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APPEALS CHAMBER

CHAMBRE D'APPEL

The Hague, 28 February 2005

CT/P.I.S./ 940e

### APPEALS CHAMBER JUDGEMENT IN THE CASE

## THE PROSECUTOR v. MIROSLAV KVOČKA, MLADO RADIĆ, ZORAN ŽIGIĆ AND DRAGOLJUB PRCAĆ

*Please find below the summary of the Judgement delivered by the Appeals Chamber, composed of Judges Shahabuddeen (Presiding), Judge Pocar, Judge Mumba, Judge Güney and Judge Weinberg de Roca, as read out by the Presiding Judge.*

What I am now reading is a summary of the Judgement, and not the Judgement itself. The Judgement will be made available in English, French and B/C/S at the end of this session, in particular to the appellants in a language they understand. I emphasise that the only authoritative account of the Appeals Chamber's conclusions is to be found in the English version of the written Judgement. The disposition will however be read out at the end of this summary.

The trial of Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Prcać and Milojica Kos commenced on 28 February 2000. Trial Chamber I of this Tribunal delivered its Judgement on 2 November 2001. The appellant Kvočka appealed on 13 November 2001, the appellants Radić and Prcać appealed on 15 November 2001, and Kos and the appellant Žigić appealed on 16 November 2001. On 21 May 2002, Kos withdrew his appeal.

This appeal has been characterized in part by the filing of a number of motions to admit additional evidence on appeal pursuant to Rule 115 of the Rules. The Appeals Chamber found that three items of additional evidence as well as three items of rebuttal material were admissible pursuant to Rule 115 of the Rules. Hearings on appeal took place between 23 and 26 March 2004. Additional evidentiary hearings took place from 19 to 21 July 2004.

The events giving rise to this appeal took place within three camps established at the Omarska and Trnopolje villages and at the Keraterm factory, in the area of Prijedor, in northwest Bosnia and Herzegovina. These camps were established shortly after the Serb takeover of the city of Prijedor on 30 April 1992; their overriding purpose was to hold individuals who were suspected of sympathizing with the opposition to the takeover.

### **Let me now turn to the Appellants:**

Miroslav Kvočka was a professional police officer attached to the Omarska police station at the time the Omarska camp was established. The Trial Chamber found that Kvočka participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service and that he had some degree of authority over the guards. Because of the authority and influence which he exerted over the guard service and the limited attempts he made to prevent crime and alleviate the suffering of detainees, as well as the significant role he played in maintaining the functioning of the camp despite his knowledge that it was a criminal endeavour, Kvočka was found to be a co-perpetrator of the joint criminal enterprise of the Omarska camp. Under Article 7(1) of the Statute, he was found guilty of co-perpetrating persecutions under Article 5 of the Statute, as well as murder and torture under Article 3 of the Statute. The Trial Chamber sentenced him to a single sentence of seven years' imprisonment for the crimes for which he was convicted.

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Dragoljub Prcać was a retired policeman and a crime technician who was mobilized to serve in the Omarska police station on 29 April 1992. The Trial Chamber found that he was an administrative aide to the commander of the Omarska camp for over three weeks and that, as such, he was able to move unhindered through the camp. As a result of his position, Prcać was found to have some influence over the guards. The Trial Chamber found that he remained impassive when crimes were committed in his presence and that, although not responsible for the behaviour of guards or interrogators, he was still responsible for managing the movement of detainees within the camp. The Trial Chamber concluded that his participation in the camp, with full knowledge of what went on, was significant and that his acts and omissions substantially contributed to assisting and facilitating the joint criminal enterprise of the camp. Pursuant to Article 7(1) of the Statute, the Trial Chamber found him guilty of co-perpetrating persecution under Article 5 of the Statute, as well as murder and torture under Article 3 of the Statute. The Trial Chamber sentenced him to a single sentence of five years' imprisonment for the crimes for which he was convicted.

