetrator. In contrast, in paragraph 229(ii) of the Appeals Judgement, the term "*accomplice*" is clearly used in the sense of *aider and abettor* and was translated as such: "in the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan, or agreement is required: indeed, the principal may not even know about the accomplice's contribution," which, in the French version of the Appeals Judgement, is: "Dans le cas du complice, il n'est pas nécessaire de prouver l'existence d'un projet concerté et, *a fortiori*, la formulation préalable d'un tel plan. Aucun projet ou accord n'est nécessaire; d'ailleurs, il peut arriver que l'auteur principal ne sache rien de la contribution apportée par son complice".

[102] Footnote 230 also refers to *Furundžija* Judgement, paras. 245 and 249 and *Kupreškić* Judgement, para. 772 and to *Tadić* Appeals Judgement, para. 229 and *Furundžija* Appeals Judgement, para. 118.

Statute must be reserved for the principal perpetrator of the crime. Although it considered that "the seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender,"[103] the Trial Chamber held that the term "committed" did not apply to a participant in a joint criminal enterprise who did not personally and physically commit the crime. On this point, the relevant passage of the Judgment is in paragraph 73 and reads as follows in the authoritative English version:

> [...] The Prosecution has sought to relate the criminal liability of a participant in a joint criminal enterprise who did not physically commit the relevant crime to the word "committed" in Article 7(1), but this would seem to be inconsistent with the Appeals Chamber's description of such criminal liability as a form of accomplice liability [footnote, referring to *Tadić* Appeals Judgement, para. 192] and with its definition of the word "committed" as "first and foremost the physical perpetration of a crime by the offender himself" [footnote, referring to *Tadić* Appeals Judgement, para. 188]. For convenience, the Trial Chamber proposes to refer to the person who physically committed the relevant crime as the "principal offender".[104]

Unlike the Trial Chamber, the Appeals Chamber does not consider that the Prosecution's submission is contrary to the *Tadić* Appeals Judgement. The Appeals Chamber notes that paragraph 188 of the *Tadić* Appeals Judgement, partially quoted by the Trial Chamber, reads as follows:

> This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission[105] of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

The Appeals Chamber accepts the Prosecution submission as justified and points out that it has since been upheld in the *Ojdanić* case. The Chamber views participation in a joint criminal enterprise as a form of "commission" under Article 7(1) of the Statute. For more detail on this point, the Appeals Chamber refers to the section of this Judgement on the applicable law.[106]

74. However, the Appeals Chamber considers that the Trial Chamber's error is not such as to render the Judgment invalid and notes that the Prosecution is asking only for the erroneous legal findings on this point to be corrected.

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[103] Judgment, para. 75.

[104] Given the context, the French version of this extract from the Judgment incorrectly translated the term "*accomplice liability*" by "*responsabilité du complice*". This version reads as follows: "L'Accusation a essayé de relier la responsabilité pénale d'un participant à l'entreprise criminelle commune qui n'a pas commis personnellement et matériellement le crime en question au terme 'commis' figurant à l'article 7 1) du Statut; cette approche semblerait toutefois en contradiction avec l'analyse de la Chambre d'appel, qui voit dans cette responsabilité une variante de la responsabilité du complice, ainsi qu'avec la définition du terme 'commis' ('d'abord et avant tout la perpétration physique d'un crime par l'auteur lui-même'). Par commodité la Chambre de première instance se propose d'appeler 'auteur principal' la personne qui a matériellement commis le crime en question".

[105] It should be noted that the authoritative English version uses the term "commission".

[106] See paras. 28 to 32 of this Judgement.

75. Finally, the Appeals Chamber will consider the Prosecution submission on the Trial Chamber's findings in paragraphs 75 and 77 of the Judgment relating to whether or not a distinction must be made between the principal offender and the other participants in a joint criminal enterprise when determining the sentence. The Trial Chamber considered that such a distinction was not necessary when assessing the maximum sentence to be passed on each individual.[107] It emphasised that the sentence should reflect the serious nature of the acts whatever their classification and that there were circumstances in which a participant in a joint criminal enterprise might deserve a higher sentence than the principal offender.[108] It also stated that the acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor to the principal offender since a participant in a joint criminal enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent. The Appeals Chamber considers that the Prosecution did not show those findings to be erroneous.

(b) Erroneous conflation of the first two categories of joint criminal enterprise

76. The error alleged here covers two objections with regard to paragraph 81 of the Judgment. The Prosecution submits firstly that the Trial Chamber erred in law by conflating the first two categories of joint criminal enterprise into a single category.[109]

77. Paragraph 81 of the Judgment reads as follows:

> A person participates in that joint criminal enterprise either:
>
> (i) by participating directly in the commission[110] of the agreed crime itself (as a principal offender);
>
> (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit[111] that crime; or
>
> (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

78. The Prosecution maintains that this wording does not cover the entire range of criminal actions set out in the definition of the first two categories of joint criminal enterprise given in the *Tadić* Appeals Judgement. It holds that the wording of paragraph 81 requires that a participant in the joint criminal enterprise who is absent at the time of the facts should belong to a criminal

[107] Judgment, paras. 74 and 75.
[108] *Ibid.*, paras. 75 to 77.
[109] Prosecution Brief, para. 2.15.
[110] It should be noted that the English version uses the term "commission".
[111] It should be noted that the English version uses the term "to commit".

system. If the criminal enterprise cannot be characterised as a system, an individual, for example a political leader, who played an important role in organising and planning a joint criminal enterprise but who was absent at the time of the facts, cannot be held liable. The Prosecution states that, according to the *Tadić* Appeals Judgement, two of the elements of the *actus reus* required for a joint criminal enterprise are (1) a plurality of persons and (2) a joint criminal design. That a system existed was envisaged only in relation to the second form of joint criminal enterprise identified on the basis of cases which relied on a "system of ill-treatment" and is not a general condition applicable to other forms of joint criminal enterprise.

79. Generally, Krnojelac objects to the Trial Chamber's having conflated these two forms of liability. He also states that the second form of liability, linked to the existence of a system, is presented in the *Tadić* Appeals Judgement as a variant of the first, specific to the concentration camp cases tried after the Second World War, and must not be applied to other detention camp cases such as this.[112] The Prosecution replies that this Defence submission is unfounded and was clearly rejected in the *Kvočka* Judgement, which referred to events occurring in a detention camp in the context of the conflict in the former Yugoslavia.[113]

80. The Appeals Chamber notes that, in paragraphs 80 and 81 of the Judgment under appeal, the Trial Chamber defines the basic forms of joint criminal enterprise.[114] The Appeals Chamber observes that, in paragraph 80 of the Judgment, the Trial Chamber defines the understanding which characterises a joint criminal enterprise and, in paragraph 81, lists the types of conduct which it considers characterise the different forms of participation in a joint criminal enterprise. The Appeals Chamber understands, moreover, that in this list the Trial Chamber intends to identify all the forms of participation in a joint criminal enterprise. The Appeals Chamber finds that the Prosecution's objection that the Trial Chamber arbitrarily conflated the first two forms of participation in a joint criminal enterprise is unfounded. The three forms of participation described by the Chamber are clearly alternatives in view of the use of the word "either" in the sentence – "A person participates in that joint criminal enterprise either:" – and the Trial Chamber goes on to set out the different forms of participation.

81. The Appeals Chamber will now consider the Prosecution's second objection relating to the Trial Chamber's use of the words "by being present at the time when the crime is committed" in the second form of participation set out in sub-paragraph (ii). The Appeals Chamber notes that, in

[112] Defence Response, paras. 17 to 25.
[113] Prosecution Reply, para. 2.4.
[114] See, in particular, the Trial Chamber's explanations in paragraph 78 of the Judgment.

accordance with its decision in the *Tadić* Appeals Judgement, once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. The party concerned need not physically and personally commit the crime or crimes set out in the joint criminal enterprise. The Appeals Chamber considers that the presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required either for this type of liability to be incurred.

