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ANNEX A

AUTHORITY 44

**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-98-30/1-A
Date: 28 February 2005
Original: English

IN THE APPEALS CHAMBER**Before:**

Judge Mohamed Shahabuddeen, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar:**Mr. Hans Holthuis****PROSECUTOR**

v.

MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

JUDGEMENT**The Office of the Prosecutor:**

Mr. Anthony Carmona
Ms. Helen Brady
Ms. Norul Rashid
Mr. David Re
Ms. Kelly Howick

Counsel for the Accused:

Mr. Krstan Simić for Miroslav Kvočka
Mr. Toma Fila for Mlado Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

D. Common legal questions concerning joint criminal enterprise

77. Each of the Appellants challenges the legal principles the Trial Chamber applied when it found that the Appellants participated in a joint criminal enterprise. The Appellants do not raise discrete errors of law. Instead, they interweave factual errors with their challenges to the legal standards applied. In its Response, the Prosecution has attempted to reorganise the submissions of the Appellants into more structured allegations of legal errors and has responded to them in a consolidated manner.

78. The Appeals Chamber recalls at the outset that it maintains discretion under Article 25 of the Statute to determine which of the parties' submissions warrant a reasoned written response.¹⁸⁷ The Appeals Chamber will begin by setting out the applicable law concerning joint criminal enterprise. Discrete legal issues relating to joint criminal enterprise will be dealt with in this section, so long as they are discernible in the Appellant's submissions. The application of the law to the facts will be considered in the sections that deal with the individual Appellants.

1. The definition of joint criminal enterprise

79. Although the Statute makes no explicit reference to "joint criminal enterprise" as a mode of responsibility, the Appeals Chamber has held that participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute.¹⁸⁸ Article 7(1), which sets out certain forms of individual criminal responsibility applicable to the crimes falling within the International Tribunal's jurisdiction, reads:

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.

80. The *Tadić* Appeal Judgement explains why participation in a joint criminal enterprise is a form of commission under Article 7(1):

The above interpretation [that responsibility under Article 7(1) is not limited to those who physically commit the crimes] is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. 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

¹⁸⁷ See above, para 15.

¹⁸⁸ See *Tadić* Appeal Judgement, paras 188, 195-226; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction- Joint Criminal Enterprise, 21 May 2003, para. 20.

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.¹⁸⁹

81. A joint criminal enterprise requires a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute.

82. Three broad forms of joint criminal enterprise have been recognised by the International Tribunal's jurisprudence.¹⁹⁰ In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose.¹⁹¹ The second form of joint criminal enterprise, the "systemic" form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps.¹⁹² This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.¹⁹³

83. The third, "extended" form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.¹⁹⁴ The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.¹⁹⁵

84. The Appeals Chamber understands that the Trial Chamber considered the crimes in Omarska camp to have been committed primarily as part of a systemic type of joint criminal enterprise. As the Trial Chamber explained:

Although the first two categories enunciated by *Tadić* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war "concentration camp" cases, best resonates with the facts of this case and is the one upon which the Trial Chamber will focus most of its attention. The Trial Chamber will examine and elaborate upon the

¹⁸⁹ *Tadić* Appeal Judgement, para. 191.

¹⁹⁰ *Ibid.*, paras 195-226.

¹⁹¹ *Ibid.*, para. 196. See also, *Krnjelac* Appeal Judgement, para. 84 ("[A]part from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent.")

¹⁹² *Tadić* Appeal Judgement, paras 202-203; *Krnjelac* Appeal Judgement, para. 89.

¹⁹³ *Tadić* Appeal Judgement, paras 203, 220, 228.

¹⁹⁴ *Ibid.*, para. 204 ("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.")

