

**KRNOJELAC APPEALS JUDGEMENT
SUMMARY OF THE JUDGEMENT RENDERED
BY THE APPEALS CHAMBER
ON 17 SEPTEMBER 2003**

1. The Appeals Chamber is holding its public hearing today to pronounce its judgement on the appeal in the case of *The Prosecutor v. Milorad Krnojelac*. On 12 April 2002, Milorad Krnojelac filed a notice of appeal against the Judgment rendered on 15 March 2002 by Trial Chamber II, composed of Judges David Hunt, Florence Mumba and Liu Daqun, sentencing Krnojelac to a single sentence of seven and a half years (7 and a half years) in prison.
2. The Trial Chamber found Krnojelac guilty of:

- persecution as a crime against humanity (based upon imprisonment, living conditions and beatings), both for his individual responsibility and as a superior;

- inhumane acts as a crime against humanity (based upon beatings), as a superior ;

- cruel treatment as a violation of the laws or customs of war (based upon beatings), as a superior;

- cruel treatment as a violation of the laws or customs of war (based upon living conditions), for his individual responsibility.

Milorad Krnojelac was acquitted of the following counts:

- count 2: torture as a violation of the laws or customs of war;

- count 4: torture as a crime against humanity;

- count 8: murder as a violation of the laws or customs of war;

- count 10: murder as a crime against humanity;

- count 11: imprisonment as a crime against humanity;

- count 13: inhumane acts as a crime against humanity (based upon living conditions).

3. On 15 April 2002, the Prosecutor also appealed the Judgment. It should be noted that the two parties appealed the sentence.

4. The Appeals Chamber will render its findings on each appeal presented, under the understanding that this summary of the Appeals Judgement is in no way the authoritative version.

I. APPEAL OF MILORAD KRNOJELAC

5. Aside from his ground of appeal relating to the sentence, Milorad Krnojelac presented five grounds of appeal.
6. Reference must first be made to the Prosecutor's submission with regard to various factual issues that the errors alleged by the Defence do not satisfy the standard of review on appeal provided for in the case-law of the Tribunal.
7. The Appeals Chamber recalls that, as opposed to the procedures in force in certain national systems, the appeals procedure provided for under Article 25 of the Statute of the ICTY is corrective by nature and is not therefore an occasion for re-examination *de novo*. This system of appeal has consequences on the nature of the arguments that a party may legitimately present on appeal and on the general burden of proof which it must satisfy in order for the Appeals Chamber to intervene. With particular regard to the alleged errors of fact, a party alleging this type of error in support of an appeal against a conviction must provide proof firstly that the error was committed and secondly that this resulted in a miscarriage of justice. The Appeals Chamber regularly recalled that it does not amend lightly factual findings reached by the Trial Chamber. The Appeals Chamber emphasises that its established case-law sets out that, if a party is not in a position to explain how an alleged error invalidates the decision, it must, as a general rule, refrain from appealing on that point. The Appeals Chamber considers that this principle applies to allegations of both legal and factual errors. Consequently, when a party's arguments have no chance of securing a reversal or review of the impugned decision, the Appeals Chamber may reject them as unlawful grounds from the outset and does not have to examine them on the merits.
8. The Appeals Chamber holds that almost all of the grounds of appeal of the Defence which raise factual errors as such are, in this case, unlawful. Generally, it emerges from the Defence Appeal Brief that, with the exception of one ground of appeal and the ground relating to the sentence, it puts forward no argument demonstrating the unreasonable nature of the Trial Chamber's findings. It is, in fact, impossible for the Appeals Chamber to identify the error allegedly committed by the Trial Chamber. It appears that the Defence only *challenges* the Trial Chamber's findings and suggests an alternative assessment of the evidence. However, this simple challenging of the Judgment in no way sufficiently demonstrates the erroneous nature of the Trial Chamber's findings. By not indicating how the Trial Chamber's assessment of the evidence cited is unreasonable and erroneous, the Defence is not assuming the burden of proof associated with allegations of errors of fact.
9. The Appeals Chamber examined the admissibility of each ground of appeal alleging errors of fact and found that the first, third and fourth grounds of appeal of the Defence were unlawful in view of the aforementioned standard of

review. The Defence satisfied the burden of proof for the fifth ground of appeal which alleged an error of fact. The Appeals Chamber therefore examined the merits of the arguments relating to this ground.

10. The second ground of appeal of the Defence, alleging an error by the Trial Chamber on a point of law, was also examined by the Appeals Chamber.

A. Krnojelac's second ground of appeal: aiding and abetting persecution (imprisonment and living conditions)

11. This ground of appeal is divided into three main sub-grounds:

1. First sub-ground: Krnojelac's acts or omissions and their significance for the commission of the crime of persecution on the basis of imprisonment and living conditions

12. Krnojelac states that the Trial Chamber committed an error of law when it found him guilty of aiding and abetting persecution on the basis of imprisonment of non-Serb civilian detainees and living conditions imposed on them without clarifying how he had contributed significantly to the commission of these crimes by their principal perpetrators.

13. The Appeals Chamber examined the substance of this sub-ground firstly with regard to imprisonment and secondly with regard to the living conditions. The Appeals Chamber considered this sub-ground as a challenge to the reasoning used for the *actus reus* of aiding and abetting. It recalled as an introductory point that the aider and abettor must, by his acts or omissions, have provided the principal perpetrator with practical assistance, encouragement or moral support which had a substantial effect on the commission of the crime.

14. With regard to imprisonment, the Appeals Chamber states that a reading of the Judgment contradicts Krnojelac's assertion that the Trial Chamber did not specify acts or omissions by which he provided the principal perpetrators of the crime of persecution - based on the imprisonment of the non-Serb civilian detainees practical assistance - with encouragement or moral support which had a substantial effect on the commission of the crime by those perpetrators.

15. With regard to the living conditions, the Appeals Chamber stated that, contrary to Krnojelac's assertions, the Trial Chamber did characterise the omission underpinning his conviction as aider and abettor to those who inflicted inhumane living conditions on the non-Serb detainees.

