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ANNEX A

AUTHORITY 58

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-98-32-A

Date: 25 February 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Date: **25 February 2004**

PROSECUTOR

v.

MITAR VASILJEVIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Steffen Wirth

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

discriminatory intent for the crime of persecution.[166] The Appellant is also alleging that the Trial Chamber committed an error of law by "convicting the accused for persecution solely on the basis of one incident."[167]

92. Under the fourth ground of appeal, the Appellant argues that he cannot be convicted cumulatively, in respect of the same conduct, of both murder under Article 3 of the Statute and persecution by way of murder under Article 5 of the Statute.[168]

93. Before addressing the above-mentioned arguments, the Appeals Chamber finds it necessary to recall the law applicable to joint criminal enterprise and the differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor.

A. Law applicable to joint criminal enterprise, participation as a co-perpetrator or as an aider and abettor

1. Joint criminal enterprise

94. Article 7(1) of the Statute sets out certain forms of individual criminal responsibility which apply to the crimes falling within the International 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.

95. This provision lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. Article 7(1) of the Statute does not make explicit reference to "joint criminal enterprise." However, the Appeals Chamber has previously held that participation in a joint criminal enterprise is a form of liability which existed in customary international law at the time, that is in 1992, and that such participation is a form of "commission" under Article 7(1) of the Statute.[169]

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[166] *Ibid*, paras 10-14.
[167] *Ibid*, paras 5-6.
[168] Defence Appeal Brief, paras 217-219.
[169] *See Tadić* Appeals Judgement, para. 188 and para. 226, which provides that "[t]he 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." To reach this finding 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, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council

96. Three categories of joint criminal enterprise have been identified by the International Tribunal's jurisprudence.[170]

97. The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention.[171] An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.

98. The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment.[172] An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.

99. The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[173] An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing")

Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993. 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 (paras 197 et seq.). It further considered the relevant provisions of two international Conventions which reflect the views of 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) (paras 221-222). 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 (paras 224-225). The *Tadić* Appeals Chamber used interchangeably the expressions "joint criminal enterprise," "common purpose" and "criminal enterprise," although the concept is generally referred to as "joint criminal enterprise," and this is the term used by the parties in the present appeal. *See* also, *Ojdanić* Decision, para. 20 regarding joint criminal enterprise as a form of commission.

[170] *See* in particular *Tadić* Appeals Judgement, paras 195-226, describing the three categories of cases following a review of the relevant case-law, relating primarily to many war crimes cases tried after the Second World War. *See* also *Krnojelac* Appeals Judgement, paras 83-84.

[171] *Ibid*, para. 196. *See* also, *Krnojelac* Appeals Judgement, para 84, providing that, "apart 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."

[172] *Tadić* Appeals Judgement, paras 202-203. Although the participants in the joint criminal enterprises of this category tried in the cases referred to 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. The *Krnojelac* Appeals Judgement found that this "systemic" category of joint criminal enterprise 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, para. 89.

[173] *Ibid,* para. 204, which held that "[c]riminal 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 Appeals Chamber came to the conclusion that this form of liability was applicable to Duško Tadić, para. 232.

with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

100. The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements: First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.[174] 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.[175] 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.[176]

101. However, the *mens rea* differs according to the category of joint criminal enterprise under consideration:

- With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[177]

- With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment.[178]

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common 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

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[174] *Ibid*, para. 227, referring to the *Essen Lynching* and the *Kurt Goebell* cases.
[175] *Ibid*, where the *Tadić* Appeals Chamber uses the expressions, "purpose," "plan," and "design" interchangeably.
[176] *Ibid*.
[177] *Ibid*, paras 196 and 228. *See* also *Krnojelac* Appeals Judgement, para. 97, where the Appeals Chamber considers that, "by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers - the principal perpetrators of the crimes committed under the system - to commit those crimes."

crime other than the one which was part of the common design arises "only if, under the circumstances of 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*"[179] – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

2. Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor

102. Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) 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, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) 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 the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

B. Alleged errors of law

1. Alleged errors of law related to the concept of joint criminal enterprise

103. Before turning to the alleged errors of law of the Trial Chamber concerning the concept of joint criminal enterprise and persecution, the Appeals Chamber will first determine under which category of joint criminal enterprise the Drina River incident falls.

[178] *Ibid*, paras 202, 220 and 228.
[179] *Ibid*, para. 228. *See* also paras 204 and 220.

104. In the present case, the Trial Chamber considered the first and second categories of joint criminal enterprise.[180]

105. The Appeals Chamber recalls that the second category of joint criminal enterprise is the so-called "concentration camp" cases. In this category of joint criminal enterprise, the co-perpetrator must have a personal knowledge of a system of ill-treatment, as well as the intent to further this system of ill-treatment.[181] The Appeals Chamber is of the view that, in light of the factual circumstances surrounding the Drina River incident, the latter does not fall within the second category of joint criminal enterprise.