¹⁹⁵ *Tadić* Appeal Judgement, paras 228 and also 204, 220; *Vasiljević* Appeal Judgement, para. 99.

standards to be applied in assessing criminal liability of participants in a detention facility which operates as a joint criminal enterprise.¹⁹⁶

85. However, in other places in the Trial Judgement, the Trial Chamber also contemplates the possibility of an extended form of joint criminal enterprise:

The Trial Chamber also wishes to emphasize that crimes committed in furtherance of the joint criminal enterprise that were natural or foreseeable consequences of the enterprise can be attributed to any who knowingly participated in a significant way in the enterprise.¹⁹⁷

Similarly, any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise.¹⁹⁸

86. The Appeals Chamber notes, however, that the Trial Chamber did not hold any of the Appellants responsible for crimes beyond the common purpose of the joint criminal enterprise. Nonetheless, the Appeals Chamber wishes to affirm that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of joint criminal enterprise, which may involve a large number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.

2. What is the difference between co-perpetration and aiding and abetting?

87. The submissions of the Appellants raise questions concerning the proper distinction between co-perpetration and aiding and abetting.¹⁹⁹ The Prosecution responds that when an accused is criminally liable based on his participation in a joint criminal enterprise, and the requisite *mens rea* is established, he should be regarded as having “committed” that crime.²⁰⁰

¹⁹⁶ Trial Judgement, para. 268 (footnote omitted).

¹⁹⁷ *Ibid.*, para. 326.

¹⁹⁸ *Ibid.*, para. 327.

¹⁹⁹ See, e.g. Kvočka Appeal Brief, para. 162; Radić Appeal Brief, paras 47-49.

²⁰⁰ Prosecution Respondent’s Brief, para. 3.18.

the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.

91. The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself.²⁰³ Therefore, it would be inaccurate to refer to aiding and abetting a joint criminal enterprise. The aider and abettor assists the principal perpetrator or perpetrators in committing the crime.

92. The Appeals Chamber notes that the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.²⁰⁴

3. What level of contribution is required to show participation in a joint criminal enterprise?

93. Each of the Appellants raises questions concerning the level of contribution required to be a participant in a joint criminal enterprise.²⁰⁵

94. The Prosecution responds that the determination of what types of conduct amount to a significant contribution is, as stated in the Trial Judgement, to be based on the facts.²⁰⁶ It further states that "any participation which enables the system to run more smoothly or without disruption would constitute a case of significant contribution".²⁰⁷

95. The Trial Chamber held that:

[P]ersons who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal endeavor, and their acts or omissions significantly assist or facilitate the commission of crimes.²⁰⁸

It stressed that not everyone working in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise:

²⁰³ *Prosecutor v. Milutinović et al.*, Case No.: IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, para. 20.

²⁰⁴ *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 75 ("[T]he acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor 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.")

²⁰⁵ See e.g. *Radić* Appeal Brief, para. 62; *Radić* Reply Brief, paras 32-37; *Prcać* Appeal Brief, paras 147-149, 348; *Kvočka* Appeal Brief, paras 163-164, *Žigić* Appeal Brief, paras 406-408.

²⁰⁶ Prosecution Respondent's Brief, para. 3.24.

²⁰⁷ *Ibid.*, para. 3.9.

²⁰⁸ Trial Judgement, para. 308.

The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e. g. a participation that enables the system to run more smoothly or without disruption. Physical or direct commission of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution.²⁰⁹

The Trial Chamber went on to consider that the significance of the contribution to the joint criminal enterprise is to be determined on a case by case basis, taking into account a variety of factors, among them the position of the accused, the amount of time spent participating with knowledge of the criminal nature of the system, the level and efficiency of the participation, and any efforts to prevent crimes. The Trial Chamber attributed particular importance to any evidence of a shared intent or agreement with the criminal system, and the physical perpetration of crimes.²¹⁰

96. The Appeals Chamber has explained the *actus reus* of the participant in a joint criminal enterprise as follows:

First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is required, which involves 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 the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.²¹¹

97. The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise.²¹² In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.

98. The Appeals Chamber agrees that the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed.²¹³ Thus, the argument that an accused did not participate in the joint criminal enterprise because he was easily replaceable must be rejected.²¹⁴

²⁰⁹ *Ibid.*, para. 309.

²¹⁰ *Ibid.*, para. 311.

²¹¹ *Vasiljević* Appeal Judgement, para. 100 (footnotes omitted).

²¹² *See e. g.* below, para. 599 (the case of "opportunistic visitors" who enter the camp to commit crimes).

²¹³ *Tadić* Appeal Judgement paras 191, 199.