82. The Appeals Chamber considers that the Judgment contains an obvious contradiction in this respect between subparagraph (ii) of paragraph 81 and footnote 236 to the following paragraph, which reads as follows:

> Decision on Form of Second Amended Indictment, 11 May 2000. In that decision, the direct participant in the joint criminal enterprise, i.e. the person who physically perpetrates the crime, is referred to as a co-perpetrator rather than a perpetrator. Given the ambiguity surrounding the term co-perpetrator engendered by the Prosecution's arguments referred to above, the Trial Chamber prefers to use the term principal offender to make it clear that it is only the person who physically carries out the crime personally that commits that crime. In paragraph (ii), the Trial Chamber refers to a person being present at the time the offence is committed by another. However, presence at the time a crime is committed is not necessary. A person can still be liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out.[115]

That decision shows that the list in paragraph 81 of the Judgment is taken entirely from paragraph 15 of the decision with the following difference: footnote 24 to point (ii) of the decision states that "the presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime." Consequently, the Appeals Chamber is satisfied that the Trial Chamber sought in its Judgment to correct the list taken from its decision of 11 May 2000 by specifying that a participant in a joint criminal enterprise need not be present at the time the crime is committed by the principal offender. This clarification appears in a footnote and seems to contradict the body of the Judgment. However, the Appeals Chamber is satisfied that this is a drafting error and not an error of law. The Prosecution's ground of appeal is therefore also rejected on this point.

(c) Scope of the common state of mind and required additional agreement

83. The first error of law pleaded by the Prosecution in this regard relates to paragraph 83 of the Judgment. The Prosecution contends that the Trial Chamber committed an error of law when it held that, in order to establish the basic form of joint criminal enterprise, the Prosecution must demonstrate that "each of the persons charged and (if not one of those charged) the principal

offender or offenders had a common state of mind, that which is required for that crime." The Prosecution argues that this is not required according to *Tadić*. The Prosecution adds that such an approach could render the notion of joint criminal enterprise redundant in the context of State criminality.[116] It gives as an illustration the example of high-level political and military leaders who, from a distant location, plan the widespread destruction of civilian buildings (hospitals and schools) in a particular area in order to demoralise the enemy without the soldiers responsible for carrying out the attacks sharing the objective in question or even knowing the nature of the relevant targets. The Prosecution argues that, in that context, the Trial Chamber's criterion would make it impossible to implement the concept of joint enterprise.

84. The Appeals Chamber finds that, apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise[117] presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent. The Appeals Chamber notes that the Prosecution does not put forward any contrary arguments and does not show how this requirement contravenes the *Tadić* Appeals Judgement, as it alleges. The Appeals Chamber also notes that the example given by the Prosecution in support of its argument on this point appears more relevant to the planning of a crime under Article 7(1) of the Statute than to a joint criminal enterprise.

85. The second error of law raised by the Prosecution concerns the Trial Chamber's requirement that a participant in a joint enterprise, who is not a principal offender, must have agreed with the principal offender or offenders to commit the various crimes constituting the joint criminal enterprise. The Prosecution argues that such a requirement is incompatible with the context of a system of ill-treatment as set out in the *Tadić* Appeals Judgement in the second category of cases.[118] The Prosecution submits that a person who holds the highest position of authority in a system where detainees are being ill-treated on discriminatory grounds, who knows that crimes are being committed within it and furthermore contributes to those crimes, cannot be considered a mere aider and abettor to the crimes but must be deemed a co-perpetrator. The Prosecution also contends that the Trial Chamber's approach is tantamount to denying the specific nature of the system and to "slicing" it into unconnected events prior to assessing whether, for each incident or set of events, there existed between the physical perpetrators and the person in authority an agreement, which was not raised in evidence and which was not legally necessary. The Prosecution maintains that, once

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[115] Emphasis added.
[116] Prosecution Brief, paras. 2.22 and 2.23.
[117] This form was identified in the *Tadić* Appeals Judgement as the third category of joint criminal enterprise.

the accused knowingly and wilfully joins a system of ill-treatment and contributes to it significantly, the relevant "agreement" is either subsumed in or replaced by acceptance of the system as a whole, including its way of functioning and the results over time, as inferred from knowledge of the system of ill-treatment and intent to further it.

86. Krnojelac argues that, "for the sake of [the] basic principles of international criminal justice, it is necessary to precisely assess each and every criminal offence committed during the existence of a joint criminal enterprise because it is the only way to precisely establish [the] criminal liability of accused persons."[119]

87. The Appeals Chamber notes that, in fact, the Prosecution is asking the following two questions:

- Did the Trial Chamber err in law by partitioning the different types of crimes which form the joint criminal enterprise?

- Did the Trial Chamber err in law by requiring proof of an agreement between Krnojelac and the principal perpetrators of the crimes in question?

The Appeals Chamber will examine the questions in turn.

(i) Did the Trial Chamber err in law by partitioning the different types of crimes which form the joint criminal enterprise?

88. The Prosecution alleges that the Trial Chamber partitioned the forms of conduct, which it believed formed part of a system, according to the different categories of crime underpinning the characterisation of persecution.

89. The Appeals Chamber holds that, although the second category of cases defined by the *Tadić* Appeals Judgement ("systemic") clearly draws on the Second World War extermination and concentration camp cases, it may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Although the perpetrators of the acts tried in the concentration camp cases were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. According to the

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[118] Prosecution Brief, paras. 2.24 and 2.25.
[119] Defence Response, para. 40.

Tadić Appeals Judgement, this category of cases - a variant of the first - is characterised by the existence of an organised system set in place to achieve a common criminal purpose. For there to be the requisite intent, the accused must have had personal knowledge of the system in question (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system. The Prosecution was therefore able to rely upon this form of joint criminal enterprise.

90. The Appeals Chamber notes from the Judgment that the criticism that the Trial Chamber compartmentalised the types of crime seems justified. The Appeals Chamber points out that the Trial Chamber did conclude that the principal perpetrators of the unlawful imprisonment participated in a "system"[120] but did not subsequently make any express reference to the concept of system when determining whether or not Krnojelac shared the common purpose of the perpetrators of each of the categories of constituent crimes specified in the Indictment. In order to assess whether or not this amounts to an error of law, the Appeals Chamber will now examine this approach contextually by considering which argument appears in the Indictment.

91. The Appeals Chamber notes that the Prosecution initially considered the Accused liable for personally and physically committing the acts constituting the crime of persecution, as indicated by the wording of the initial indictment.[121] Then, in the second amended indictment, the Prosecution charged the Accused for the first time with having participated in the execution of a common plan involving the sum of the acts constituting the crime of persecution.

92. In its Pre-Trial Brief, the Prosecution then referred to the different forms of joint criminal enterprise in relation to the Accused's liability on the count of persecution. It referred initially to the first category of basic joint criminal enterprise set out in the *Tadić* Appeals Judgement with regard to imprisonment, inhumane living conditions, forced labour and deportation based on active participation in the crimes forming part of the common purpose and the failure to prevent or stop them.[122] The Prosecution then referred to the systemic form of joint criminal enterprise, that is to say "a system of repression",[123] as well as to the extended form of criminal enterprise.[124]

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[120] *Ibid.*, para. 127.

[121] Initial indictment, para. 5.2. "Milorad Krnojelac persecuted the Muslim and other non-Serb males by subjecting them to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings [...]".