Mlado Radić was a professional policeman attached to the Omarska police station. The Trial Chamber found that he took up his duties as shift leader of guards in the Omarska camp on approximately 28 May 1992 and remained there until the end of August 1992. As a guard shift leader, Radić was found to have been in a position of substantial authority over guards on his shift. He used his power selectively to prevent crimes, ignoring the vast majority of crimes committed on his shift. The Trial Chamber noted that guards on his shift were particularly brutal and that Radić personally committed sexual violence against female detainees. The Trial Chamber found that Radić played a substantial role in the functioning of the Omarska camp and that he was a co-perpetrator of the joint criminal enterprise. He was found guilty under Article 7(1) of the Statute as a co-perpetrator of the following crimes committed as part of a joint criminal enterprise: persecutions under Article 5 of the Statute, and murder and torture under Article 3 of the Statute. Mlado Radić received a single sentence of twenty years' imprisonment for his involvement at the Omarska camp.

Zoran Žigić was a civilian taxi-driver who was mobilized to serve as a reserve police officer. He worked for a short period of time in the Keraterm camp as a guard and delivered supplies, and was also allowed to enter the Omarska and Trnopolje camps. With regard to the Omarska camp, the Trial Chamber found that Žigić regularly entered the camp specifically to abuse detainees. Žigić's significant participation in the crimes at the Omarska camp, coupled with his awareness of their persecutory nature and the eagerness and aggressiveness with which he participated therein, led the Trial Chamber to conclude that he was a co-perpetrator of the joint criminal enterprise of the Omarska camp. The Trial Chamber also found that Žigić committed persecutions, torture and murder at the Keraterm camp and that these crimes were part of a widespread or systematic attack against non-Serbs detained there, constituting crimes against humanity. The Trial Chamber found further that Žigić entered Trnopolje camp and abused detainees.

Pursuant to Article 7(1) of the Statute, Žigić was found guilty of persecutions for crimes committed in the Omarska camp generally, and in particular against specified individuals, as well as of crimes committed by him in the Keraterm camp against specified individuals. Žigić was found guilty of murder with respect to crimes committed in the Omarska camp generally and against a specified individual. With regard to the Keraterm camp, he was found guilty of murder with respect to specified individuals. He was found guilty of torture with respect to crimes committed in the Omarska camp generally and against specified individuals, and with respect to crimes committed in the Keraterm camp against specified individuals. He was found guilty of cruel treatment with respect to crimes committed against a specified individual in the Omarska camp and a specified individual in the Trnopolje camp. The Trial Chamber sentenced Zoran Žigić to a single sentence of twenty-five years' imprisonment.

Let me now consider the grounds of appeal raised by the appellants:

All four appellants share common grounds of appeal concerning alleged insufficiency of reasoning on the part of the Trial Chamber, issues relating to the Indictment, and questions concerning the doctrine of joint criminal enterprise. These will be considered before turning to the grounds of appeal specific to the individual appellants.

Now, then, as to the common grounds of appeal:

First, the alleged insufficiency of reasoning. Several of the appellants contend that the Trial Chamber failed to give sufficient reasons for their conviction.

The Appeals Chamber recalls that every accused has the right to a reasoned opinion. However, the Trial Chamber is not under an obligation to justify its findings in relation to every submission made during trial. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication to the contrary, which can happen, for instance, when there is a failure to refer to something which clearly required to be noticed. In this respect, the Appeals Chamber emphasises that it is necessary for an appellant claiming an error of law due to the lack of a reasoned opinion to identify the specific factual findings or arguments which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision. It is not possible to draw any inferences about the quality of a judgement from the length of a judgement or from a comparison of the length devoted to particular matters. These grounds of appeal are dismissed.

Second, issues relating to the indictment. Each of the appellants contends that the Trial Chamber erred in law in convicting him of crimes not properly pleaded in the indictment, for which he therefore lacked notice. The appellants submit specifically that the Indictment failed to plead joint criminal enterprise as a mode of liability.

It is established that the Statute requires the Prosecution to plead in the indictment all material facts underpinning the charges in the indictment, but not the evidence by which the material facts are to be proven. An indictment is defective if it fails to plead material facts. Whether or not a fact is considered material depends on the nature of the Prosecution's case. If the Prosecution relies on a theory of joint criminal enterprise, the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the participation of the accused in the enterprise. The indictment should also indicate which form of joint criminal enterprise is being alleged. However, in some instances, the prejudicial effect of a defective indictment can be remedied if the Prosecution has provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him, which compensates for the failure of the indictment to give proper notice of the charges.