²¹⁴ *Prcać* Appeal Brief, para. 356 ("the accused did not have any special knowledge, skills or talents and, in the nature of things, he was easily replaceable."); *Radić* Appeal Brief, para. 62 ("The Defence can only conclude that the system would have functioned in the same way even without the presence of the accused Radić"); *Radić* Reply Brief, para. 34

99. Appellant Kvočka appears to argue that a co-perpetrator in a joint criminal enterprise must physically commit part of the *actus reus* of a crime in order to be criminally liable.²¹⁵ The Appeals Chamber disagrees. A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met. As the *Tadić* Appeals Chamber explained, “[a]lthough 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.”²¹⁶ This is particularly evident with respect to the systemic form of joint criminal enterprise at issue in the present case.

4. Can participation in a joint criminal enterprise be inferred from the accused’s position in a camp?

100. The Appellants argue that a significant contribution cannot be inferred from their position in the camp and that their low positions of employment in the camps precluded responsibility for crimes committed there.²¹⁷ The Prosecution responds that a position of authority, while not a legal requirement for joint criminal enterprise responsibility, is still a factor in the determination of responsibility.²¹⁸

101. The Appeals Chamber affirms that the *de facto* or *de jure* position of employment within the camp is only one of the contextual factors to be considered by the Trial Chamber in determining whether an accused participated in the common purpose. A position of authority, however, may be relevant evidence for establishing the accused’s awareness of the system, his participation in

(“Anyone could have replaced him since his presence is irrelevant for the events that took place in Omarska. Hence he could have been replaced at any time by anyone without any repercussions on the running of the camp”).

²¹⁵ Kvočka Appeal Brief, para. 162 (“[T]he action has to be part of co-perpetration of some offense and also give its contribution to co-perpetration in the great extent”).

²¹⁶ *Tadić* Appeal Judgement para. 191; see also para. 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 aiders and abettors might understate the degree of their criminal responsibility”.

²¹⁷ Kvočka Appeal Brief, paras 163 (“Kvočka did not have any important position in the camp. He had no authority and influence over guards”), 164; Prać Appeal Brief, paras 348, 352; Radić Appeal Brief, para. 57 (“The Trial Chamber erroneously objectifies existence of joint criminal enterprise and it mistakenly takes (*sic*) that if Omarska is a joint criminal enterprise it automatically means that the shift leader of the guard must be the co-perpetrator in the joint criminal enterprise, without finding it necessary to establish individual circumstance of possible involvement of the accused”), 61-62; Radić Reply Brief, para. 36 (“[T]he authority is the key factor with which to determine the contribution to the joint criminal enterprise”).

²¹⁸ Prosecution Respondent’s Brief, paras 6.96-6.125.

under Article 5 of the Statute.⁶⁷⁸ Accordingly, Kvočka proceeds to contest the conclusions of the Trial Chamber on each of the constitutive acts of persecution of which he has been found guilty.

314. As regards the general arguments raised by Kvočka in connection with the definition of the crime of persecutions, the Appeals Chamber stresses at the outset that it is unable to identify the error or errors alleged by Kvočka. Consequently, the Appeals Chamber declines to consider these general arguments and will deal with the specific errors Kvočka alleges regarding the criminal acts that constitute persecutions.

1. Specific criminal acts that constitute persecutions as a crime against humanity

315. Before turning to Kvočka's specific allegations, the Appeals Chamber notes that he was not found guilty of persecutions in connection with all the incidents listed in Schedule A under count 1 of the Indictment. A careful reading of the factual findings of the Trial Chamber shows that Kvočka was found guilty under Article 7(1) of the Statute of the persecutions committed against the following individuals listed in Schedule A: Witness A,⁶⁷⁹ Zuhra Hrnić,⁶⁸⁰ Witness AM,⁶⁸¹ Omer Mešan,⁶⁸² Sabit Murčehajić,⁶⁸³ Witness AI,⁶⁸⁴ Nusret Sivac⁶⁸⁵ and Sifeta Sušić⁶⁸⁶ who were confined in inhumane conditions. The detainees Emir Beganović,⁶⁸⁷ Abdulah Brkić,⁶⁸⁸ Muhamed Cehajić,⁶⁸⁹ Jasmin Hrnić,⁶⁹⁰ Witness AK,⁶⁹¹ Hase Ičić,⁶⁹² Asef Kapetanović,⁶⁹³ Emir Karabašić,⁶⁹⁴ Witness T,⁶⁹⁵ Azedin Oklopčić,⁶⁹⁶ Silvije Sarić⁶⁹⁷ and Witness AJ⁶⁹⁸ were confined in inhumane conditions and were victims of beatings. Witness J,⁶⁹⁹ Witness B,⁷⁰⁰ Witness F⁷⁰¹ and Witness K⁷⁰²