[122] Prosecution Pre-Trial Brief, para. 49: "Where the common design involved the confinement and enslavement of Muslim and other non-Serb detainees from the Foča area, the Accused participated by administering the venue where such acts took place. As camp commander, Krnojelac was personally responsible for the maintenance of the inhumane conditions at the facility. Krnojelac ordered and supervised the actions of his guards and did nothing to restrain their misconduct. Nor did he do anything to prevent access to detainees by Serb military personnel who would beat and kill detainees. Such omissions encouraged the abuse of detainees. Furthermore, Krnojelac, during his time as a commander,

93. However, the Appeals Chamber notes that for the count of persecution, although the Indictment was issued after the Pre-Trial Brief, it relies on the theory of a common purpose with the guards and soldiers who entered the camp. This purpose is defined solely as the sum of the constituent acts charged, that is imprisonment, torture and beatings, killings, forced labour, inhumane conditions, deportation and expulsion. Under count 1 of the Indictment, Milorad Krnojelac is charged with persecuting the Muslim and other non-Serb male civilian detainees on political, racial or religious grounds from April 1992 until August 1993 as camp commander at the Foča KP Dom, together with the KP Dom guards under his command and in common purpose with the guards and soldiers specified elsewhere in the Indictment. The same Indictment describes the joint plan as:

> a) the prolonged and routine imprisonment and confinement within the KP Dom facility of Muslim and other non-Serb male civilian inhabitants of Foča municipality and its environs;
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> b) the repeated torture and beatings of Muslim and other non-Serb male civilian detainees at KP Dom;
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> c) numerous killings of Muslim and other non-Serb male civilian detainees at KP Dom;
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> d) the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom;
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> e) the establishment and perpetuation of inhumane conditions against Muslim and other non-Serb male civilian detainees within the KP Dom detention facility; and
>
> f) the deportation and expulsion of Muslim and other non-Serb civilians detained in the KP Dom detention facility to Montenegro and other places which are unknown.

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formed and supervised workers' groups made up of detainees who were used for forced labour and selected detainees for deportation to Montenegro [...]." See also para. 50: "Thus the Accused's active participation in crimes which made up the persecution, unlawful confinement, inhumane conditions, and enslavement, and his failure to prevent or stop the abuses carried out under the common plan demonstrate that he intended these crimes to take place."

[123] *Ibid.*, para. 52: "The Accused Krnojelac actively participated in a system of repression against non-Serb civilians through his position as camp commander of KP Dom. Krnojelac prepared or approved lists of detainees to be tortured and beaten and established a daily routine for these beating and torture. He ordered guards to beat detainees for even minor violations of prisons rules, which he himself was responsible for establishing. He subjected non-Serb detainees to collective punishment." See also para. 56: "Therefore, under the second theory of common purpose liability, criminal responsibility must also attach to the Accused for his involvement in, persecution [...]."

[124] See, in particular, *ibid.* para. 60: "In the present case, the Prosecution contends that the KP Dom functioned as a prison-camp in order to carry out the brutal confinement of Muslims and other non-Serb male civilians as part of the broader criminal purpose of ethnically cleansing Foča municipality and the surrounding areas. The Accused Krnojelac participated in this common criminal design by acting as a warden of KP Dom. The evidence will show that during the relevant period time periods described in the Indictment, while the Accused Krnojelac was supervising operations at KP Dom, outsiders frequently entered the camp and harassed, tortured and killed detainees. The crimes committed by these outsiders, even if outside the original common scheme established at KP Dom, were a natural and foreseeable consequence of the execution of this common plan." See also para. 61: "[...] Even if the very first incidents were not anticipated, over the course of weeks and months, these crimes certainly became foreseeable consequences of the common plan and, indeed, of the Accused's actions in permitting access [...]."

94. The Appeals Chamber notes that the Trial Chamber clearly followed the approach taken in the Indictment since, for each aspect of the common purpose pleaded by the Prosecution, it sought to determine whether Krnojelac shared the intent of the principal offenders. The Appeals Chamber finds that such an approach corresponds more closely to the first category of joint criminal enterprise than to the second. However, given that the Prosecution did not provide a more suitable definition of common purpose when referring to the systemic form of joint criminal enterprise, this approach does not amount to an error of law.[125] The Appeals Chamber will now consider the second issue raised by this sub-ground of appeal.

(ii) Did the Trial Chamber err in law by requiring proof of an agreement between Krnojelac and the principal perpetrators of the crimes in question?

95. The Appeals Chamber starts by observing that, as the Prosecution alleges, it is apparent from the Judgment that the Trial Chamber required proof of an agreement between Krnojelac and the principal offenders when it assessed whether he could be held personally liable as a participant in the joint criminal enterprise. In so doing, the Trial Chamber held that the Prosecution had to establish (1) that there was an agreement between Krnojelac, the prison guards and the military authorities to subject the non-Serb detainees to the inhumane conditions which constituted inhumane acts and cruel treatment, and that each of the participants in the enterprise, including Krnojelac, shared the intent to commit that crime;[126] and (2) that there was an agreement between Krnojelac and the other participants [guards and soldiers] to persecute the said detainees by way of the underlying crimes found to have been committed, and that the principal offenders and Krnojelac shared the intent required for each of the underlying crimes and the intent to discriminate in their commission.[127]

96. The Appeals Chamber notes that, with regard to the crimes considered within a systemic form of joint criminal enterprise, the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system of ill-treatment. Using these criteria, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system. As the Appeals Chamber recalled in the *Tadić* Appeals Judgement, in

[125] See para. 28 *et seq.* of this Judgement.
[126] Judgment, para. 170.
[127] *Ibid.*, para. 487.

102. The Appeals Chamber notes that customary international law does not require a purely personal motive in order to establish the existence of a crime against humanity.[134] The Appeals Chamber further recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out "the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide."[135] It is the Appeals Chamber's belief that this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.

103. The Appeals Chamber does not construe the Trial Chamber's assertion in the Judgment that "the Prosecution has [not] excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent" to mean that the Trial Chamber confused intent and motive or that it concluded that the existence of a motive, for example the execution of an order, would be incompatible with the intent to participate in the joint criminal enterprise. The Appeals Chamber considers that the Trial Chamber held that the Prosecution had not established the intent beyond all reasonable doubt.

104. Consequently, the Appeals Chamber holds that the error of law pleaded by the Prosecution has not been established. It will now consider whether it was unreasonable for the Trial Chamber to find that intent was not established here by examining the Prosecution's ground of appeal concerning the manner in which the requisite intent for the second form of joint criminal enterprise was applied to the facts.

(b) Erroneous application of the intent criterion to the second category of joint criminal enterprise

105. The Prosecution submits that, in view of the Trial Chamber's own findings,[136] if the law had been applied correctly to the facts of the case, Krnojelac should have been found guilty not as an aider and abettor but as a co-perpetrator of the crimes of persecution (imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed) under counts 1 and 15.[137] The Prosecution accordingly requests the Appeals Chamber to revise the Judgment on this point and

[134] *Tadić* Appeals Judgement, para. 270.
[135] *Jelisić* Appeals Judgement, para. 49. See also the *Kunarac* Appeals Judgement, paras. 103 and 153.
[136] Prosecution Brief, para. 2.32, referring to paras. 116 to 124, 128 to 168, 308 to 311 and 488 to 492 of the Judgment.
[137] Prosecution Brief, para. 2.43. The Prosecution further submits that if its sixth and seventh grounds are upheld, Krnojelac should also be found guilty as a co-perpetrator of persecution, namely forced labour and deportations.

submits that, according to the Trial Chamber's own findings, the following were established beyond all reasonable doubt:

- the existence of a system of unlawful detention;

- multiple instances of beatings, inhumane acts and cruel treatment committed within that system, all committed with discriminatory intent;

- Krnojelac's position of authority;

- Krnojelac's knowledge of the system of unlawful detention, of the beatings, inhumane acts and cruel treatment, and of the discriminatory intent behind the commission of these crimes (ill-treatment);

- Krnojelac's intent to facilitate the commission of the crimes as an aider and abettor (implicit in the Trial Chamber's finding that he aided and abetted the relevant crimes).[138]

The Prosecution takes the view that all the constituent elements of the second category of joint criminal liability identified in the *Tadić* Appeals Judgement are therefore satisfied in the Trial Chamber's findings and it was not reasonable to regard him as a mere aider and abettor.[139]

106. Krnojelac argues that the Trial Chamber did not find that he had sufficient authority to have been one of the participants in the joint criminal enterprise.[140] He further contends that, were the Prosecution's submissions to be upheld, there would no longer be any difference between an aider and abettor and a participant in a joint criminal enterprise.[141]

107. The Appeals Chamber will first consider the Trial Chamber's findings on the commission of the relevant crimes by the principal perpetrators, that is: (1) that the establishment and perpetuation of inhumane conditions, constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom, had been carried out with the intent to discriminate against them because of their religious or political affiliations and that, as such, the crime of persecution was established;[142] (2) that the acts of torture, inhumane acts or cruel treatment under paragraphs 5.15 and 5.23 of the Indictment were carried out on discriminatory grounds (FWS-03 only);[143] and (3) that the

[138] Prosecution Brief, para. 2.33.
[139] *Ibid.*, para. 2.34.
[140] Defence Brief, paras. 44 to 48.
[141] *Ibid.*, para. 49.
[142] Judgment, para. 443.
[143] *Ibid.*, para. 465.

deprivation of liberty of the non-Serb detainees at the KP Dom constituted imprisonment within the meaning of Article 5(e) of the Statute.