2. Second sub-ground: Krnojelac's knowledge that, through his acts or omissions, he was contributing in a significant way to the underlying crimes committed by the principal perpetrators (persecution on the basis of imprisonment and living conditions) and Krnojelac's knowledge of the discriminatory intent of the perpetrators

16. Contrary to the previous sub-ground, this sub-ground concerns the *mens rea* and not the *actus reus* of aiding and abetting persecution. Despite the

allegations put forward by the Defence, the Appeals Chamber considered that this sub-ground alleged, in substance, an error of fact rather than an error of law. The Appeals Chamber also examined firstly Krnojelac's allegations relating to imprisonment and secondly those relating to the living conditions.

17. With regard to the two allegations, the Appeals Chamber indicated that Krnojelac did not demonstrate how the factual findings in question were unreasonable. The Appeals Chamber thus rejects the first claim of the second sub-ground.

3. Third sub-ground: the *mens rea* of the aider and abettor to an act of persecution

18. This error of law alleged by Krnojelac raises the question of knowing whether, in establishing the *mens rea* of the aider and abettor to persecution, it suffices to demonstrate that the person concerned voluntarily provided the principal perpetrator with his practical assistance or encouragement knowing that the principal had discriminatory intent or whether it is also necessary to demonstrate that the aider and abettor was also driven by such intent.
19. The Appeals Chamber holds that the aider and abettor to persecution, a crime with special intent, must not only have knowledge of the crime whose perpetration he is facilitating, but must also be aware of the discriminatory intent of the perpetrators of the crime. He must not necessarily share that intent but must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement is to have a substantial effect on its commission. The Appeals Chamber points out that this is the very criterion applied by the Trial Chamber in the case in point in paragraphs 489 and 490 of the Judgment.
20. The second ground of appeal of the Defence is, therefore, rejected.

B. Krnojelac's fifth ground of appeal: superior responsibility for beatings inflicted on detainees

21. Krnojelac maintains that the Trial Chamber erred in finding him guilty as superior, pursuant to Article 7(3) of the Statute, of inhumane acts and cruel treatment on the basis of beatings. He asserts that the Trial Chamber erroneously concluded that he was aware that beatings were being inflicted on the detainees. Krnojelac challenges the three main pieces of evidence on which the Trial Chamber relied in determining whether he had the requisite knowledge.
22. The Appeals Chamber did not consider the arguments presented by Krnojelac in support of this ground of appeal to be convincing. It therefore rejected the arguments relating to this ground of appeal as lacking in merit.
23. The fifth ground of appeal is therefore rejected.

II. APPEAL OF THE PROSECUTOR

24. The Prosecutor presented seven grounds of appeal. The Appeals Chamber will set out its findings relating to each ground of appeal.

A. First ground of appeal:

The Trial Chamber erred in law in defining the responsibility arising from participation in a joint criminal enterprise and in applying this definition to the facts of the case

25. According to the Prosecutor, had the definition of joint criminal enterprise been applied correctly, Krnojelac would have been found guilty as co-perpetrator and not as aider and abettor to the crimes of persecution (imprisonment and inhumane acts) and cruel treatment (living conditions) on counts 1 and 15 of the Indictment.
26. The Appeals Chamber considers that, in establishing the intent to participate in a systemic joint criminal enterprise, the Trial Chamber, by requiring evidence of an agreement on the commission of each of the crimes within the joint enterprise, 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 was meant to subject the non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber had to examine whether or not Krnojelac had knowledge of the system and subscribed thereto, without it needing to be established that he had entered with the guards and soldiers - the principal perpetrators - into an agreement to commit the crimes implicit in the system.
27. The Appeals Chamber holds that the scope of the alleged error depends on the issue of whether applying the criterion set by the *Tadić* Appeals Judgement, that is determining intent on the basis of knowledge of the system and adherence thereto, rather than the Trial Chamber's criterion which requires the aforementioned agreement, would have entailed Krnojelac's liability as co-perpetrator and not as a simple aider and abettor. If this is the case, consideration should be given to whether the error in question invalidates the Judgment.
28. By applying the appropriate criterion to the facts of the case and given the factual findings of the Trial Chamber relating to the living conditions constituting inhumane acts, the beatings, torture and imprisonment, the Appeals Chamber concluded that the error committed by the Trial Chamber was an error which invalidated the verdict insofar as the application of that criterion should have led the Trial Chamber to find Krnojelac guilty as a co-perpetrator. The Appeals Chamber considers that the error of law committed by the Trial Chamber was such as to invalidate the Judgment. Consequently, the Appeals Chamber finds Krnojelac guilty as co-perpetrator under counts 1 and 15 for the crime of persecution (imprisonment and inhumane acts) and cruel treatment (on the basis of living conditions imposed).
29. Moreover, the Prosecutor criticises the Trial Chamber for partitioning the forms of conduct, which she believed constituted part of a system, according to the different categories of crimes underpinning the persecution charge.
30. The Appeals Chamber holds, firstly, that although the second category of cases defined by the *Tadić* Appeals Judgement (hereinafter "systemic cases") clearly draws on the Second World War extermination and concentration camp cases, it can be applied to other cases, in particular, to the serious violations of international humanitarian law committed in the territory of the former

Yugoslavia since 1991. Even though the perpetrators of the acts tried in the aforementioned concentration camp cases were mostly members of criminal organisations, the *Tadic* case-law did not hold that an individual had to belong to such an organisation to be deemed a member of the joint criminal enterprise. According to the *Tadic* Appeals Judgement, what characterises this category of cases - a variant of the first - is the existence of an organised system to achieve a joint criminal purpose. For the requisite intent to be constituted, the accused must have had personal knowledge of the system in question (whether proved by express testimony or inferred from the accused's position of authority) and the intent to further that concerted system. The Prosecutor could then rely on this form of joint criminal enterprise.