106. The Appeals Chamber further finds that the responsibility of the Appellant could have been envisaged under the third category of joint criminal enterprise (extended form), but that it was clearly not pleaded by the Prosecution. In this respect, the Trial Chamber considered in paragraph 63 of the Judgement that

> [i]n the Indictment, the Prosecution alleges that the Accused "acted in concert" with Milan Lukić Sredoje Lukić and other unknown individuals with respect to acts of extermination, persecution, murder, inhumane acts and violence to life and person. At the Pre-Trial Conference on 20 July 2001, the Prosecution was asked to state clearly what it meant by the use of the term "in concert". The Prosecution initially stated that all it was trying to convey was that the Accused was not acting alone and that he did not commit the crimes by himself, but it was eventually agreed that the Prosecution was relying upon a joint criminal enterprise. The Prosecution did not plead the extended form of joint criminal enterprise [...]. Indeed, when asked, counsel for the Prosecution expressly disclaimed any intention to rely upon such a case.

107. For the above reasons, the Appeals Chamber is of the view that only the first category is relevant. The Appellant alleges three errors of law related to the concept of joint criminal enterprise. According to the first alleged error, the Trial Chamber failed to explicitly indicate which exact criteria it applied to assess the existence of a joint criminal enterprise. The Appeals Chamber recalls that paragraphs 63 to 69 of the Judgement clearly set out the Prosecution's case as well as the applicable law. Furthermore, contrary to the Appellant's submission, paragraphs 206 to 211, as well as paragraphs 238 to 240 of the Judgement clearly indicate the criteria the Trial Chamber applied in order to determine whether the Appellant participated in a joint criminal enterprise to murder the seven Muslim men. Therefore, the Appeals Chamber finds that the Appellant's submission is not well founded. This sub-ground of appeal is dismissed.

108. Second, the Appellant alleges that the Trial Chamber erred in finding that the existence of an arrangement or understanding amounting to an agreement between two or more persons need not be expressed but can also be inferred.[182] The Prosecution responds that this argument is not tenable, and refers in support to the Appeals Chamber's findings in the *Tadić* Appeals Judgement and the *Furundžija*

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[180] Judgement, para. 63.
[181] *Tadić* Appeals Judgement, paras 202-203.
[182] Defence Appeal Brief, paras 180-183 (under the fourth ground of appeal) and 236 (under the seventh ground of appeal).

Appeals Judgement.[183] The Appellant replies that, in any event, it is not clear from the evidence that such an agreement existed.[184]

109. It clearly results from *Tadić* Appeals Judgement that "[t]here is no necessity for th[e] 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."[185] The Appeals Chamber in the *Furundžija* Appeals Judgement relied on this reasoning, when it identified the legal elements of co–perpetration in a joint criminal enterprise.[186] The Appeals Chamber finds, therefore, that the Appellant's submission is not well founded and this sub-ground of appeal must fail.

110. Third, the Appellant challenges the Trial Chamber's finding that, if the agreed crime is committed by one or more of the participants in a joint criminal enterprise, all of the participants are equally guilty of the crime regardless of the part played by each in its commission.[187] The Prosecution submits that the Appellant confuses the questions of criminal liability and sentencing, and that it is well established in relation to criminal liability that participation in a joint criminal enterprise is a method of "committing" the crime within the meaning of Article 7(1) of the Statute.[188] In the Defence Reply, the Appellant submits that it agrees with the Prosecution that criminal liability and sentencing are two separate questions, but argues that the Trial Chamber committed an error in sentencing when it "expressly had regard to the nature of the Appellant's role in the joint criminal enterprise."[189]

111. The Appeals Chamber recalls that the case-law of the Tribunal stemming from the *Tadić* Appeals Judgement and the *Ojdanić* Decision regards participation in a joint criminal enterprise as a form of commission. In light of this established case-law, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in finding all of the participants in the joint criminal enterprise to beequally guilty of the crime regardless of the part played by each in its commission. The Appeals Chamber considers further that the Appellant has not elaborated on what error the Trial Chamber would have made with regard to sentencing. This sub-ground of appeal is dismissed.

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[183] Prosecution Response Brief, para. 8.9.
[184] Defence Reply, para. 8.3.
[185] *Tadić* Appeals Judgement, para. 227. *See* also *Krnojelac* Appeals Judgement, para. 97 where the Appeals Chamber considers that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case.
[186] *Furundžija* Appeals Judgement, para. 119.
[187] Defence Appeal Brief, para. 241.
[188] Prosecution Response, para. 8.13.
[189] Defence Reply, para. 8.5.