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Trial Judgement, paragraphs or respective footnotes of paras 452 and 557.

⁶⁸⁰ *Ibid.*, paragraphs or respective footnotes of paras 86, 94 and 107.

⁶⁸¹ *Ibid.*, paragraphs or respective footnotes of paras 49, 94-96.

⁶⁸² *Ibid.*, paragraphs or respective footnotes of paras 437, 482, 490, 518 and 541.

⁶⁸³ *Ibid.*, paragraphs or respective footnotes of paras 58, 482, 483 and 493.

⁶⁸⁴ *Ibid.*, paras 86, 368 and 382.

⁶⁸⁵ *Ibid.*, paragraphs or respective footnotes of paras 55, 82, 370, 391, 435, 436, 445, 482, 487, 493 and 495.

⁶⁸⁶ *Ibid.*, paragraphs or respective footnotes of paras 71, 98, 370, 391, 436, 540, 547 and 561.

⁶⁸⁷ *Ibid.*, paragraphs or respective footnotes of paras 593, 597, 598 and 685.

⁶⁸⁸ *Ibid.*, paragraphs or respective footnotes of paras 437 and 593.

⁶⁸⁹ *Ibid.*, para. 493.

⁶⁹⁰ *Ibid.*, para. 534.

⁶⁹¹ *Ibid.*, paragraphs or respective footnotes of paras 382, 387, 411, 444, 483, 527, 528, 569, 587-593, 597-598.

⁶⁹² *Ibid.*, paragraphs or respective footnotes of paras 93, 514, 520, 528, 535, 542 and 614.

⁶⁹³ *Ibid.*, paras 483, 530, 585-598, 685. The victim named Asef Kapetanović to which it is referred here is the one tortured in the White house and in the Pista, not the one killed upon his arrival at the camp.

⁶⁹⁴ *Ibid.*, para. 530.

⁶⁹⁵ *Ibid.*, paras 599-609.

⁶⁹⁶ *Ibid.*, paragraphs or respective footnotes of paras 85, 368, 436, 487, 528, 536, 537, 540 and 593.

⁶⁹⁷ *Ibid.*, para. 530.

⁶⁹⁸ *Ibid.*, paragraphs or respective footnotes of paras 55, 59, 368, 487, 585-598.

⁶⁹⁹ *Ibid.*, paras 548 and 549.

⁷⁰⁰ *Ibid.*, paragraphs or respective footnotes of paras 49, 50, 54, 71, 104, 107, 436, 437, 444, 445, 491, 518, and 546.

⁷⁰¹ *Ibid.*, paras 547, 561.

⁷⁰² *Ibid.*, paras 551, 552, 559.

were confined in inhumane conditions and victims were of rape or sexual violence. Ahil Dedić,⁷⁰³ Ismet Hodžić,⁷⁰⁴ Bećir Medunjanin,⁷⁰⁵ Mehmedalija Nasić,⁷⁰⁶ were detained and killed in the camp. As to Ahil Dedić and Ismet Hodžić, the Appeals Chamber recalls that it reversed the Trial Chamber's findings and found Kvočka not guilty of these two murders.⁷⁰⁷ For the same reasons which have led to this conclusion, the Appeals Chamber further vacates Kvočka's conviction for persecutions (confinement in inhumane conditions) in respect of Ahil Dedić and Ismet Hodžić.