31. The Appeals Chamber recalls that it is for the Prosecutor to determine the legal theory which she believes most likely demonstrates that the facts she intends to submit for the Trial Chamber's assessment make it possible to establish the responsibility of the person being prosecuted. To this end, the Prosecutor may additionally or alternatively allege one or more legal theories, under the condition that she does so clearly, soon enough and in any event in time to put the accused on notice of what precisely he is charged with and in time to allow the defence to organise its case accordingly.
32. The Appeals Chamber considers well founded the challenge raised by the Prosecutor to the partitioning made by the Trial Chamber. By replacing the Trial Chamber's approach in its context, the Appeals Chamber notes that the Trial Chamber clearly followed the approach taken in the indictment since, for each aspect of the common purpose pleaded by the Prosecutor, it sought to determine whether Krnojelac shared the intent of the principal offenders. According to the Appeals Chamber, such an approach corresponds more closely to the first category of joint criminal enterprise than to the second but does not constitute an error of law insofar as the Prosecutor did not include in the theory of "systemic" joint criminal enterprise a better suited definition of the common purpose. Therefore, the Appeals Chamber does not discern any error in the approach followed by the Trial Chamber.
33. The issue of what approach seems the most appropriate for determining whether a participant in a "systemic" joint criminal enterprise – be it as a co-perpetrator or an aider and abettor - may be responsible for crimes committed by the principal offenders in a context such as that of the KP Dom is considered one of general importance to the Tribunal's case-law and the Appeals Chamber therefore examined it limiting itself to the acts charged as persecution. The Appeals Chamber finds that the most appropriate approach for the Prosecutor in this case would have been to limit the definition of the common purpose within the KP Dom "system" to the commission of those crimes which, having regard for the context and evidence tendered, could be considered beyond all reasonable doubt common to all the perpetrators. As an alternative at least, the Prosecutor should, thus, have specified the form under which, she thought, the accused's responsibility could be entailed for the crimes which were not clearly part of the joint purpose of the system, as set out. According to the Appeals Chamber, the following approach could have been envisaged.

34. As to the alleged crimes such as the killings which, though committed at the KP Dom, clearly surpassed the system's common purpose: liability may be imputed to a participant in the system for crimes of this kind committed by another participant if it was foreseeable that such a crime was likely to be committed by one participant or the other and the former willingly took the risk (or was indifferent to it). The Appeals Chamber notes that such was the Prosecutor's case for the killings in her Pre-Trial Brief.
35. With regard to the alleged crimes which, although bringing together several co-perpetrators within the KP Dom do not appear to constitute, beyond all reasonable doubt, a purpose common to all the participants in the system, they should be addressed, without recourse to the notion of system, as part of a joint criminal enterprise of the first category. The Appeals Chamber holds that the alleged crime of forced labour must be dealt with in this way. A person who had participated in its commission might be considered as a co-perpetrator in a joint criminal enterprise which has as an objective the commission of the crime in question, provided that the person concerned shares the joint intent of the principal perpetrators. Alternatively, the person concerned might be considered an aider and abettor of the crime if he simply had knowledge of the intent of its perpetrators and provided them with assistance which had a substantial effect on the commission of the crime.
36. A distinction should be made between the various alleged crimes which fit into a broader plan, such as imprisonment and deportation, on the basis of whether they form part of the common purpose of all the participants in the system and other co-perpetrators outside it or form part of a common purpose shared by only some of the participants in the system and the outsiders. In the first instance, to which the crime of imprisonment is related, the "system" notion can be applied to all of the participants. However, the distinctive nature of the crimes stems from the fact that some of the principal offenders are persons outside of the system in place at the camp - that is, with respect to imprisonment, certain civilian and/or military authorities that ordered the arbitrary arrests and detention at the KP Dom. In the second instance, to which the crime of deportation or transfer of some of the non-Serb detainees is related, the crimes in question should be considered without applying the "system" notion. A person who participated in their commission might be considered a co-perpetrator in a joint criminal enterprise, the purpose of which is the commission of the crimes in question, provided that the person concerned shares the joint purpose of the principal perpetrators. Alternatively, the person concerned might be considered an aider and abettor to the crimes if he simply had knowledge of the intent of the principal perpetrators and provided them with assistance which had a substantial effect on the commission of the crimes.

B. Second ground of appeal:
the Trial Chamber erred in law when it required that the Indictment refer to
an "extended form" of joint criminal enterprise

37. The Prosecutor maintains that the Trial Chamber erred in law when it found that the accused could not be held liable under the third form of joint criminal enterprise referred to in the *Tadić* Appeals Judgement with respect to any of the crimes alleged, unless an "extended" joint criminal enterprise was expressly pleaded in the indictment. The Prosecutor does not request that the Trial Judgment be reversed or revised on this point. She raises this ground of appeal because of its general significance to the case-law of the Tribunal.
38. The Appeals Chamber notes that, in its decision on the form of the second amended Indictment, the Trial Chamber, which was, in particular, seized of a complaint about the lack of precision in paragraph 5.2 of the Indictment in question, indicated that, in that Indictment, the Prosecutor presented for the first time the theory of common purpose and responded to the question of what exactly was covered by this theory. In so doing, the Trial Chamber set out the three categories of cases referred to in the *Tadić* Appeals Judgement. In light of this decision, had she considered that the Trial Chamber had misinterpreted her intentions on this point, it would have been for the Prosecutor to remove any ambiguity in this respect, either by asking the Trial Chamber to reconsider its decision or by requesting leave to amend the Indictment. Should the Prosecutor have considered basing her argument on an extended concept of joint criminal enterprise only after the said decision, it would have been for her to request leave to amend the Indictment. >
39. The Appeals Chamber notes that the Trial Chamber Judgment shows that the Chamber concluded as it did precisely because the Prosecutor did not amend the Indictment after the Trial Chamber held without ambiguity that the Second Amended Indictment did not consider an extended form of joint criminal enterprise. In view of these circumstances, the Trial Chamber considered that "in the exercise of its discretion", it would be unfair to the accused to allow the Prosecutor to rely on an extended concept of joint criminal enterprise in order to establish his responsibility.
40. It must be noted that these circumstances gave rise to a certain amount of uncertainty for the Defence with regard to the Prosecution case. Consequently, although Krnojelac's Closing Brief shows that he did consider the three forms of joint criminal enterprise set out in the *Tadić* Appeals Judgement before concluding that he had not taken part in a joint criminal enterprise, the Appeals Chamber considers that, in view of the persisting ambiguity about what exactly was the Prosecutor's argument, the Trial Chamber was well founded in refusing, in all fairness, to consider an extended form of responsibility against Krnojelac.
41. This ground of appeal is therefore rejected.