The Appeals Chamber notes that joint criminal enterprise was not pleaded in the initial or subsequent indictments against the Appellants. The Appeals Chamber notes, however, that the Prosecution gave timely, clear and consistent information to the Appellants. This information detailed the factual basis of the charges against them and compensated for the failure of the indictment to give proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility. The Prosecution addressed the doctrine of joint criminal enterprise in its Pre-Trial Brief of 9 April 1999, the updated version of its Pre-Trial Brief, filed on 14 February 2000, its opening statement at trial, and its further opening statement after the arrest of Prać and the subsequent adjournment of the trial. A consideration of the Appellants' trial submissions further demonstrates that they were on notice of the Prosecution's reliance on joint criminal enterprise during the trial proceedings.

The Appellants Radić and Kvočka also contend that the Trial Chamber erred by failing to make factual findings in respect of each incident listed in the confidential schedules attached to the indictment. As the Appeals Chamber has noted previously, "schedules to an indictment form an integral part of the indictment". The incidents or events contained in the confidential schedules amount to material facts that have to be proved before the accused can be held responsible for the crimes contained in the indictment. The Appeals Chamber notes that the Trial Chamber made factual findings in relation to some of the incidents detailed in the confidential schedules, and assured itself that instances of each crime contained in the indictment had been committed, but it did not opt for a victim-by-victim or crime-by-crime analysis. The Appeals Chamber is of the view that it would have been preferable if the Trial Chamber had provided an exhaustive list of established incidents underlying each of the crimes. However, the Appeals Chamber has been able to find a great number of factual findings in the Trial Judgement underpinning the crimes for which the Appellants have been found guilty by the Trial Chamber.

The third common ground of appeal relates to joint criminal enterprise. Each of the Appellants challenges the legal principles the Trial Chamber applied when it found that the Appellants participated in a joint criminal enterprise. The Appeals Chamber affirms that joint criminal enterprise

is a form of commission under Article 7(1) of the Statute requiring a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute. Three forms of joint criminal enterprise have been recognized by the International Tribunal's jurisprudence. At issue in this case was the second form of joint criminal enterprise, the "systemic" form, characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the common criminal purpose of that system.

The submissions of the Appellants raise questions concerning the proper distinction between co-perpetration by means of a joint criminal enterprise and aiding and abetting a joint criminal enterprise. The Trial Chamber considered that a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and actively furthers the enterprise. An aider or abettor, on the other hand, does not share the intent of the other participants; he need only be aware that his contribution assists or facilitates a crime committed by the other participants. The Trial Chamber held that the shared intent may be inferred from knowledge of the criminal nature of the enterprise and continued significant participation therein. It acknowledged that there may be difficulties in distinguishing between an aider or abettor and a co-perpetrator, in particular in the case of mid-level accused who did not physically commit crimes. When, however, an accused participated in a crime that advanced the goals of the criminal enterprise, the Trial Chamber considered him more likely to be held responsible as a co-perpetrator than as an aider or abettor.

Each of the Appellants also raises questions concerning the level of contribution required of a participant in a joint criminal enterprise. In particular, they argue that a significant contribution cannot be inferred from their position in the camp. The Appeals Chamber first notes that a participant in a joint criminal enterprise need not physically participate in any element of any crime. The Appeals Chamber also considers that there is no specific legal requirement for the accused to make a substantial contribution to the joint criminal enterprise. In practice, however, the significance of the accused's contribution will be relevant to demonstrating that he shared the intent to pursue the common purpose. The Appeals Chamber also affirms that the *de facto* or *de jure* position of employment within the camp is only one of the contextual factors to be considered by the Trial Chamber in determining whether an accused participated in the common purpose. A position of authority, however, may be relevant to establishing the accused's awareness of the system, his participation in enforcing or perpetuating the common criminal purpose of the system, and, eventually, for evaluating the accused's level of participation for sentencing purposes.