316. No factual findings could be found in the Trial Judgement for the following individuals contained in Schedule A under count 1: Eno Alić, Refik Begulić, Witness AV, Zlata Bilajac, 12 men with the family name Garibović, Husein Hodžić, Mehmed Hadžić, Fikret Harambašić, Safet Ilić, Sakib Jakupović, Witness AU, Witness AF, Witness M, Ferid Mujčić, Witness AL, Muharem Nezirević, Abdulah Puškar, Hanki Ramić and Reuf Travančić. The Appeals Chamber concludes that Kvočka has not been found guilty in respect of these individuals.

(a) Harassment, humiliation and psychological abuse

317. Kvočka argues that acts of harassment, humiliation and psychological abuse do not constitute the crime of persecutions.⁷⁰⁸ He submits that, under *Kupreškić*,⁷⁰⁹ in order for an act to be held as persecution, it must be of equal gravity or severity as the criminal acts listed in Article 5 of the Statute, and that the acts in question do not rise to this standard.⁷¹⁰

318. The Prosecution responds that this submission does not have a factual or legal basis, and that the Trial Chamber correctly considered harassment, humiliation and psychological abuse as acts of persecution, as is supported by the *Krnjelac* Trial Judgement, the *Blaškić* Trial Judgement and the *Aleksovski* Appeal Judgement.⁷¹¹ It submits that those acts against Bosnian Muslims amounted to a gross or blatant denial of fundamental human rights, thus satisfying the legal criterion of seriousness.⁷¹²

319. Referring to the case-law of the Tribunal, the Trial Chamber defined the constitutive elements of the crime of persecution as follows: "(1) the occurrence of a discriminatory act or omission; (2) a basis for that act or omission founded on race, religion, or politics; and (3) the intent

⁷⁰³ *Ibid.*, para. 76.

⁷⁰⁴ *Ibid.*, footnote 164.

⁷⁰⁵ *Ibid.*, paras 599-609.

⁷⁰⁶ *Ibid.*, paras 83 and 379(f).

⁷⁰⁷ See above, paras 268, 271, 277.

⁷⁰⁸ Kvočka Appeal Brief, para. 83.

⁷⁰⁹ *Ibid.*, para. 72, quoting *Kupreškić et al.* Trial Judgement, para. 621.

⁷¹⁰ Kvočka Appeal Brief, paras 72 and 81-82; Kvočka Reply Brief, paras 63 and 64.

⁷¹¹ Prosecution Respondent's Brief, paras 5.66, 5.68 and 5.70.

to infringe an individual's enjoyment of a basic or fundamental right"⁷¹³ and, in more general terms, defined persecutions as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5"⁷¹⁴.

320. The Appeals Chamber finds no error in the constitutive elements identified by the Trial Chamber but prefers to adopt the wording of the *Krnojelac* Appeal Judgement, which was rendered after the delivery of the Trial Judgement in the present case and which it has endorsed in all its recent judgements:

(...) the crime of persecution consists of an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).⁷¹⁵

321. The Appeals Chamber also notes that with respect to the *actus reus* of the crime of persecutions, the Trial Chamber rightly noted that the acts included in the crime of persecution, be they considered in combination or separately, are of the same gravity as the enumerated crimes in Article 5 of the Statute.⁷¹⁶ Kvočka does not in fact contest the standard of gravity but refers to it to show the Trial Chamber's alleged error. The Appeals Chamber points out that to apply the standard of gravity, the acts must not be considered in isolation, but in context, by looking at their cumulative effect.⁷¹⁷

322. The Appeals Chamber will further determine whether the charges of harassment, humiliation and psychological abuse as established in this case were of sufficient gravity to constitute crimes of persecution under Article 5(h) of the Statute.

323. Harassment, humiliation and psychological abuse are not listed as such under Article 5 of the Statute nor do they constitute specific offences under other articles of the Statute. The Appeals Chamber notes however that Common Article 3(1)(c) of the Geneva Conventions prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment". The specific

⁷¹² *Ibid.*, para. 5.73.

⁷¹³ Trial Judgement, para. 184, referring to *Tadić* Trial Judgement, para. 715.

⁷¹⁴ Trial Judgement, para. 184, referring to *Kupreškić et al.* Trial Judgement, para. 621.

⁷¹⁵ *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113; *Blaskić* Appeal Judgement, para. 131; *Kordić and Čerkez* Appeal Judgement, para. 101.