108. As regards Krnojelac's intent, the Trial Chamber found that he did not share the intent to commit the crimes set out below as part of a joint criminal enterprise:

- *Living conditions constituting inhumane acts*: on the grounds that the Prosecution did not establish that Krnojelac had entered into an agreement with the prison guards and the military authorities to subject the non-Serb detainees to inhumane conditions constituting inhumane acts and cruel treatment or that he had the intent to subject the detainees to inhumane living conditions of this kind while he was warden of the KP Dom.[144] The Trial Chamber did however hold that Krnojelac was aware of the intent of the principal offenders - the guards and military authorities - responsible for the living conditions imposed upon the non-Serb detainees at the KP Dom and that he was aware that his failure to take any action as warden in relation to this knowledge encouraged the principal offenders to maintain those conditions and contributed in a substantial way to their maintenance. The Trial Chamber thus found that Krnojelac incurred criminal responsibility as an aider and abettor to inhumane acts and cruel treatment for having assisted and encouraged the maintenance of living conditions at the KP Dom whilst prison warden.

- *Beatings and acts of torture*: on the grounds that there is no satisfactory evidence that Krnojelac participated in a joint criminal enterprise which consisted of meting out beatings and torture to the non-Serb detainees.[145] The Trial Chamber nevertheless held that Krnojelac knew that beatings and acts of torture were being carried out and that, by failing to take any appropriate measures which, as warden, he was obliged to adopt, he encouraged his subordinates to commit such acts. The Trial Chamber thus found that Krnojelac was responsible as an aider and abettor to the beatings although it considered that, in view of the nature of his participation, the more appropriate basis of liability was his responsibility as a superior.[146]

- *Imprisonment*: On this point the Appeals Chamber refers to the extract from paragraph 127 of the Judgment and the Trial Chamber's findings that, by virtue of his position as prison warden, Krnojelac knew that the non-Serb detainees were being unlawfully detained, had admitted to knowing that they were being detained precisely because they were non-Serbs and

[144] Judgment, para. 487, referring to para. 170.
[145] *Ibid*, para. 487, referring to paras. 313 to 314 and 346. It appears however that the relevant paragraph is para. 315.

knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[147]

109. In view of the Trial Chamber's findings of fact and the criterion to be applied to determine whether a participant in a system whose common purpose was the persecution (based on imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed) of the non-Serb civilian detainees at the KP Dom had the required intent, the Appeals Chamber will now examine whether no trier of fact could reasonably have concluded that Krnojelac shared the intent of the co-perpetrators of those crimes.

110. The Trial Chamber noted that, by his own admission, Krnojelac was warden of the KP Dom from 18 April 1992 until the end of July 1993, that is for 15 months.[148] It found that Krnojelac had voluntarily undertaken the position of acting warden and then warden until his departure from the KP Dom[149] and that he retained all powers associated with the pre-conflict position of warden during that period.[150] It was noted above that the Trial Chamber established that, by virtue of his position as prison warden, Krnojelac knew that the non-Serb detainees were being unlawfully detained, had admitted to knowing that they were being detained precisely because they were non-Serbs and knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom. It was also established that he was aware of the intent of the principal offenders - the guards and military authorities - responsible for the living conditions imposed on the non-Serb detainees at the KP Dom, knew that beatings and acts of torture were being carried out and that, by failing to take any appropriate measures which, as warden, he was obliged to adopt, he encouraged his subordinates to maintain those conditions and furthered the commission of those acts.

111. The Appeals Chamber holds that, with regard to Krnojelac's duties, the time over which he exercised those duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature, a trier of fact should reasonably have inferred from the above findings that he was part of the system and thereby intended to further it. The same conclusion must be reached when determining whether the findings should have led a trier of fact

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[146] *Ibid.*, paras. 316 to 320.
[147] *Ibid.*, para. 124.
[148] *Ibid.*, para. 96.
[149] *Ibid.*, para. 99.
[150] *Ibid.*, para. 103. Moreover, the Trial Chamber concluded that Krnojelac had authority over all the subordinate personnel and detainees at the KP Dom and that, while he could exercise only limited control over the activity of the investigators and paramilitaries entering the camp, he was in a position to instruct the investigators to interview detainees of his choosing with a view to their exchange or release and to ensure that the paramilitaries did not remove detainees without the authorisation of their superiors (paras. 105 to 107).

reasonably to conclude that Krnojelac shared the discriminatory intent of the perpetrators of the crimes of imprisonment and inhumane acts.[151] As the Trial Chamber rightly recalled, such intent must be established for Krnojelac to incur criminal liability on the count of persecution on this basis.[152]

112. Hence, the Appeals Chamber upholds the Prosecution's ground of appeal and overturns the Trial Chamber's finding that Krnojelac was guilty as an aider and abettor and not a co-perpetrator of persecution (imprisonment and inhumane acts) and cruel treatment (imposed living conditions) under counts 1 and 15 .

113. The Appeals Chamber will now examine the scope of the error of law arising out of the Trial Chamber's requirement of proof of an agreement between Krnojelac and the principal offenders to commit the crimes. The Appeals Chamber set this matter aside until it had determined whether applying the *Tadić* criterion instead of requiring such an agreement should have resulted in Krnojelac being found liable as a co-perpetrator and not an aider and abettor to the facts for which he was held liable under Article 7(1) of the Statute. This is indeed the case, as has just been demonstrated. For this reason, the Appeals Chamber holds that the error of law committed by the Trial Chamber was such as to invalidate the Judgment. Consequently, the Appeals Chamber finds Krnojelac guilty as a co-perpetrator on counts 1 and 15 for the crime of persecution (imprisonment and inhumane acts) and cruel treatment (based on living conditions imposed) .

114. Before considering the Prosecution's second ground of appeal, the Appeals Chamber will examine another issue raised indirectly by the Prosecution's appeal. The Appeals Chamber found earlier that the approach adopted by the Prosecution in its Indictment for defining common purpose corresponded more closely to the first category of joint criminal enterprise than to the second. The Appeals Chamber considers that the issue of which approach appears most appropriate for determining whether liability may be incurred as a co-perpetrator or an aider and abettor by a participant in a "systemic" form of joint criminal enterprise for crimes committed by the principal perpetrator in a context such as the KP Dom is of general importance for the Tribunal's case-law. The Appeals Chamber will therefore examine the issue, limiting itself to acts charged as persecution.

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[151] The Appeals Chamber holds that this is the necessary conclusion even supposing that, as the Trial Chamber found, the Prosecution's allegation according to which Krnojelac's membership of the SDS and support of Serb nationalistic policy was direct evidence of his intent to discriminate against the non-Serb civilian detainees, had not been established (Judgment, para. 487).

[152] Judgment, para. 487.

143. The Appeals Chamber further notes that, while the Prosecution's Pre-Trial Brief of 16 October 2000, that is subsequent to the decision of 11 May 2000, pleads an extended form of joint criminal enterprise for the first time, the Indictment is silent on the matter.