Each of the Appellants suggests that he lacked the necessary intent to further the joint criminal enterprise, and that he was merely doing his job. The Appeals Chamber notes that it has repeatedly confirmed the distinction between intent and motive. Shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise.

Another legal issue raised in the Appellants' submissions is the question whether the Prosecution must prove an agreement between the accused and the other participants in the joint criminal enterprise. The Appeals Chamber considers the jurisprudence on this issue to be clear. Joint criminal enterprise requires the existence of a common purpose which amounts to or involves the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.

Implicit in a number of the Appellants' arguments is the suggestion that they should not be held responsible for crimes committed when they were not present at the camp. A co-perpetrator in a joint criminal enterprise need not physically commit any part of the *actus reus* of the crime involved. Nor is the participant in a joint criminal enterprise required to be physically present when and where the crime is being committed. While it is legally possible for an accused to be held liable for crimes committed outside of his or her presence, the application of this possibility in a given case depends on the evidence.

**The Appeals Chamber now turns to the grounds of appeal specific to the individual appellants:**

For reasons of practicality, the Appeals Chamber addresses the appellants' grounds of appeal in a different order from that which appears in their briefs. In this summary, only their main arguments are considered.

**First, as to the appellant Kvočka:**

Kvočka contends that the Trial Chamber erred in its consideration of his interview with the Prosecution. He argues that evidence of the interview should not have been admitted, and that, contrary to the finding of the Trial Chamber, it did not support the proposition that there were shift leaders in the Omarska camp.

The Appeals Chamber does not consider that the Trial Chamber erred in admitting evidence of Kvočka's interview. As to the reading of the record of the interview, the Appeals Chamber finds that a reasonable trier of fact could have drawn the same inference as that drawn by the Trial Chamber. This ground of appeal is thus dismissed.

As his second ground of appeal, Kvočka submits that the Trial Chamber erred in finding that he had the *de facto* status of a deputy commander of the guard service. He argues that the evidence did not prove this beyond reasonable doubt and challenges the evidence of certain witnesses. He also contends that he was not the deputy of Meakić, the commander of the Omarska police station at that time, and did not replace Meakić in his absence.

The Appeals Chamber finds Kvočka's challenge to be without merit. Kvočka has not demonstrated that no reasonable tribunal of fact could arrive at the conclusion that he held a *de facto* position of authority in the camp. The Trial Chamber based its finding on the evidence of a number of witnesses. For the most part, Kvočka's challenge to their testimony does not succeed. A reasonable trier of fact could conclude from Kvočka's own testimony that he acted as Meakić's deputy on the occasions on which Meakić was absent. The Appeals Chamber also notes that, as Kvočka was charged in the amended indictment with liability under Article 7(1) of the Statute, his formal position in the police hierarchy as commander or deputy commander is immaterial to his responsibility. A person does not need to hold a formal position in a hierarchy to incur liability under Article 7(1). This ground of appeal is dismissed.

Kvočka submits that the Trial Chamber erred in finding the requisite *actus reus* and *mens rea* to establish his responsibility as co-perpetrator in a joint criminal enterprise. Specifically, Kvočka argues that when he was working in the Omarska camp he was not aware of the common criminal purpose and did not intend to further the system of ill-treatment.

The Appeals Chamber observes that the Trial Chamber found that Kvočka had served in the camp from about 29 May 1992 to 23 June 1992 and that he was absent from 2 to 6 June 1992 and, again, from 16 to 19 June 1992; that he held a high-ranking position in the camp and had some degree of authority over the guards; that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely; that he carried out his tasks diligently, participating actively in the running of the camp; and that, through his own participation, in the eyes of the other participants he endorsed what was happening in the camp. Kvočka has not shown how the Trial Chamber's findings were unreasonable. It is clear that, through his work in the camp, Kvočka contributed to the daily operation and maintenance of the camp and that, in doing so, he allowed the system of ill-treatment to perpetuate itself.