⁷¹⁶ Trial Judgement, paras. 184-185.

offence of outrages upon personal dignity also appears in Article 75(2)(b) of Additional Protocol I.⁷¹⁸ The Appeals Chamber also considers that acts of harassment and other psychological abuse, depending on the circumstances, can clearly be assimilated to violations of the “mental well-being of persons” prohibited under Article 75(2)(a) of Additional Protocol I.⁷¹⁹ The Appeals Chamber recalls incidentally that acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law.

324. Contrary to Kvočka’s claim, the Trial Chamber endeavoured to show in what respect the acts of harassment, humiliation and psychological abuse committed in the camp reached the degree of gravity of the crimes against humanity explicitly listed in the Statute. The Trial Chamber argued as follows:

(...) The conditions of detention prevailing in the camp – gross overcrowding in small rooms without ventilation, requiring the detainees to beg for water, and forcing them to relieve bodily functions in their clothes – were themselves a form of abuse, and were intended to harass, humiliate, and inflict mental harm on the detainees. The constant berating, demoralizing, and threatening of detainees, including the guards’ coercive demands for money from detainees, and the housing of detainees in lice-infected and cramped facilities were calculated by participants in the operation of the camp to inflict psychological harm upon detainees. Just as rape and forced nudity are recognized as crimes against humanity or genocide if they form part of an attack directed against a civilian population or if used as an instrument of the genocide, humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution.

The Trial Chamber is also satisfied that the horrendous conditions of detention and the demoralizing treatment of detainees in Omarska camp were sufficiently degrading and traumatizing to constitute *per se* an outrage upon personal dignity, which qualifies as persecution since it was clearly committed on discriminatory grounds.⁷²⁰

325. The Appeals Chamber has no doubt that, in the context in which they were committed and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution. The Appeals Chamber finds the conclusion reached by the Trial Chamber reasonable. This ground of appeal is therefore dismissed.

(b) Murder

326. Kvočka claims that the Trial Chamber erred in finding him guilty of murder as persecution with respect to Silvije Sarić. He submits that the list of victims for Counts 1 to 3 is the same as that for Counts 4 and 5, only with the addition of Silvije Sarić. The Indictment stated that Sarić was

⁷¹⁷ See Trial Judgement, para. 185; also *Kupreškić et al.* Trial Judgement, paras 615(e) and 622; *Krnjelac* Trial Judgement, para. 434.

⁷¹⁸ See also Article 4(2)(e) of Additional Protocol II.

⁷¹⁹ See *ibid.*

⁷²⁰ Trial Judgement, paras 190-191 (footnote omitted).

sufficient to establish that he was aware of his acts being discriminatory, but that he must have consciously intended to discriminate.⁸³⁷ The Prosecution responds that Radić has not shown that the Trial Chamber erred by inferring his discriminatory intent from his conduct, and from the fact that he participated knowingly and wilfully in a joint criminal enterprise which comprised a system of maltreatment in which detainees were persecuted on discriminatory grounds.⁸³⁸

363. The Trial Chamber found that all the detainees in the Omarska camp were non-Serbs or persons suspected of sympathizing with non-Serbs. Virtually all offences were committed against non-Serbs. The establishment of the camp formed only one element of a common plan to drive the non-Serb population of Prijedor out of the territory.⁸³⁹ Radić does not challenge these findings, nor does he dispute that the crimes committed in the Omarska camp, for which he was convicted under this count, deny or infringe fundamental rights of the victims. In the present case, the Appeals Chamber found that the Trial Chamber correctly defined the crime of persecution.⁸⁴⁰ Under the given circumstances, there is no doubt that the underlying crimes were committed upon discriminatory grounds, and had discriminatory effects.