144. It must be noted that these circumstances left the Defence in some uncertainty as to the Prosecution's argument. Therefore, even though it is apparent from Krnojelac's Final Trial Brief that he did take the three forms of joint criminal enterprise described in the *Tadić* Appeals Judgement into consideration before concluding that he had not taken part in a joint criminal enterprise,[175] the Appeals Chamber holds that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good grounds for refusing, in all fairness, to consider an extended form of liability with respect to Krnojelac.

145. For the above reasons, the Prosecution second ground of appeal on the form of the Indictment is dismissed.

C. The Prosecution's third and fourth grounds of appeal: errors relating to the *mens rea* of superior responsibility under Article 7(3) of the Statute

146. The third and fourth grounds of appeal both invoke errors relating to the *mens rea* of superior responsibility under Article 7(3) of the Statute. The Prosecution submits that the Trial Chamber erred in fact by not concluding that, for the purposes of Article 7(3) of the Statute, Krnojelac "knew or had reason to know" that detainees were being tortured by his subordinates as opposed to being beaten arbitrarily (third ground of appeal) and that his subordinates were involved in the murder of the detainees listed in Schedule C of the Indictment (fourth ground of appeal). Given the similarity of the issues raised, the Appeals Chamber will address both grounds of appeal in the same section.

147. In the form of relief, the Prosecution requests that the Appeals Chamber reverse the Trial Chamber's findings under counts 5 (inhumane acts as a crime against humanity) and 7 (cruel treatment as a violation of the laws or customs of war) and find Krnojelac guilty under counts 2 (torture as a crime against humanity) and 4 (torture as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute. It also requests that the Appeals Chamber reverse the acquittals under count 8 of the Indictment (murder as a crime against humanity) and count 10 (murder as a violation of the laws or customs of war) and find Krnojelac guilty under these counts

[175] Krnojelac's Final Trial Brief, paras. 103 to 109.

pursuant to Article 7(3) of the Statute. The Prosecution requests that the Trial Chamber's sentence be increased commensurately to reflect Krnojelac's liability for the above two crimes.[176]

148. In support of both grounds of appeal,[177] the Prosecution recalls the legal test set out by the Trial Chamber in paragraph 94 of the Judgment for determining a superior's *mens rea*. The Trial Chamber stated that:

> It must be demonstrated that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. It must be proved that (i) the superior had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates. This knowledge requirement has been applied uniformly in cases before this Tribunal to both civilian and military commanders. The Trial Chamber is accordingly of the view that the same state of knowledge is required for both civilian and military commanders.[178]

149. The Appeals Chamber notes that the Prosecution's submissions do not challenge the legal definition of the "had reason to know" standard provided by the Trial Chamber but instead argue that the Trial Chamber erred in applying the test to the facts of the case.

150. In general terms (the submissions specific to each ground of appeal are analysed below), the Prosecution states that the only finding a reasonable trier of fact could have reached was that alarming information was available to Krnojelac which put him on notice of possible unlawful acts by his subordinates at the KP Dom and required him to carry out an additional investigation. The Prosecution maintains that, in spite of this information, Krnojelac failed in his duty to prevent the acts of torture and murders and punish their perpetrators. In support of both grounds of appeal, the Prosecution reiterates the Trial Chamber's findings that Krnojelac held the position of warden in the KP Dom and exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom. As for the actions of the KP Dom guards, the Prosecution points out that the Trial Chamber held Krnojelac responsible as their superior under Article 7(3) of the Statute and that, as warden of the KP Dom, Krnojelac was the *de jure* superior of the guards and knew that they were involved in the beating of the non-Serb detainees.[179]

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[176] Prosecution Brief, paras. 4.41 and 5.21; T(A), 14 May 2003, p. 74.
[177] Prosecution Brief, para. 4.11.
[178] Judgment, para. 94 (footnotes omitted).
[179] The Prosecution refers to paragraphs 107 and 318 of the Judgment (See Prosecution Brief, for the third ground of appeal, paras. 4.8 and 4.9 and, for the fourth ground of appeal, paras. 5.5 and 5.6). As regards Krnojelac's superior responsibility, the Trial Chamber reached the following conclusions in the aforementioned paragraphs of the Judgment: regarding Krnojelac's position as warden, "[T]he Prosecution has established that the Accused held the position of warden, as that term is generally understood, at the KP Dom, that the lease agreement by which the Accused leased part of the KP Dom to the military had little impact upon the single hierarchy within the KP Dom or the Accused's position

151. According to the Prosecution, the Trial Chamber's approach to torture and murders runs counter to the Tribunal's case-law, in particular, to the *Čelebići* Appeals Judgement. The Prosecution asserts that it is clear from the case-law that the information received by the superior need not point to any *specific* crime;[180] the superior need only receive information *of a general nature*, putting him on notice of the *risk* of crimes being committed.

152. Aside from routinely putting forward the argument that Krnojelac had no jurisdiction, the Defence maintains that: "the Prosecution refers to allegations and indicia endeavouring to use some facts, some information that the Accused might possibly have raised to the level of alarming information and which would then lay down the standard for *mens rea*, that is are allowed to bring charges against the Accused under 7(3) of the Statute."[181] The Defence submits that if the Prosecution's interpretation were to be accepted by the Appeals Chamber:

> [...] for a person to be held responsible as a superior it is enough that he has information that there is an armed conflict between the Serbs and the Muslims in progress at a relevant sector, that some Muslims are being held imprisoned and that they are guarded by the Serb prison guards. Such a general piece of information would then be sufficient to alert superiors in charge that there is a risk of possible crimes involved. This would possibly reduce the role of superiors to investigations as to whether there are any crimes taking place or not, on daily basis. So, the information on an armed conflict between two ethnic groups, of which one holds the members of the other group in prison and organises guards to keep them imprisoned is the kind of general information which may notify superiors that there is a risk of crime involved. Such a claim is, of course, unacceptable from the point of view of international criminal law and it most certainly is not in accord with adopted standards and principles.[182]

153. Here, the Prosecution's argument seems to come down to accepting that, simply because of the beatings, of which Krnojelac was found to *have been aware* and which constituted cruel treatment and inhumane acts, it must be concluded that Krnojelac *had reason to know* that acts of

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as warden within that hierarchy, and that the Accused exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom" (para. 107). In respect of the actions of the KP Dom guards, "the Accused is responsible as their superior under Article 7(3) of the Statute. As warden of the KP Dom, the Accused was the *de jure* superior of the guards, and he knew [...] that they were involved in the beating of non-Serb detainees. Not only did the Accused personally see one of his subordinates beat a detainee, he also heard about such incidents, and it must have been clear that, considering that the guards were in direct contact with and controlled the detainees, some of them were involved. The Trial Chamber considers that the Accused failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principle offenders [...]" (para. 318, footnotes omitted).

[180] Prosecution Brief, para. 4.12. According to the Prosecution: "[...] he can be said to have reason to know that his subordinates may commit crimes and will be responsible for those crimes on that basis. Nor does the superior need to be in actual possession of the information about the crimes committed by the subordinates. It's sufficient if he was provided with the relevant information. Even if the information was made available to him. If the information is objectively alarming, his duty to inquire or to investigate, thereby, is triggered" (T(A), 14 May 2003, p. 73). Thus "in the *Čelebići* case, it was held that the information available to the superior does not have to be information as to the exact nature of a crime. It's enough -- it has to be enough to put the superior on notice. It doesn't actually have to say, 'There's torture going on out there, and it's on this prohibited purpose.' It has to be enough to place him on notice that he's got to do something further" (T(A), 14 May 2003, p. 192).

[181] T(A), 14 May 2003, pp. 164 and 165. See also Defence Response, para. 101.

[182] Defence Response, para. 112.

torture and murders might be committed (as knowledge of the beatings constitutes sufficient information to alert him to the risk of acts of torture and murders being committed) and that, since he did not open any investigation in order to ascertain whether such crimes had been or were about to be committed, Krnojelac had the requisite *mens rea* to incur liability pursuant to Article 7(3) of the Statute for torture and murders.[183] On this point, the Appeals Chamber considers it appropriate to provide the following clarification.