2. Alleged error of law by convicting the Appellant for persecution based on only one incident

112. In his sixth ground of appeal the Appellant submits that the Trial Chamber made an error of law "by convicting the accused for persecution solely on the basis of one incident which occurred on June 7, 1992 at the Drina River."[190] According to the Appellant, the case law of this Tribunal shows that convictions for persecution are generally based on the alleged role of an accused in numerous acts. In the absence of numerous offences, evidence of the requisite discriminatory intent must be applied with great caution.[191] In response, the Prosecution submits that in law "a single act may constitute persecution, if there is clear evidence of the discriminatory mental state."[192] The present case cannot be seen as an "isolated incident," as the Milan Lukić group committed various crimes against the Muslim population. The Prosecution takes the view that there is no reason why the Appellant should not be convicted of persecution as a participant in it, even if he was not convicted in relation to any other incident.[193] In reply, the Appellant argues that "a single event may only constitute persecution when there is clear evidence of the discriminatory intent" and that, in the present case, such clear evidence of the discriminatory intent of the Appellant is not available.[194]

113. The Appeals Chamber does not subscribe to the views of the Appellant that the Trial Chamber erred in finding him guilty of persecution "solely on the basis of one incident,"[195] First, the Drina River incident consists of the murder of five people and the inhumane acts inflicted on two others. This incident cannot be described as a single act but rather as a series of acts. Second, as held by the Appeals Chamber in the *Krnojelac* Appeals Judgement, persecution is "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*)."[196] Although persecution often refers to a series of acts, a single act may be sufficient,[197] as long as this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds. The Appeals Chamber therefore finds that this sub-ground of appeal is without merit.

114. In conclusion, the Appellant's four sub-grounds of appeal alleging errors of law are dismissed and the Appeals Chamber now turns to the alleged errors relating to the *mens rea* of the Appellant. In

[190] Defence Additional Appeal Brief, para. 6.
[191] *Ibid*, para. 5.
[192] Prosecution Response Brief, para. 7.14.
[193] *Ibid*, para. 7.14.
[194] Defence Additional Reply, paras 6-7.
[195] Defence Additional Appeal Brief, para. 6.
[196] *Krnojelac* Appeals Judgement, para. 185 (cmphasis added).
[197] *See* also *Krnojelac* Trial Judgement, para. 433 and *Kupreškić* Trial Judgement, para. 624.

the present case, the Appellant did not allege that the Trial Chamber erred when it found that the *actus reus* of the crime was established. His arguments on appeal relate to his *mens rea*. The Appeals Chamber will therefore consider the *actus reus* of the Appellant only if it finds that the Trial Chamber erred in concluding that the Appellant had the intent to kill the seven Muslim men.

C. Alleged errors relating to the Appellant's *mens rea* to kill the seven Muslim men

115. The Appellant submits that the Trial Chamber erred in finding that he shared the intent to kill the seven Muslim men.[198]

116. The Trial Chamber inferred the intent of the Appellant from his actions,[199] which are described in paragraph 209 of the Judgement as follows:

> [t]he Trial Chamber is satisfied that the Accused personally participated in this joint criminal enterprise by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started.

117. The Appellant argues that these acts are not conclusive proof of his intention that the seven Muslim men be killed, as required for murder.[200] In support of his argument, the Appellant states that he was not armed that day and did not point a gun at the seven men in the Vilina Vlas Hotel and that the intention of Milan Lukić at the time the group was in the hotel was not to kill the seven Muslim men but to imprison them. He further argues that witnesses VG-14 and VG-32 described differently how they moved towards the Drina River and that their testimonies do not support a finding that the Appellant pointed a gun at the seven Muslim men and prevented their escape. The Appellant also argues that he was standing 10 to 15 meters behind Milan Lukić and the other two men when the shooting occurred.[201]

118. The Prosecution responds that it is for the Appellant to demonstrate that the Trial Chamber's conclusion was so unreasonable that no reasonable trier of fact could have come to this conclusion.[202] The Prosecution submits that it was open to a reasonable trier of fact to conclude, on the basis of the totality of circumstances and evidence, that the Appellant, as demonstrated by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself.[203]

119. The Appeals Chamber recalls that to find the individual criminal responsibility of a co-perpetrator in a joint criminal enterprise, the Prosecution must establish that i) an accused voluntarily

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[198] Defence Additional Brief, para. 59 (under fourth ground of appeal); Defence Appeal Brief, para. 231 (under sixth ground of appeal).
[199] Judgement, paras 113 and 208.
[200] Defence Additional Appeal Brief, para. 57 (under the fourth ground of appeal).
[201] *See* paras 61-67 above.
[202] Prosecution Response Brief, para. 5.8.