C. Third ground of appeal:
the Trial Chamber erred in fact by concluding that Krnojelac did not know or did not have reason to know that his subordinates were torturing the detainees and, consequently, could not be held responsible pursuant to Article 7(3) of the Statute

42. The Appeals Chamber recalled the relevant facts accepted by the Trial Chamber. These facts related to 1) the context of the commission of the beatings and the widespread nature of their commission; 2) Krnojelac's authority over his subordinates as prison warden and 3) the frequency of the interrogations and punishment inflicted on the detainees.
43. The Appeals Chamber holds that both the external context (that is the circumstances in which the detention centre was set up) and the internal context (that is the operation of the centre, in particular the widespread nature of the beatings and the frequency of the interrogations), together with the facts that Krnojelac witnessed the beatings inflicted on Zekovic, apparently inflicted for the prohibited purpose of punishing him for his escape attempt, that subsequent to this event, at least one other detainee, witness FWS-73, was victim to acts of torture, and that the Trial Chamber did not accept Krnojelac's declaration that he was not aware of any punishment inflicted on account of Zekovic's escape, mean that no reasonable trier of fact could fail to conclude that Krnojelac had reason to know that some of the acts were or could have been committed for one of the purposes prohibited by the rules of law relating to torture. Krnojelac had a certain amount of general information alerting him to possible acts constituting torture by his subordinates. Thus, he incurs liability pursuant to Article 7(3) of the Statute.
44. It cannot be overly stressed that when superior responsibility is at issue, an accused is not implicated for the crimes of his subordinates but for a failure to carry out his duty as superior, that is, to exercise control. There is no doubt that, given the information he possessed, Krnojelac was in a position to exercise such control, that is to investigate the possible commission of acts of torture. The Trial Chamber considered moreover that, as regards beatings, he had the authority to prevent the crimes or punish the perpetrators. Considering that no reasonable trier of fact could have arrived at the same factual findings as the Trial Chamber, the Appeals Chamber holds that the Trial Chamber committed an error of fact.
45. As regards whether this error resulted in a miscarriage of justice, the Appeals Chamber adopts the findings of the ICTR Appeals Chamber in the *Rutaganda* case and considers that when Krnojelac was erroneously acquitted by the Trial Chamber, the latter failed in its duty by not identifying all the requisite legal implications of the evidence presented.

D. Fourth ground of appeal: The Trial Chamber committed an error of fact by concluding that, for the purposes of Article 7(3) of the Statute, Krnojelac did not have sufficient information to put him on notice that his subordinates were involved in the murder of detainees at the KP Dom

46. The Prosecutor states that, given the factual findings accepted by the Trial Chamber, the only reasonable finding open to the said Chamber was that Krnojelac had sufficient information to put him on notice that his subordinates might be involved in the murder of detainees.
47. As with the previous ground of appeal, the Appeals Chamber recalled the relevant facts accepted by the Trial Chamber with regard to the murders.

48. The Appeals Chamber holds that a certain number of facts constituted sufficiently alarming information to have required Krnojelac to carry out an additional investigation. Being aware of the beatings and the suspicious disappearances and having seen the bullet impacts in the walls, Krnojelac was in a position to reflect that the perpetrators of these beatings were likely to have committed murders. He should, at the very least, have carried out an investigation. The Appeals Chamber considers that no reasonable trier of fact could have reached the factual findings of the Trial Chamber. The Appeals Chamber holds therefore that the Trial Chamber committed an error of fact and that, for the reasons set out above, this resulted in a miscarriage of justice.

E. Fifth ground of appeal: The Trial Chamber erred in fact by concluding that the beatings constituting inhumane acts and cruel treatment were not inflicted on discriminatory grounds and that, therefore, Krnojelac could not be held responsible for persecution as superior

49. The Prosecutor submits that the Trial Chamber erred in concluding that the beatings constituting inhumane acts and cruel treatment inflicted by the guards on detainees at the KP Dom were not carried out on discriminatory grounds and that they did not therefore constitute persecution for which Krnojelac could be responsible under Article 7(3) of the Statute.

50. The Appeals Chamber recalls that, in law, persecution as a crime against humanity requires proof of specific intent to discriminate on political, racial or religious grounds and that it falls to the Prosecutor to prove that the acts in question were committed with the requisite discriminatory intent. The Appeals Chamber does not consider that the discriminatory intent of the beatings can be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity. According to the Appeals Chamber, such a context is not in itself proof of discriminatory intent. The Appeals Chamber does hold, however, that discriminatory intent may be inferred from such a context, provided that, with respect to the facts of the case, there are circumstances surrounding the commission of the acts charged which confirm the existence of such intent. These circumstances may include, for example, the functioning of the prison (in particular the systematic nature of the crimes committed against a racial or religious group) or the general attitude of the alleged perpetrator of the offence through his behaviour.

51. In this case, the Trial Chamber indicated that the "detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foča municipality". The Appeals Chamber holds that one can infer from this finding that the treatment inflicted on the non-Serb detainees is the result of the aforesaid discriminatory policy, which was the cause of their detention. There still need to be circumstances surrounding the commission of the acts charged which confirm this initial inference.

