**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

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")

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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."

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*

[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).

finds that the Appellant has not shown a discernable error in the exercise of the Trial Chamber's discretion. This sub-ground of appeal is dismissed.

### B. The Appeals Chamber's considerations

181. The Trial Chamber imposed a prison sentence of twenty years on the Appellant. The Appeals Chamber has not found in favour of any of the Appellant's alleged errors in relation to the sentence. However, the Appeals Chamber is of the view that the sentence needs to be adjusted due to the Appeals Chamber's finding that the Appellant was responsible as an aider and abettor with respect to murder as a violation of the laws or customs of war under Article 3 of the Statute (Count 5) and persecution by way of murder and inhumane acts as a crime against humanity pursuant to Article 5(h) of the Statute (Count 3), instead of being responsible as a co-perpetrator as was found by the Trial Chamber. The Appeals Chamber considers that it has the mandate to revise the sentence by itself without remitting it to the Trial Chamber.[290]

182. The Appeals Chamber is of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.[291] The Appeals Chamber recalls that the sentence to be imposed must reflect the inherent gravity of the criminal conduct of an accused. The Appeals Chamber is of the view that the Appellant committed very serious crimes. Therefore, taking into account the particular circumstances of this case as well as the form and degree of the participation of the Appellant in the crimes, the Appeals Chamber finds that a sentence of 15 years is appropriate.

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matters which may be taken into account in mitigation unless such co-operation is "substantial." Nevertheless, the co-operation which was given by the Accused was indeed modest, and it has been given very little weight," Judgement, para. 299.

[290] *See Krnojelac* Appeals Judgement, paras 263-264; *Jelisić* Appeal Judgement, para. 99; *Aleksovski* Appeal Judgement, para. 99. The Appeals Chamber of the ICTR has in several cases determined that quashing a conviction would not necessarily affect the imposed sentence and may be determined by the Appeal Chamber without remitting it back to the Trial Chamber. *See Musema* Appeals Judgement, paras 372-373.

[291] *Cf. R. v. Price* (2000), 144 C.C.C. (3d) 343 at 358 (Ont. C.A.)(Can.); §3B1.2 of the 2003 United States Sentencing Guidelines, applicable to aiding and abetting through §2X2.1 of the Guidelines: "Based on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels"; Regina v. Dwayne Gordon, CA (Crim Div), [2002] EWCA Crim 1637, 11 June 2002 (England); Article 27 (2) of the 1997 Chinese Penal Code ("An accomplice shall, in comparison with a principal offender, be given a lesser punishment or a mitigated punishment or be exempted from punishment"; Articles 32 (2) and 55 of the 1988 Penal Code of South Korea (Article 32 [2]: "The punishment of accessories shall be mitigated to less than that of the principals"; Article 55 [1] no. 2: "When penal servitude for life or imprisonment for life is to be mitigated, it shall be reduced to limited penal servitude, or limited imprisonment, for not less than seven years; no. 3: When limited penal servitude or limited imprisonment is to be mitigated, it shall be reduced by one-half of the term of the punishment"); Sections 27 (2), 49 of the German Penal Code (Section 27 [2]: "The punishment for the accessory corresponds to the punishment threatened for the perpetrator. It shall be mitigated pursuant to Section 49 subsection [1]"; Section 49 [1]: "If mitigation is prescribed or permitted under this provision, then the following shall apply to such mitigation: 1. Imprisonment for not less than three years shall take the place of imprisonment for life; 2. In cases of imprisonment for a fixed term, at most three-fourths of the maximum term provided may be imposed [...]"); Section 34 (1) no. 6 of the Austrian Penal Code: "it is true that accomplices are normally less blameworthy than principals and therefore deserve less severe sentences".