154. The *Čelebići* Appeals Judgement defines the "had reason to know" standard by setting out that "[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know' [...] This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[184]

155. The Appeals Chamber finds that this case-law shows only that, with regard to a specific offence (torture for example), the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed. It may not be inferred from this case-law that, where one offence (the "first offence") has a material element in common with another (the "second offence") but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7(3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment).[185] Such an inference is not admissible with regard to the principles

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[183] Without it being very explicit, the Prosecution sometimes seems to support this argument. As for the alleged error regarding torture, the Prosecution made the following submissions at the appeal hearing: "Our proposition is a very simple one. Applying *Čelebići* to the facts of this case can lead to only one reasonable conclusion, and that is that by actually knowing of the beatings going on within KP Dom, he was on notice of the risk that at least some of them may have resulted in torture. His knowledge of the beatings in this KP Dom environment was enough to alert him to the need for additional information or to conduct an investigation *to ascertain whether torture by beatings was being committed by his subordinates.*" (T(A), 14 May 2003, p. 72). Regarding the murders, the Prosecution stated at the appeal hearing: "when one looks at the peculiarities of these beatings, the peculiarities of the harsh treatment meted out against these individuals, the only difference between the beatings as found and the murders has to do in terms of what was the inevitable effect. In one case it was a case of beatings that resulted in incapacitation. In another, it was a case of certain beatings that resulted in death. In other words, a level of behaviour, a level of deportment, if I may so describe it, that is of the same genus and of the same type. And significantly, one would consider that when one looks at what in fact is the definition of murder, isn't murder dealing with in fact acts with intent to cause grievous bodily harm? Isn't that what murder is? So does it mean that because, for example, that final step is not reached, that you are not put on inquiry [...]" (T(A), 14 May 2003, pp. 116 and 117).

[184] *Čelebići* Appeals Judgement, para. 238.

[185] Judgment, para. 314.

governing individual criminal responsibility. In other words, and again using the above example of the crime of torture, in order to determine whether an accused "had reason to know" that his subordinates had committed or were about to commit acts of torture, the court must ascertain whether he had sufficiently alarming information (bearing in mind that, as set out above, such information need not be specific) to alert him to the risk of acts of torture being committed, that is of beatings being inflicted not arbitrarily but for one of the prohibited purposes of torture. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture.

156. The Appeals Chamber reiterates that an assessment of the mental element required by Article 7(3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.[186]

157. Having provided this clarification, the Appeals Chamber will now analyse the Prosecution's submissions in support of each ground of appeal.

1. Third ground of appeal: error in the Trial Chamber's findings of fact regarding the acts of torture committed at the KP Dom

158. Apart from the finding that Krnojelac held a position of superior authority in the KP Dom,[187] the Prosecution restates some of the Trial Chamber's other findings of fact in support of this ground of appeal,[188] in particular:

- that Krnojelac's subordinates tortured some of the detainees;[189]
- that Krnojelac knew or had reason to know that Muslim detainees were being beaten or otherwise generally mistreated;[190]
- that Krnojelac knew that a detainee by the name of Ekrem Zeković had been tortured.[191]

159. In essence, the Prosecution challenges the Trial Chamber's findings in paragraph 313 of the Judgment which reads as follows:

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[186] *Čelebići* Appeals Judgement, para. 239.
[187] As stated previously, the Prosecution refers to paragraphs 107 and 318 of the Judgment.
[188] Prosecution's Notice of Appeal, p. 3.
[189] The Prosecution refers to paragraphs 226 to 236, 239 to 242, 249 to 253, 254 to 255, 256 to 258, 262, 268, 277, 282, 300 and 305 of the Judgment. See Prosecution Brief, para. 4.2.
[190] The Prosecution refers to paragraphs 308 to 312 of the Judgment. See Prosecution Brief, para. 4.3.
[191] The Prosecution refers to paragraph 312 of the Judgment. See Prosecution Brief, para. 4.7.

suspected of having played a part in his escape. It stated that, in view of the seriousness of the treatment inflicted upon FWS-73, the treatment amounted to torture.[233]

171. The Appeals Chamber holds that the external context (i.e. the circumstances in which the detention centre was set up) and the internal context (i.e. the operation of the centre, in particular, the widespread nature of the beatings and the frequency of the interrogations), taken together with the facts that Krnojelac witnessed the beating inflicted on Zeković ostensibly for the prohibited purpose of punishing him for his failed escape, that after this event at least one other detainee, witness FWS-73, was the victim of acts of torture and that the Trial Chamber dismissed Krnojelac's claim that he was unaware of any punishment inflicted as a result of Zeković's escape, mean that no reasonable trier of fact could fail to conclude that Krnojelac had reason to know that some of the acts had been or could have been committed for one of the purposes prohibited by the law on torture. Krnojelac had a certain amount of general information putting him on notice that his subordinates might be committing abuses constituting acts of torture. Accordingly, he must incur responsibility pursuant to Article 7(3) of the Statute. It cannot be overemphasised that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control. There is no doubt that, given the information available to him, Krnojelac was in a position to exercise such control, that is, to investigate whether acts of torture were being committed, especially since the Trial Chamber considered he had the power to prevent the beatings and punish the perpetrators.[234] In holding that no reasonable trier of fact could have made the same findings of fact as the Trial Chamber, the Appeals Chamber takes the view that the Trial Chamber committed an error of fact.

172. As regards whether this error occasioned a miscarriage of justice, the Appeals Chamber adopts the findings of the ICTR Appeals Chamber in the *Rutaganda* Appeals Judgement and considers that when an accused has been erroneously acquitted by the Trial Chamber, that Chamber failed in its duty by not identifying all of the requisite legal implications of the evidence

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[232] *Ibid.*, para. 233.
[233] *Ibid.*, para. 235.
[234] As regards beatings, the Trial Chamber held that: "the Accused failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders for the following reasons: (i) He failed to investigate the allegations of beatings, when he would inevitably have ascertained the identity of those responsible for many of those beatings (including those individuals from outside the KP Dom). (ii) He failed to take any appropriate measures to stop the guards from beating and mistreating detainees when, as the warden and their superior, he was obliged to do so. In particular, the Accused failed to order the guards to stop beating detainees and to take appropriate measures so that other individuals from outside the KP Dom would not be in a position to mistreat detainees. (iii) He failed to speak to his subordinates about the mistreatment of detainees. (iv) He failed to punish those guards who would have been identified, had he carried out an investigation, as being responsible for the beatings or to take steps to have them punished. (v) He failed to report their abuses to a higher authority." (See the Judgment, para. 318).

presented.[235] The Appeals Chamber considers that, in order to correct the Trial Chamber's error, the acquittals under counts 2 and 4 of the Indictment must be reversed and Krnojelac found guilty under those counts pursuant to Article 7(3) of the Statute for having failed to take the necessary and reasonable measures to prevent the acts of torture committed subsequent to those inflicted on Ekrem Zeković and for having failed to investigate the acts of torture committed prior to those inflicted on Ekrem Zeković and, if need be, punish the perpetrators. The convictions entered against Krnojelac under counts 2 and 4 of the Indictment (torture) require the findings of guilt entered against him under counts 5 and 7 (inhumane acts and cruel treatment) to be reversed for the following facts: paragraphs 5.21 (for FWS-73), 5.23, 5.27 (for Nurko Nisić and Zulfo Veiz), 5.28 and 5.29 (for Aziz Šahinović) of the Indictment and facts described under points B4, B14, B22, B31, B52 and B57 of Schedule C of the Indictment, on the ground that the crime of torture subsumes the crimes of inhumane acts and cruel treatment.[236] The possibility of multiple convictions based on the same facts is thus eliminated.