162. As to the issue of whether verbal abuse by one of the members of the Milan Lukić group may aggravate the Appellant's sentence, the Appeals Chamber finds that, regardless of who made it, verbal abuse aggravated the gravity of the crimes committed on the bank of the Drina River. The Appellant took part in these crimes and the Trial Chamber correctly found that verbal abuse made in these circumstances amounted to an aggravating factor. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber committed an error in exercising its discretion. Therefore, this sub-ground of appeal is dismissed.

(c) The trauma suffered cannot be an aggravating factor since it is an element of the crime

163. The Appellant argues that the trauma suffered by the victims cannot amount to an aggravating factor since the trauma is an element of inhumane acts as a crime against humanity pursuant Article 5(i) of the Statute.[265] He submits that as an element of the crime, the trauma can not be taken into account additionally as aggravating the act.

164. The Prosecution responds that the long-term trauma suffered by the victims is not, as such, an element of the crime of persecution or murder as a crime against humanity or of murder as a war crime.[266]

165. In the present case, when recalling the applicable law in Chapter XI of the Judgement on inhumane acts, the Trial Chamber held that:

> The elements to be proved [for an act to constitute an inhumane act as a crime against humanity] are:
>
> (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;
>
> (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack of human dignity;
>
> (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.[267]
>
> To assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.[268]

[265] Defence Appeal Brief, para. 252; Defence Reply, para. 9.4.
[266] Prosecution Response, para. 9.7.
[267] Judgement, para. 234.
[268] *Ibid*, para. 235, (emphasis added). The Trial Chamber referred to *Krnojelac* Trial Judgement, para. 144 and *Kunarac* Trial Judgement, para. 501.

166. The Trial Chamber was satisfied that "the attempted murder of VG-32 and VG-14 constitutes a serious attack on their human dignity, and that it caused VG-32 and VG-14 immeasurable mental suffering".[269] Considering the aggravating factors argued by the Prosecution, the Trial Chamber found that "the trauma still suffered by the survivors of the shooting" constituted an aggravating factor.[270]

167. The Appeals Chamber is of the view that, even if the mental suffering of the survivors of the Drina River constitutes an element of the crime of inhumane acts, the Trial Chamber was entitled to take the long term effect of the trauma still suffered by witnesses VG-14 and VG-32 into account as an aggravating factor. Therefore, the Appellant has not demonstrated that the Trial Chamber erred in the exercise of its discretion. This sub-ground of appeal is dismissed.

(d) Discriminatory state of mind

168. The Appellant submits that the Trial Chamber committed an error of law by finding that his discriminatory state of mind was an aggravating factor in relation to the murders as a violation of the laws or customs of war under Article 3 of the Statute because the crime of persecution as a crime against humanity under Article 5(h) of the Statute already includes this element.[271] Such application, he argues, violates the principle *non bis in idem*.[272]

169. The Prosecution submits that the rules on the permissibility of cumulative convictions allow convictions under Articles 3 and 5 of the Statute based on the same conduct on the basis that each crime contains an element which the other does not. Therefore, in the submission of the Prosecution, it is within the discretion of the Trial Chamber to consider a factor in aggravation under Article 3 even if the same factor cannot be considered in aggravation for the crime of persecution.[273]

170. The Appellant was convicted only for his conduct in relation to the Drina River incident. The Trial Chamber found when discussing cumulative convictions that

> [c]onvictions for the crimes enumerated under Articles 3 and 5 of the Statute based on the same conduct are permissible, as each contains a materially distinct element. The materially distinct element required by Article 3 is the requirement that there be a close link between the acts of the accused and the armed conflict. That required by Article 5 offences is that the offence be committed within the context of a widespread of systematic attack directed against a civilian population. Applying this test to the present case, convictions for murder as a violation of the laws or customs of war and any other crime charged under Article 5 of the Statute based on the same conduct are permissible. Whenever cumulative convictions under both Article 3 and Article 5 of the Statute is based on the same conduct, the Trial

[269] Judgement, para. 239.
[270] *Ibid*, para. 276.
[271] Defence Appeal Brief, para. 253; Defence Reply, para. 9.5.
[272] Defence Additional Appeal Brief, para. 63.
[273] Prosecution Response Brief, para. 9.8.

ORDERS, in accordance with Rule 103(C) and 107 of the Rules of Procedure and Evidence, that Mitar Vasiljević is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

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

Judge Theodor Meron
Presiding

Judge Mohamed Shahabuddeen

Judge Mehmet Güney

Judge Wolfgang Schomburg

Judge Inés Mónica Weinberg de Roca

Judge Mohamed Shahabuddeen appends a separate and dissenting opinion to this Judgment.

Dated this twenty-fifth day of February 2004
At The Hague,
The Netherlands.