Even though Kvočka may have participated in the joint criminal enterprise at the outset without being aware of its criminal nature, the facts of the case prove that he could not have failed to become aware of it later on. The Appeals Chamber agrees with the Trial Chamber's argument that, given the absence of direct evidence, his intent may be inferred from the circumstances, for example, relating to his authority in the camp, to his knowledge of the crimes being perpetrated in the camp, and to his continued participation in the functioning of the camp. The Appeals Chamber holds that a reasonable trier of fact could have inferred from the facts found by the Trial Chamber that Kvočka shared the intent to further the common criminal purpose. For these reasons, the Appeals Chamber considers that the Trial Chamber did not err in finding Kvočka guilty as a co-perpetrator of crimes committed as part of the joint criminal enterprise. This ground of appeal is dismissed.

Kvočka submits that the Trial Chamber erred in finding him guilty of the crime of murder. He argues that the Trial Chamber did not evaluate the evidence relating to the charge of murdering prisoners in Omarska between 24 May and 30 August 1992; he contends that the Trial Chamber failed to establish the existence of any acts or omissions by him in relation to each victim's death.

The Appeals Chamber must first consider the temporal limitation on Kvočka's liability. The Appeals Chamber concurs with Kvočka that the Trial Chamber decided not to hold him responsible for the crimes committed before his arrival in the camp. The Trial Chamber also considered that he could not be held responsible for the crimes committed after he left the camp. However, the Appeals Chamber considers that the Trial Chamber did not limit Kvočka's responsibility to those days when he effectively worked in the camp but held him responsible for the crimes committed in the camp during the time that he was employed there, whether or not he was actually in the camp.

To find an accused guilty of the crime of murder committed as part of a joint criminal enterprise, it is not necessary to establish his physical participation in the murder. It is sufficient to prove that the death of the victim was the result of implementing a joint criminal purpose and the responsibility of the accused in furthering that purpose. The Appeals Chamber finds that the Trial Chamber did not err in finding Kvočka guilty of the crime of murder without establishing his physical participation in each murder.

Kvočka submits that the Trial Chamber erred in finding him guilty of a number of specified murders. For the reasons set forth in the Judgement, the Appeals Chamber upholds Kvočka's arguments as regards the murders of Ahil Dedić and Ismet Hodžić and dismisses the remainder. The Appeals Chamber considers that these two errors do not invalidate Kvočka's conviction for murder under Count 5 insofar as it upholds Kvočka's convictions for the murders of Mehmedalija Nasić and Bećir Medunjanin.

Kvočka submits that the Trial Chamber erred in finding him responsible for the torture of detainees in the Omarska camp.

Contrary to Kvočka's allegation, the Appeals Chamber observes that the Trial Chamber did not require that at least one of the perpetrators of the act of torture be a public agent. The Appeals Chamber also considers that the Trial Chamber did not commit an error of law in not so requiring in light of the *Kumarac* Appeal Judgement. For the reasons stated in the Judgement, the Appeals Chamber rejects Kvočka's challenges relating to particular instances of torture.

Kvočka contends that the Trial Chamber erred in finding him guilty of persecutions as a crime against humanity. He argues that acts of persecution must be of equal gravity or severity to other acts enumerated under Article 5 of the Statute and that, as a result, acts of harassment, humiliation and psychological abuse do not constitute the crime of persecution. He submits that the Prosecution did not prove beyond reasonable doubt that the alleged rapes and sexual assaults happened during his stay in the camp. He also argues that, since it was impossible for him to influence the imprisonment or release of detainees, he should not have been held responsible for confinement in inhumane conditions.

Kvočka further contends that the Trial Chamber erred in convicting him of persecutions as a crime against humanity as the Prosecution did not prove beyond reasonable doubt that he possessed the necessary discriminatory intent. He points out that he is married to a Bosnian Muslim and had close association with non-Serbs; that he is a member of the moderate Reformist Party of Ante Marković; and that he was released from the Omarska camp after being considered a traitor and suspected of supporting Bosnian Muslims.

The Appeals Chamber has no doubt that, in the context in which they were committed and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse as found by the Trial Chamber are acts which, by their gravity, constitute material elements of the crime of persecution. The Appeals Chamber also considers that it is of no consequence that Kvočka was unable to prevent certain crimes since his contribution to the joint criminal enterprise encompassing those crimes has been established.