2. Radić's discriminatory intent

364. Radić contests the Trial Chamber's conclusion that the individual discriminatory intent required for the crime of persecution could be inferred from the discriminatory character of the Omarska camp.⁸⁴¹ Radić argues that the existence of the Omarska camp cannot *per se* establish his discriminatory intent because the *Krnjelac* Trial Chamber held that such intent of the accused needed to be established for every individual act.⁸⁴² Radić argues that the Trial Chamber's failure to establish his discriminatory intent without further evidence, and the "automatic" attribution of discriminatory intent violated the rights of the accused.⁸⁴³ Further, Radić refers to the case of *Georgiadis v. Greece*⁸⁴⁴ of the European Court of Human Rights to demonstrate that a court of law must "give much more specific reason" when its finding is of "decisive importance for appellant's rights" and when the findings include "assessment of factual issues".⁸⁴⁵

⁸³⁷ *Ibid.*, para. 75.

⁸³⁸ Prosecution Respondent's Brief, para. 6.141.

⁸³⁹ Trial Judgement, paras 197-198.

⁸⁴⁰ See above, paras 319-320.

⁸⁴¹ Radić Appeal Brief, para. 67.

⁸⁴² *Ibid.*, para. 71.

⁸⁴³ *Ibid.*

⁸⁴⁴ *Georgiadis v. Greece*, 29 May 1997, Eur. Ct. H. R., Report 1997-III.

⁸⁴⁵ Radić Appeal Brief, para. 77.

365. The Prosecution submits that the Trial Chamber's articulation of the *mens rea* for persecution is legally beyond reproach,⁸⁴⁶ that a trier of fact is permitted to infer an accused's discriminatory intent from many factors including the conduct itself and the context in which it occurs.⁸⁴⁷ In the view of the Prosecution, the Trial Chamber was correct in concluding that a participant in a joint criminal enterprise must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that these acts facilitated the crimes committed through the enterprise.⁸⁴⁸

366. The Appeals Chamber agrees with Radić that the discriminatory intent of crimes cannot be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity. However, the discriminatory intent may be inferred from the context of the attack, provided it is substantiated by the surrounding circumstances of the crime.⁸⁴⁹ Accordingly, the Appeals Chamber found in the case *Prosecutor v. Krnojelac* that, when beatings were inflicted only on the non-Serb detainees in a prison, it was reasonable to conclude that these beatings were committed because of the political or religious affiliation of the victims, and that these acts were committed with the requisite discriminatory intent.⁸⁵⁰ In the present case, it appears that almost all the detainees in the camp belonged to the non-Serb group. It was reasonable to conclude that the reason for their detention was their membership in this group and therefore of a discriminatory nature.

367. Radić argues that he did not share the goal of the discriminatory policy, but that he reluctantly served in the camp only because of the explicit orders of his superior. The Appeals Chamber recalls that discriminatory intent must be distinguished from the motive for doing so.⁸⁵¹ The Trial Chamber inferred Radić's discriminatory intent from his knowledge of the persecutory nature of the crimes, and his knowing participation in the system of persecution pervading Omarska camp.⁸⁵² The Appeals Chamber finds that it was reasonable to reach the conclusion that Radić acted with discriminatory intent from the facts of the case, regardless of his personal motives for doing so. His personal motives may become relevant at the sentencing stage, but not as to the finding of his criminal intent.

⁸⁴⁶ Prosecution Respondent's Brief, para. 6.143.

⁸⁴⁷ *Ibid.*, para. 6.144.

⁸⁴⁸ *Ibid.*, para. 6.146.

⁸⁴⁹ *Krnojelac* Appeal Judgement, para. 184.

⁸⁵⁰ *Ibid.*, para. 186; *Kordić and Čerkez* Appeal Judgement, para. 950.

⁸⁵¹ See above, para. 106.

⁸⁵² Trial Judgement, para. 571(g).

368. The Appeals Chamber understands that Radić, by his reference to the case of *Georgiadis v. Greece*⁸⁵³ of the European Court of Human Rights, contends that the Trial Chamber failed to give sufficient reasons for his conviction. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98 *ter* (C).⁸⁵⁴ However, the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during trial. It is therefore necessary for any appellant claiming an error of law due to the lack of a reasoned opinion to identify the specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.⁸⁵⁵ The Appeals Chamber finds that the Trial Chamber's findings as to Radić's discriminatory intent meet this standard, and that Radić has failed to identify any particular omission on the part of the Trial Chamber.