52. In this case, it emerges from the Trial Chamber's findings that, in reality, only the non-Serb detainees were beaten. The Appeals Chamber holds that the

differences in the treatment of the Serb and non-Serb detainees cannot reasonably be attributed to the guards' random assignment. This finding confirms the aforesaid inference. Thus, the Appeals Chamber considers that the only reasonable finding to be made on the basis of the relevant facts accepted by the Trial Chamber was that the beatings were inflicted on the non-Serb detainees for political or religious reasons and that, consequently, these unlawful acts were committed with the requisite discriminatory intent. The Appeals Chamber considers that, assuming that the blows inflicted on the non-Serb detainees were meted out to punish them for violations of the rules, the choice of that punishment, if inflicted only on non-Serb detainees, arose from a wish to discriminate against them on religious or political grounds.

53. The Prosecutor maintains that Krnojelac should be found guilty of persecution under Article 7(3) of the Statute. The Appeals Chamber recalls that the Trial Chamber acknowledged that Krnojelac freely accepted the position in full knowledge of the fact that non-Serb civilians were being unlawfully detained at the KP Dom on the basis of their ethnicity. Furthermore, Krnojelac accepted that he knew that the non-Serbs were being detained precisely because they were non-Serbs and that none of the procedures in place for legally detained persons were followed at the KP Dom. The Trial Chamber acknowledged that Krnojelac knew that Muslim detainees were being beaten and generally mistreated. He "knew about the conditions of the non-Serb detainees, the beatings and other mistreatment to which they were subjected while being detained at the KP Dom, and [...] he knew that the mistreatment which occurred at the KP Dom was part of the attack upon the non-Serb population of Foča town and municipality". In view of all the elements set out above, the Appeals Chamber considers that Krnojelac who, as prison warden, retained authority over all detainees in the KP Dom had sufficient information to put him on notice that inhumane acts and cruel treatment were being inflicted on the non-Serb detainees on political or religious grounds. The Appeals Chamber concludes, therefore, that the Trial Chamber committed an error of fact which resulted in a miscarriage of justice.

F. Sixth ground of appeal:
the Trial Chamber erred by acquitting Krnojelac on the count of
persecutions based on forced labour

54. In support of this ground of appeal, the Prosecutor submitted that the Trial Chamber erred by finding that there was insufficient evidence to establish the involuntary nature of the labour. She maintained that, in applying the legal test for involuntariness to the facts, the Trial Chamber erroneously determined for eight detainees that the evidence produced was insufficient to conclude that they had been forced to work.
55. Here again, the Appeals Chamber has summed up the relevant facts accepted by the Trial Chamber.
56. The Appeals Chamber repeats that the living conditions at the KP Dom were clearly deplorable. Of the facts previously summed up, some are especially significant and must be emphasised. The Trial Chamber concluded that within the

KP Dom, there was a deliberate policy to feed the non-Serb detainees barely enough for their survival. All non-Serb detainees suffered considerable weight loss ranging from 20 to 40 kilograms during their detention at the KP Dom. Additionally, non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back. Some, however, were taken out to work knowing that they would receive additional and much needed food if they did. The non-Serb detainees were subjected to harrowing psychological abuse during their period of detention at the KP Dom. The detainees were exposed to the sounds of people being beaten and tortured over a period of months, in particular in June and July 1992, and they constantly feared that they would be the next to be selected. The Appeals Chamber considers that, in view of the particular detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have reached the conclusion that the detainees' general situation negated any possibility of free consent. The Appeals Chamber is satisfied that the detainees worked in order to avoid being beaten or in the hope of obtaining additional food. Those who refused to work did so out of fear, given the disappearance of detainees who had gone outside the KP Dom. The climate of fear made it impossible to express free consent. A detainee cannot be expected to raise an objection. Nor can it be held that, for forced labour to be established, a person in a position of authority must threaten to punish a detainee if he refuses to work. The fact that a detainee may have objected is irrelevant if the possibility of objecting is not a real option.

57. In the view of the Appeals Chamber, the specific circumstances of the KP Dom detainees' life in prison were therefore such as to make free consent impossible. Consequently, the Appeals Chamber sets aside the Trial Chamber's findings in respect of witnesses FWS-249, FWS-144, Rasim Taranin, FWS-66, FWS-198, Ekrem Zekovi}, Muhamed Lisica and FWS-71 and reaches the conclusion that these witnesses were forced to work.
58. The Prosecutor secondly contended that if forced labour were to be established, the Trial Chamber's findings were sufficient to warrant Krnojelac's conviction for persecutions based on forced labour.
59. On this point, the Appeals Chamber restates that the acts underlying the crime of persecution, whether taken in isolation or in conjunction with others, must constitute a crime of persecution of equal gravity to the crimes enumerated under Article 5 of the Statute. It maintained that, in the case in point, the forced labour must be considered as part of a series of acts comprising unlawful detention and beatings, the cumulative effect of which is of sufficient gravity to amount to a crime of persecution, it being understood that the unlawful detention and beatings were committed on one or more of the discriminatory grounds listed under Article 5 of the Statute. Accordingly, the degree of gravity of the persecution based on these acts amounts to that of the crimes expressly set out under Article 5 of the Statute.
60. The Appeals Chamber has previously recalled that, in this instance, the Trial Chamber indicated that the "detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Fo~a

municipality". The Appeals Chamber has also previously pointed out that it could be inferred from this backdrop that the treatment meted out upon the non-Serb detainees was the result of the aforementioned discriminatory policy which led to their detention on the condition that, as regards the facts of the case, there were circumstances surrounding the commission of the acts of forced labour which confirm the existence of such intent. In the view of the Appeals Chamber, there is no doubt that, in this instance, the non-Serb prisoners were detained and forced to work on account of their ethnicity. The Trial Chamber underscored that the "few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They were not mistreated like the non-Serb detainees. The quality and quantity of their food was somewhat better, sometimes including additional servings. They were not beaten or otherwise abused, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees." It is clear that the non-Serb detainees were, on the other hand, subjected to a quite different regime. The overcrowding of the solitary confinement cells in which the detainees were so crammed that they were unable to move around or lie down, the under-nourishment and its principal effects in terms of weight loss, the widespread nature of the beatings and mistreatment, and the psychological abuse linked to the detention conditions and the mistreatment constitute circumstances particularly indicative of the discriminatory character of the acts of forced labour imposed upon the non-Serb detainees.