2. Fourth ground of appeal: error in the Trial Chamber's findings of fact regarding the murders committed at the KP Dom

173. The Prosecution challenges paragraph 348 of the Judgment, which reads as follows:

> Finally the Prosecution alleges that the Accused incurred superior responsibility for the deaths at the KP Dom pursuant to Article 7(3). The position of the Accused as the warden of the KP Dom and his power to prevent and punish crimes has already been determined by the Trial Chamber. The Trial Chamber is not satisfied that the Prosecution has established that the Accused incurred superior responsibility for the killings that occurred at the KP Dom during the months of June and July 1992. The Trial Chamber accepts that the Accused had knowledge of two deaths, the suicide of Juso Džamalija, and the suspicious death of Halim Konjo. The Trial Chamber is also satisfied that the Accused had been told by RJ about beatings and disappearances which were occurring in the month of June 1992. However the Trial Chamber is not satisfied that this was sufficient information in the possession of the Accused to put him on notice that his subordinates were involved in the murder of detainees. Accordingly, the Accused's responsibility as a superior for the killings that occurred at the KP Dom during the months of June and July 1992 has not been established.[237]

174. The Prosecution submits that the only reasonable conclusion the Trial Chamber could have reached on the basis of its findings of fact was that sufficient information was available to Krnojelac to put him on notice of the risk that his subordinates were involved in the murder of the detainees.[238] The Prosecution maintains that there were clear and objective indicators of the murders being committed at the KP Dom,[239] such as the number of victims, the blood stains

[235] *Rutaganda* Appeals Judgement, para. 580.
[236] As, moreover, the Trial Chamber acknowledged in paragraph 314 of the Judgment.
[237] Footnotes omitted.
[238] Prosecution Brief, paras. 5.11 and 5.13; T(A), 14 May 2003, p. 120.
[239] Prosecution Brief, para. 5.14.

Accordingly, the Appeals Chamber considers that the Trial Chamber committed an error of fact which, for the above reasons,[257] occasioned a miscarriage of justice.

180. The Appeals Chamber considers that, in order to correct the Trial Chamber's error, the acquittals under counts 8 and 10 of the Indictment must be reversed and Krnojelac found guilty pursuant to Article 7(3) of the Statute for having failed to take the necessary and reasonable measures to prevent the murders committed subsequent to the disappearances of which he had knowledge and for having failed to investigate the murders committed prior to those disappearances and, if need be, punish the perpetrators of the murders, of whom he was the superior.

D. The Prosecution's fifth ground of appeal: the Trial Chamber committed an error of fact when it found that the beatings constituting inhumane acts and cruel treatment were not inflicted on discriminatory grounds and that Krnojelac could not therefore be held responsible for persecution as a superior

181. The Prosecution submits that the Trial Chamber erred in concluding that the beatings constituting inhumane acts and cruel treatment inflicted by the guards on detainees at the KP Dom were not committed on discriminatory grounds and that they did not therefore constitute persecution for which Krnojelac could incur responsibility as a superior under Article 7(3) of the Statute.[258]

182. The Prosecution argues that the Trial Chamber took an unduly restrictive approach to the question of what constitutes discrimination and failed to consider the broader context in which the underlying acts took place.[259] According to the Prosecution, the Trial Chamber arbitrarily compartmentalised the incidents pleaded as persecution in the Indictment and lost sight of the overall discriminatory nature of the KP Dom environment. The nature of the environment was

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[257] See para. 172 of this Judgement.

[258] Prosecution Notice of Appeal, pp. 4 and 5; Prosecution Brief, para. 6.1. It should be noted that, in the Judgment, the Trial Chamber held that only "the following acts of torture, inhumane acts or cruel treatment were carried out on discriminatory grounds: Indictment paras. 5.15 and 5.23 (FWS-03 only)". See Judgment, para. 465.

[259] Prosecution Brief, para. 6.4. The Prosecution maintains that the Trial Chamber disregarded the systematic nature of the discrimination against the non-Serbs at the KP Dom. It recalls that, in order to assess whether a particular act was committed with discriminatory intent, the Trial Chamber compared the treatment accorded to the non-Serb detainees with the treatment accorded to the Serb detainees. Where the Trial Chamber found a difference in the treatment of those two groups, it concluded that there was discrimination on political or religious grounds. In order to determine whether or not there was discrimination, the Chamber apparently adopted the principle of formal equality (according to which similarly situated persons should be treated the same) discussed in the *Andrews v. Law Society of British Columbia* case brought before the Supreme Court of Canada ([1989] 1 S.C.R., pp. 163 to 172). The Prosecution cites paragraphs 438 and 441 to 443 of the Judgment (See Prosecution Brief, para. 6.5). It states that, in this case, there was, coincidentally, a group of Serb detainees in the KP Dom against which the Trial Chamber could, and to some degree did, compare the treatment of the non-Serb detainees at the KP Dom. However, had there not been such a group, the Trial Chamber would have had difficulty concluding that the non-Serbs were subjected to grossly inadequate living conditions on discriminatory grounds. However, the comparison is not possible in all of the cases brought before the Tribunal, which illustrates the inadequacy of the restrictive approach. See Prosecution Brief, para. 6.8.

moreover amply illustrated in the Trial Chamber's findings.[260] The beatings inflicted upon the detainees at the KP Dom were discriminatory because they were carried out in a widespread and systematic manner for the purpose of punishing, disadvantaging and oppressing the non-Serb detainees because of their ethnicity.[261] The Prosecution states that, even when using the restrictive approach taken by the Trial Chamber, it is unreasonable to conclude that the beatings were not discriminatory. On this point, it reproduces the Trial Chamber's finding in paragraph 47 of the Judgment in which the Chamber states that the Serb convicts, who were kept in a different part of the building from the non-Serbs, "were not beaten or otherwise abused". The only reasonable conclusion to be drawn from this finding is that the beatings inflicted upon the non-Serbs were carried out on a discriminatory basis given that the Serbs themselves were not subjected to beatings.[262] In any event, and more fundamentally, the Prosecution submits that the treatment of the non-Serbs at the KP Dom need not have been compared with the treatment of another group.[263] It contends that, given the spirit of discrimination against the non-Serbs prevailing at the KP Dom, the Trial Chamber should have reasonably *inferred*, in the absence of evidence to the contrary, that most of the acts committed by the KP Dom guards were perpetrated on discriminatory grounds.[264]

183. Even though, in its Brief, the Prosecution appears to raise the issue of the Trial Chamber's definition of a discriminatory act articulated in respect of the facts of the case, it actually seems to challenge the Trial Chamber's treatment of the specific issue of discriminatory intent, i.e. the *mens rea* as opposed to the *actus reus* of the offence.[265] The Appeals Chamber will therefore address the issue of whether it was unreasonable for the Trial Chamber to conclude that only the acts of torture, inhumane acts or cruel treatment set out in paragraphs 5.15 and 5.23 of the Indictment (FWS-03 only) were carried out on discriminatory grounds.[266]

184. The Appeals Chamber reiterates that, in law, persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite

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[260] The Prosecution refers to paragraphs 27 to 33, 34, 39, 41, 42, 116, 118 to 124, 134, 135, 138, 139, 141, 142, 143, 330 to 342, 438, 440, 441 and 443 of the Judgment. See Prosecution Brief, paras. 6.9 to 6.19.
[261] Prosecution Brief, paras. 6.21 to 6.23.
[262] *Ibid.*, para. 6.22.
[263] *Ibid.*, para. 6.23.
[264] *Ibid.*, para. 6.34.
[265] The Prosecution's submissions as they are set out in its Brief are somewhat equivocal on this point. In paragraphs 6.3 to 6.8 of its Brief, the Prosecution essentially alleges that the Trial Chamber "took an unduly [...] restrictive approach to the question *of what constitutes discrimination* and failed to consider adequately the broader context in which the underlying acts took place". (See para. 6.4, emphasis added). The remainder of the Brief, though, appears to address the issue of the discriminatory intent behind the acts committed (See paras. 6.20 to 6.35). It should moreover be noted that the findings of the Trial Chamber challenged by the Prosecution all relate to the issue of discriminatory intent.
[266] Judgment, para. 465.

discriminatory intent. The Appeals Chamber may not hold that the discriminatory intent of beatings can be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity.[267] According to the Appeals Chamber, such a context may not in and of itself evidence discriminatory intent. Even so, the Appeals Chamber takes the view that discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent. Circumstances which may be taken into consideration include the operation of the prison (in particular, the systematic nature of the crimes committed against a racial or religious group) and the general attitude of the offence's alleged perpetrator as seen through his behaviour.