3. The sexual offences did not involve discrimination

369. Radić also asserts that the acts of rape and sexual violence charged do not involve discrimination based on religion, ethnicity, or political belief.⁸⁵⁶ He submits that the Trial Chamber found personal motives in the acts of rape as persecution, but failed to establish what constituted his discriminatory intent.⁸⁵⁷

370. The Appeals Chamber finds that Radić, again, does not distinguish between intent and motive. The Trial Chamber found that the sexual violence was directed only against women of non-Serb origin,⁸⁵⁸ and Radić does not contest this finding. It was, for the reasons set out in the preceding section, reasonable to conclude that Radić acted with the required discriminatory intent, notwithstanding his personal motives for committing these acts.

C. Alleged factual errors (ground of appeal 4)

371. In his fourth ground of appeal, Radić challenges various factual findings of the Trial Chamber.

⁸⁵³ *Georgiadis v. Greece*, 29 May 1997, Eur. Ct. H. R., Report 1997-III.

⁸⁵⁴ *Kunarac et al.* Appeal Judgement, para. 41; *Furundžija* Appeal Judgement, para. 69; *see above*, para. 23.

⁸⁵⁵ *See above*, para. 25.

⁸⁵⁶ Radić Appeal Brief, para. 73.

⁸⁵⁷ *Ibid.*, para. 66.

⁸⁵⁸ Trial Judgement, para. 560.

(ii) the act or omission being one which was committed on political, racial or religious grounds; and
 (iii) the act or omission being one which was committed with discriminatory or persecutory intent.¹⁰³⁶ The Trial Chamber's findings supported the conclusion that the establishment of the camps fitted into a wider persecutory plan to drive the non-Serb population out of Prijedor, that those detained in the camps were selected on discriminatory grounds, and finally that virtually all offences committed in the camps were committed on discriminatory grounds.¹⁰³⁷ In relation to discriminatory intent, the Prosecution submits that the Trial Chamber's articulation of the *mens rea* for persecution was legally correct. The requisite discriminatory intent, the Prosecution argues, could be inferred from the conduct itself and the context in which it occurred.¹⁰³⁸

454. The Appeals Chamber recalls that in the jurisprudence of the Tribunal, persecution as a crime against humanity is defined as:

(...) an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).¹⁰³⁹

The Appeals Chamber finds that there is no basis for Žigić's claim that the Trial Chamber erred in law in its definition of persecution.¹⁰⁴⁰

455. In application of this standard, the Trial Chamber considered that when all the detainees were non-Serbs or those suspected of sympathizing with non-Serbs, it would be disingenuous to contend that religion, politics, and ethnicity did not define the group targeted for attack. In relation to the facts of the present case, the Trial Chamber noted:

[V]irtually all the offences alleged were committed against non-Serb detainees of the camps. The victims were targeted for attack on discriminatory grounds. While discriminatory grounds form the requisite criteria, not membership in a particular group, the discriminatory grounds in this case are founded upon exclusion from membership in a particular group, the Serb group. [...] There is no doubt that the attacks specifically targeted the non-Serb population of Prijedor and purported to drive this population out of the territory or to subjugate those remaining. The Trnopolje and

¹⁰³⁵ The Prosecution refers to the arguments in relation to Kvočka's grounds of appeal nos 5 and 6, and to Radić's ground of appeal no 3, Prosecution Respondent's Brief, para. 7.264.

¹⁰³⁶ Prosecution Respondent's Brief, para. 6.131.

¹⁰³⁷ *Ibid.*, para. 6.135.

¹⁰³⁸ *Ibid.*, para. 6.143-6.144.

¹⁰³⁹ *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113; *Blaškić* Appeal Judgement, para. 131; *Kordić and Čerkez* Appeal Judgement, para. 101.

¹⁰⁴⁰ See above, para 320.

and finally,

RULES that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellants are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

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

Mohamed Shahabuddeen
Presiding

Fausto Pocar

Florence Ndepele Mwachande Mumba

Mehmet Güney

Inés Mónica Weinberg de Roca

Judge Mohamed Shahabuddeen and Judge Inés Mónica Weinberg de Roca append separate opinions to this Judgement.

Dated this twenty-eighth day of February 2005,
At The Hague,
The Netherlands

[Seal of the International Tribunal]