61. In the opinion of the Appeals Chamber, the Trial Chamber was misled by its case-by-case approach to each of the acts of forced labour and, consequently, failed to consider all of the circumstances surrounding the commission of the acts - circumstances which, in this instance, confirm that the said acts did indeed fit into the discriminatory context at the KP Dom, as did the unlawful detention and the beatings that were committed. The Appeals Chamber thus finds that, in view of the circumstances, no reasonable trier of fact would have failed to conclude that the acts of forced labour were committed with discriminatory intent.
62. The Appeals Chamber is in no doubt that the eight detainees forced to work were the victims of persecutions within the meaning of Article 5 of the Statute.
63. With the persecution based on forced labour established, the Appeals Chamber next considered Krnojelac's responsibility for these crimes.
64. The Appeals Chamber has previously stated that, in the case in point, the alleged crime of forced labour should be dealt with as forming part of a first category joint criminal enterprise without use being made of the "system" notion, and that the persons who participated in its commission may be viewed as co-perpetrators of a joint criminal enterprise whose purpose was to commit the crime in question or as aiders and abettors thereto depending upon whether, as in the first instance, the individual concerned shared the common intent, or, as in the second, merely had knowledge thereof.
65. On this point, the Appeals Chamber takes the view that Krnojelac must not be regarded as a mere aider and abettor but as a co-perpetrator of the crimes of forced labour which were committed. The Appeals Chamber believes that

Krnojelac shared the intent to make the non-Serb detainees perform unlawful labour in conditions which the Appeals Chamber found to be such that it was impossible for them to consent freely to work. The Appeals Chamber holds that the only conclusion which a reasonable trier of fact should have reached is that Krnojelac was guilty as a co-perpetrator of persecutions based on the forced labour of the non-Serb detainees for the following reasons: Krnojelac was aware of the initial decision to use KP Dom detainees to work, he was responsible for all the business units and work sites associated with the prison and he played a central role in the matter. Moreover, Krnojelac voluntarily accepted the position in full awareness that non-Serb civilians were being illegally detained at the KP Dom because of their ethnicity and he also knew that none of the procedures in place for legally detained persons was ever followed with the non-Serbs at the KP Dom. He exercised final control over the work of detainees in and for the KP Dom. He had regular meetings with the heads of the furniture factory, metal workshop and farm where the detainees worked.

66. It is the Appeals Chamber's opinion that, in light of the foregoing, it is not possible that Krnojelac did not share the intent to use unlawfully detained non-Serbs to work. The Appeals Chamber therefore finds that the Trial Chamber's decision to acquit Krnojelac of the crime of persecution based on forced labour must be reversed and that, on the basis of Article 7(1) of the Statute, Krnojelac must be convicted of persecution based on forced labour as a co-perpetrator of the joint criminal enterprise whose purpose was to persecute the non-Serb detainees by exploiting their forced labour.

G. Seventh ground of appeal:
the Trial Chamber erred by acquitting Krnojelac on the count of
persecutions (deportation)

67. This ground of appeal concerns the Trial Chamber's findings on the first count of the Indictment – persecutions based on "deportation and expulsion".

1. Persecutions based on deportation and expulsion

68. In support of this ground, the Prosecutor principally argued that the Trial Chamber had erred in the definition of deportation and, to some extent, the definition of expulsion.
69. The Appeals Chamber does not believe that, in the circumstances of this case, the main issue is the definition of these terms. The Appeals Chamber emphasises that, as regards the Indictment submitted by the Prosecutor, the subject of the discussions before the Trial Chamber was persecution, and the Appeals Chamber therefore holds that two issues arise out of the Prosecutor's submissions: (a) whether the Trial Chamber correctly construed the allegations of persecution in the Indictment; and (b) whether the acts of displacement admitted by the Chamber are such as to possibly constitute crimes underlying persecutions.
70. In the Indictment, Krnojelac is charged with persecutions punishable under Article 5(h) of the Statute for acts of deportation and expulsion. He is not

- separately charged with 'deportation' (as a crime against humanity). The Appeals Chamber is of the view that while the wording used in the Indictment was not best suited, it did not contain any ambiguity as to the fact that Krnojelac was being prosecuted for having perpetrated the crime of persecution by means of forcible displacements within and across the borders of Bosnia and Herzegovina.
71. The Appeals Chamber is of the view that there is no need to rule on the definition the Trial Chamber gave to the terms "deportation" and "expulsion" either for the purposes of setting aside or upholding that definition. The issue raised in this instance was whether the alleged acts of forcible displacement could constitute a crime of persecution, assuming that they were committed with discriminatory intent. The Appeals Chamber notes that the terms "deportation" and "expulsion" under paragraph 5.2(f) of the Indictment were clearly used by the Prosecutor as generic terms embracing all the forms of conduct alleged, in this instance, to underlie the crime of persecution. No reference was made in the Indictment to deportation under Article 5(d) of the Statute. As such, there is no need to define a term which does not appear in the provision on which the Indictment relies.
72. The Appeals Chamber holds that the Trial Chamber was bound to make a ruling on the material facts alleged and to assess whether these acts constituted persecutions within the meaning of Article 5(h) of the Statute. The Appeals Chamber has examined which acts of displacement may constitute persecutions when perpetrated with the requisite discriminatory intent and whether the acts alleged by the Prosecutor were indeed such as to constitute acts underlying the crime of persecution. The Appeals Chamber considers that the acts of forcible displacement underlying the crime of persecutions punishable under Article 5(h) of the Statute are not restricted to displacements across a national border. The Appeals Chamber believes that the crime of persecutions may take various forms. It may be one of the other acts constitutive of crimes under Article 5 of the Statute or one of the acts constitutive of crimes under other articles of the Statute. In order for it to be possible for these acts to be viewed as underlying the crime of persecution, they must, separately or cumulatively, be committed with discriminatory intent and constitute a crime of persecution of equal gravity to the other crimes under Article 5 of the Statute. The Appeals Chamber concludes that displacements within a country or across a national border committed on grounds not authorised by international law are crimes punishable in customary international law and that such acts, if committed with the requisite discriminatory intent, do constitute the crime of persecution under Article 5(h) of the Statute. The Appeals Chamber holds that the facts found by the Trial Chamber fall into the category of displacements which may constitute persecutions. The Appeals Chamber notes that by failing to determine whether the alleged acts of forcible displacement constituted persecutions, the Trial Chamber committed an error of law which renders its decision void.
73. The Prosecutor contended that the Trial Chamber made an error of fact when it held that the 35 non-Serb detainees from the KP Dom taken across the border to Montenegro freely chose to be exchanged. She submitted that the Trial