185. Additionally, the Appeals Chamber considers that the fact that such circumstances may allow the *actus reus* of persecution (i.e. the discriminatory nature of an act) to be established does not preclude a Trial Chamber from giving consideration to those circumstances, as well as other factors, to establish the *mens rea* of the offence, that is the discriminatory intent on the basis of which the discriminatory act was committed. On this point, the Appeals Chamber notes that the Trial Chamber correctly defined the crime of persecution as it appears in paragraph 431 of the Judgment. It reads: "[...] the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[268] However, the Appeals Chamber does not agree with the interpretation given to this definition in paragraph 432 of the Judgment, particularly in footnote 1293 which reads as follows:

> The crime of persecution, the only crime in the Statute which must be committed on discriminatory grounds (see *Tadić* Appeal Judgment, par 305), has as its object the protection of members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups. If a Serb deliberately murders someone on the basis that he is Muslim, it is clear that the object of the crime of persecution in that instance is to provide protection from such discriminatory acts to members of the Muslim religious group. If it turns out that the victim is not Muslim, to argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance (Muslims).

The Appeals Chamber finds this assertion to be incorrect. It is an erroneous interpretation of the requirement for discrimination in fact (or a discriminatory act) established by the case-law. To use the example provided in the footnote, the Appeals Chamber considers that a Serb mistaken for a Muslim may still be the victim of the crime of persecution. The Appeals Chamber considers that the

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[267] It should be noted that not every attack against a civilian population is necessarily discriminatory. Moreover, the discriminatory character is not an constituent element of an attack against a civilian population.
[268] Footnotes omitted.

act committed against him institutes discrimination in fact, *vis-à-vis* the other Serbs who were not subject to such acts, effected with the will to discriminate against a group on grounds of ethnicity.

186. In this case, the Trial Chamber indicated that the "detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foča municipality."[269] The Appeals Chamber holds that it may be inferred from this finding that the treatment meted out to the non-Serb detainees was the consequence of the aforementioned discriminatory policy at the root of their detention.[270] Furthermore, the Appeals Chamber recalls the Trial Chamber's findings in paragraph 47 of the Judgment:

> The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They *were not mistreated like the non-Serb detainees*. The quality and quantity of their food was somewhat better, sometimes including additional servings. *They were not beaten or otherwise abused*, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees.[271]

The Appeals Chamber observes that this finding shows that only the non-Serb detainees were, in actual fact, subject to beatings. It holds that the differences in the way that the Serb and non-Serb detainees were treated cannot reasonably be attributed to the random posting of the guards. This finding therefore confirms the above presumption. Accordingly, the Appeals Chamber considers that the only reasonable finding that could be reached on the basis of the Trial Chamber's relevant findings of fact was that the beatings were inflicted upon the non-Serb detainees because of their political or religious affiliation and that, consequently, these unlawful acts were committed with the requisite discriminatory intent. The Appeals Chamber considers that, even if it were to be assumed that the blows inflicted upon the non-Serb detainees were meted out in order to punish them for violating the regulations, the decision to inflict such punishment arose out of a will to discriminate against them on religious or political grounds since punishment was only inflicted upon non-Serb detainees.

187. The Prosecution submits that Krnojelac should be found guilty pursuant to Article 7(3) of the Statute for the acts of persecution committed.[272] The Appeals Chamber restates that the Trial Chamber acknowledged that Krnojelac had voluntarily accepted his position in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity.[273]

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[269] Judgment, para. 50.
[270] *Ibid.*, para. 438.
[271] Footnotes omitted (emphasis added).
[272] Prosecution Brief, paras. 6.38 and 6.40.
[273] Judgment, para. 100.

Furthermore, Krnojelac admitted that he knew that the non-Serb detainees were detained because they were non-Serbs and that he knew that none of the procedures in place for legally detained persons was ever followed at the KP Dom.[274] The Trial Chamber found that Krnojelac knew that non-Serb detainees were being beaten and generally mistreated.[275] He "knew about the conditions of the non-Serb detainees, the beatings and the other mistreatment to which they were subjected while detained at the KP Dom, and [...] he knew that the mistreatment which occurred at the KP Dom was part of the attack upon the non-Serb population of Foča town and municipality."[276] In view of all the foregoing, the Appeals Chamber considers that Krnojelac who, as prison warden, retained jurisdiction over all detainees in the KP Dom[277] had sufficient information to alert him to the risk that inhumane acts and cruel treatment were being committed against the non-Serb detainees because of their political or religious affiliation. The Trial Chamber therefore committed an error of fact which occasioned a miscarriage of justice.[278]

188. The Appeals Chamber considers that, in order to correct the Trial Chamber's error, Krnojelac must be found guilty under count 1 of the Indictment (persecution), as requested by the Prosecution,[279] in order to reflect his liability pursuant to Article 7(3) of the Statute for the beatings described in paragraphs 5.9, 5.16, 5.18, 5.20, 5.21, 5.27 and 5.29 of the Indictment and the facts corresponding to numbers A2, A7, A10, A12, B15, B17, B18, B19, B20, B21, B25, B26, B28, B30, B33, B34, B37, B45, B46, B48, B51 and B59 in Schedule C of the Indictment, since the Trial Chamber viewed all of these beatings as inhumane acts and cruel treatment under Articles 5(i) and 3 of the Statute respectively.[280] Consequently, the convictions entered against Krnojelac under count 5 of the Indictment (crime against humanity of inhumane acts) for the above beatings must be reversed since the crime of persecution in the form of inhumane acts subsumes the crime against humanity of inhumane acts. The possibility of multiple convictions based on the same facts is thus eliminated. Krnojelac's liability under count 7 of the Indictment based on the above beatings is confirmed.

[274] *Ibid.*, para. 124.
[275] *Ibid.*, para. 308.
[276] *Ibid.*, para. 62.
[277] *Ibid.*, para. 102.
[278] See the findings regarding miscarriages of justice recapitulated above. See para. 172 of this Judgement.
[279] Prosecution Brief, paras. 6.2 and 6.36. The Prosecution requests that the sentence be revised upwards commensurably (See Prosecution Brief, paras. 6.36 to 6.40).
[280] Judgment, para. 320.

7(3) of the Statute for the following facts: paragraphs 5.21 (FWS-73), 5.23, 5.27 (Nurko Nisić and Zulfo Veiz), 5.28 and 5.29 (Aziz Šahinović) of the Indictment and the facts described under points B4, B14, B22, B31, B52 and B57 of Schedule C of the Indictment;[423]

DISMISSES the sentencing appeals entered by Krnojelac and the Prosecution (with the exception of the sub-ground allowed in paragraph 262 of this Judgement) and **IMPOSES** a new sentence, taking account of Krnojelac's responsibility established on the basis of the new convictions on appeal and in the exercise of its discretion;

SENTENCES Krnojelac to 15 years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period Krnojelac has already spent in detention, that is from 15 June 1998 to the present day.

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

Judge Claude Jorda
Presiding

Judge Wolfgang Schomburg

Judge Mohamed Shahabuddeen

Judge Mehmet Güncy

Judge Carmel Agius

Judges Schomburg and Shahabuddeen each append a Separate Opinion to this Judgement.

Done this seventeenth day of September 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

[423] On the ground that there would be unacceptable multiple convictions if the Accused were to be found guilty of these counts. See paragraphs 172 and 188 of this Judgement.