- Chamber was mistaken in not taking account of the regime of coercion to which the KP Dom detainees were subjected.
74. The Appeals Chamber observes that the living conditions at the KP Dom subjected the non-Serb detainees to a coercive prison regime which was such that they were unable to make a true choice. The Appeals Chamber accordingly concludes that the 35 detainees were subjected to duress and that the Trial Chamber was mistaken in finding that they had freely chosen to be exchanged.
75. The Prosecutor further argued that no Trial Chamber could have reasonably concluded that it had not been shown that the transfer of the 35 detainees to Montenegro had been carried out on the requisite discriminatory grounds. The Prosecutor makes general reference back to the arguments pleaded in support of her fifth ground of appeal and, notably, to the climate of systematic violence and discrimination in which the KP Dom detainees lived because of their ethnicity.
76. Given these findings, as well as the discriminatory character of the unlawful imprisonment and the infliction upon the non-Serb detainees at the KP Dom of living conditions as described above, the Appeals Chamber makes the finding that it was unreasonable for the Trial Chamber to conclude that there was no evidence that the transfer of the 35 detainees to Montenegro had been carried out on the requisite discriminatory grounds. The Appeals Chamber considers that the reasoning used in order to establish that the 35 non-Serb detainees were forcibly displaced to Montenegro applies *mutatis mutandis* to the other displacements found by the Trial Chamber. The same holds for Krnojelac's discriminatory intent.

2. Krnojelac's responsibility

77. The Prosecutor maintained that the Trial Chamber erred when it held that Krnojelac was not responsible for the displacement of detainees within Bosnia and Herzegovina with which he was charged under count 1 (persecutions) and that the acquittal should be reversed. In addition, she contended that the Trial Chamber erred by finding Krnojelac not guilty, pursuant to Article 7(1) of the Statute, of the transfer of 35 non-Serb detainees to Montenegro and of other non-Serb detainees to other locations in Bosnia and Herzegovina.
78. The Appeals Chamber is satisfied that the KP Dom administration carried out the orders of the military authorities and that the KP Dom guards handed over the detainees for transfer. It is not, however, satisfied that Krnojelac had the power to influence which detainees were to be displaced. There is evidence that Krnojelac tried, without success, to assist witness RJ who wanted to be exchanged and that he believed he was assisting him to gain security and rejoin his family. The Prosecutor further submitted that Krnojelac "knew that the transport of detainees was problematic and that he had reason to ensure the safety of the detainees after they left the compound". The Appeals Chamber considers that Krnojelac was aware of the consequences of the transport of the detainees but that he played no role therein.

79. This notwithstanding, Krnojelac is criminally and individually responsible for the exchanges which formed part of the joint criminal enterprise in which he personally played a role in the ultimate aim of achieving the forcible displacement of the detainees under his control at the KP Dom. As a result, it need not be proven that he personally took part in drawing up the lists. The "exchanges" began in the summer of 1992 and continued until March 1993, at least. As already stated, the Appeals Chamber is satisfied that the non-Serb detainees were taken out of the KP Dom with discriminatory intent. According to his own testimony, Krnojelac knew that the detainees were being taken out of the KP Dom. Furthermore, the Trial Chamber established that, by virtue of his position as warden of the KP Dom, Krnojelac knew that the non-Serb detainees were being unlawfully detained on account of their ethnicity. In his capacity as warden, Krnojelac authorised the KP Dom personnel to hand over non-Serb detainees. He encouraged such departures by allowing them to continue. Without the unlawful imprisonment, it would not have been possible to continue with the exchanges. The Appeals Chamber is satisfied that Krnojelac shared the intent of the principal perpetrators of the joint criminal enterprise whose purpose was to take the non-Serb detainees out of the KP Dom.
80. The Appeals Chamber therefore considers that Krnojelac is responsible as a co-perpetrator for persecutions which took the form of forcible displacements, as alleged by the Prosecutor under "deportation" and "expulsion".

H. Sentence

81. In the present case, both parties raised grounds of appeal relating to the seven-and-a-half-year sentence imposed by the Trial Chamber. The Appeals Chamber has examined the various grounds of appeal by applying the standard of review for alleged errors as settled in its jurisprudence.
82. The Appeals Chamber dismissed all of the grounds of appeal raised by the parties with the exception of one of the Prosecutor's grounds.
83. The Prosecutor challenged the weight which the Trial Chamber gave in mitigation of sentence to the co-operation provided to the Tribunal and Prosecution by the Defence – and not Krnojelac. According to the Prosecutor, the efficient and co-operative conduct of *defence counsel* cannot be a mitigating factor warranting a reduced sentence for the *accused* any more than the inefficient or unco-operative conduct of counsel may be considered an aggravating factor warranting an increased sentence.
84. The Appeals Chamber finds that the conduct described in the contested paragraph of the Judgment is the normal conduct that any counsel should adopt before a Trial Chamber. The Appeals Chamber therefore considers that the Trial Chamber committed an error by giving credit to the accused for the conduct of his counsel. The Appeals Chamber concludes that the commission of this error means, as previously indicated, that the conduct of counsel for Krnojelac must not be taken into consideration in determining the sentence imposed on the basis of the new convictions on appeal.

85. The Appeals Chamber shall now determine the sentence having regard for the new convictions pronounced on appeal. The Prosecutor requested that, if the Appeals Chamber reversed one or more of the acquittals, the sentence be increased commensurably. She submitted that it was possible for the Appeals Chamber to revise the sentence itself rather than remit the matter to the Trial Chamber. This assertion was not contested by Krnojelac and is accepted by the Appeals Chamber.
86. Having given due consideration to the gravity of the crimes and Krnojelac's responsibility as established by the Trial Chamber and taking into account Krnojelac's responsibility established on the basis of the new convictions on appeal, the Appeals Chamber has revised the sentence in the exercise of its discretion and in the light of the mitigating and aggravating circumstances taken into consideration.

III. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 14 and 15 May 2003;

SITTING in open session;

ALLOWS the Prosecutor's first ground of appeal and **SETS ASIDE** Krnojelac's convictions as an aider and abettor to the persecutions (crime against humanity, for imprisonment and inhumane acts) and cruel treatment (violations of the laws or customs of war for the living conditions imposed) under counts 1 and 15 of the Indictment pursuant to Article 7(1) of the Statute;

ALLOWS the Prosecutor's third ground of appeal and **REVERSES** Krnojelac's acquittal on counts 2 and 4 of the Indictment (torture as a crime against humanity and violations of the laws or customs of war) pursuant to Article 7(3) of the Statute;

ALLOWS the Prosecutor's fourth ground of appeal and **REVERSES** Krnojelac's acquittal on counts 8 and 10 of the Indictment (murder as a crime against humanity and murder as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute;

ALLOWS the Prosecutor's fifth ground of appeal for the revision of Krnojelac's conviction on count 1 of the Indictment (persecution as a crime against humanity) pursuant to Article 7(3) of the Statute so that it encompasses a number of beatings⁽¹⁾;

ALLOWS the Prosecutor's sixth ground of appeal and **REVERSES** Krnojelac's acquittal on count 1 of the Indictment (persecution as a crime against humanity) based on the forced labour imposed upon the non-Serb detainees;

ALLOWS the Prosecutor's seventh ground of appeal and **REVERSES** Krnojelac's acquittal on count 1 of the Indictment (persecution as a crime against humanity) based on the deportation and expulsion of non-Serb detainees;

DISMISSES the Prosecutor's second ground of appeal on the form of the Indictment;

DISMISSES all of the grounds of appeal raised by Krnojelac;

FINDS Krnojelac guilty of counts 1 and 15 of the Indictment as a co-perpetrator of persecution, a crime against humanity (imprisonment and inhumane acts), and of cruel treatment, a violation of the laws or customs of war (for the living conditions imposed), pursuant to Article 7(1) of the Statute;

FINDS Krnojelac guilty of counts 2 and 4 of the Indictment (torture as a crime against humanity and violations of the laws or customs of war) pursuant to Article 7(3) of the Statute based on the following facts: paragraphs 5.21 (for FWS-73), 5.23 (except for FWS-03)⁽²⁾, 5.27 (for Nurko Nisić and Zulfo Veiz), 5.28 and 5.29 (for Aziz Šahinović) of the Indictment and facts described under points B4, B14, B22, B31, B52 and B57 of List C of the Indictment;

FINDS Krnojelac guilty of counts 8 and 10 of the Indictment (murder as a crime against humanity and murder as violations of the laws or customs of war) pursuant to Article 7(3) of the Statute;

REVISES Krnojelac's conviction under count 1 of the Indictment (persecutions as a crime against humanity) pursuant to Article 7(3) so that it encompasses the beatings described in paragraphs 5.9, 5.16, 5.18, 5.20, 5.21 (for FWS-110, FWS-144, Muhamed Lisica and several other unidentified detainees), 5.27 (for Salem Bičo) and 5.29 (for Vahida Džemal, Enes Uzunović and Elvedin Čedić) of the Indictment, and in the facts corresponding to numbers A2, A7, A10, A12, B15, B17, B18, B19, B20, B21, B25, B26, B28, B30, B33, B34, B37, B45, B46, B48, B51 and B59 of List C of the Indictment;

FINDS Krnojelac guilty of count 1 of the Indictment as a co-perpetrator of the crime against humanity of persecutions (forced labour, deportation and expulsion) pursuant to Article 7(1) of the Statute;

SETS ASIDE all of the convictions entered under count 5 of the Indictment (inhumane acts as crimes against humanity) pursuant to Article 7(3) of the Statute and the convictions entered under count 7 of the Indictment (cruel treatment as a violation of the laws or customs of war) pursuant to Article 7(3) of the Statute based on the following facts: paragraphs 5.21 (for FWS-73), 5.23, 5.27 (for Nurko Nisić and Zulfo Veiz), 5.28

and 5.29 (for Aziz Šahinović) of the Indictment and facts described under points B4, B14, B22, B31, B52 and B57 of List C of the Indictment⁽³⁾;

DISMISSES the sentencing appeals entered by Krnojelac and the Prosecutor (with the exception of the ground of appeal allowed in paragraph 262 of this Judgement) and **DETERMINES** a new sentence, having regard for Krnojelac's responsibility established on the basis of the new convictions on appeal and in the exercise of its discretion;

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

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

Claude Jorda
Presiding

Wolfgang Schomburg
Judge

Mohamed Shahabuddeen
Judge

Mehmet Güney
Judge

Carmel Agius
Judge

Judges Schomburg and Shahabuddeen each append a Separate Opinion to the Appeals Judgment.

Done this seventeenth day of September 2003

At The Hague

The Netherlands

[Seal of the Tribunal]

1. The consequences of the Appeals Chamber allowing the Prosecutor's fifth ground of appeal appear in the first paragraph on page 135 of this Judgement.
2. The Trial Chamber found Krnojelac guilty of persecution as a crime against humanity pursuant to Article 7(3) of the Statute based on the beatings inflicted upon FWS-03. See footnotes 1590 and 1591 of the Trial Judgment.
3. On the ground that there would be an unacceptable cumulation were the accused to be found guilty on these counts. See paragraphs 172 and 188 of the Appeals Judgement.