As regards the rapes and sexual assaults, the Appeals Chamber finds that the Trial Chamber erred in convicting Kvočka of these crimes given that it failed to determine whether they occurred during Kvočka's period of employment at the Omarska camp. The Appeals Chamber thus upholds this part of Kvočka's ground of appeal and invalidates his conviction for rape and sexual assault as persecutions.

The Appeals Chamber recalls its earlier conclusion that the Trial Chamber did not err in finding that Kvočka had the intent to contribute to the joint criminal enterprise of the Omarska camp. The Appeals Chamber is of the opinion that, in the context of this particular case, the intent to contribute to the joint criminal enterprise and discriminatory intent is one and the same thing. Hence the Appeals Chamber considers that the Trial Chamber did not commit an error in concluding that Kvočka had the requisite discriminatory intent. Save for the section of the ground of appeal relating to rape and sexual assault, this ground of appeal is dismissed.

#### **Now for the appellant Radić:**

Radić submits that the Trial Chamber violated his right to a fair and impartial trial by failing to make factual findings in respect of each incident listed in the confidential schedules. After considering in detail the factual findings of the Trial Chamber, the Appeals Chamber finds that, contrary to Radić's allegations, the Trial Chamber did not find him guilty of certain crimes alleged in the indictment without establishing at least some of the facts underlying each of those counts. This ground of appeal is accordingly dismissed.

Radić challenges his conviction for persecution as a crime against humanity. He argues that there must be discriminatory consequences to hold an act discriminatory and that it is not sufficient to establish that he was aware of his acts being discriminatory, but that he must have consciously intended to discriminate. Radić contests the Trial Chamber's conclusion that the individual discriminatory intent required for the crime of persecution could be inferred from the discriminatory character of the Omarska camp.

The Appeals Chamber considers that, in light of the circumstances, there is no doubt that the underlying crimes were committed on discriminatory grounds, and had discriminatory effects. The Appeals Chamber agrees with Radić that the discriminatory intent of crimes cannot be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity. However, the discriminatory intent may be inferred from the context of the attack, provided it is substantiated by the surrounding circumstances of the crime.

Radić also argues that he did not share the goal of the discriminatory policy, but that he reluctantly served in the camp only because of the explicit orders of his superior. It appears to the Appeals Chamber that Radić fails to distinguish motive from intent. The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that Radić acted with discriminatory intent from his knowledge of the persecutory nature of the crimes and his knowing participation in the system of persecution pervading the camp. This ground of appeal is therefore dismissed.

Radić challenges various factual findings of the Trial Chamber, notably its finding regarding his position within the camp. He submits that the Trial Chamber did not establish beyond reasonable doubt that he was the shift leader of guards and that he held a position of authority. He contends that he offered assistance to detainees "when it was possible" and not from a position of authority, and further that he had no effective control over the guards on his shift. The Appeals Chamber notes that the Trial Chamber relied on the statements of a large number of witnesses to establish Radić's position in the camp. A close reading of the witnesses' statements on which Radić relies to challenge the Trial Chamber's conclusion shows that they do not support his submissions. Radić thus fails to establish that no reasonable tribunal of fact could have arrived at the Trial Chamber's finding.

Radić also challenges the Trial Chamber's finding that he raped, attempted to rape and committed sexual violence against certain individuals. After considering Radić's arguments and reviewing the relevant evidence, for the reasons laid out in the Judgement, the Appeals Chamber dismisses Radić's contentions.

In this ground of appeal, Radić also contests the Trial Chamber's application of the joint criminal enterprise doctrine to his case. Radić disputes the Trial Chamber's finding that the Omarska camp functioned as a joint criminal enterprise. He argues that, according to the Trial Chamber's findings, anarchy and lawlessness prevailed in the camp. Thus, in his view, it is doubtful if a common design existed at all. Even if one existed, he submits, the Appellants were not aware of it and did not participate in its formulation. He also submits that he did not willingly or intentionally participate in the maintenance of the camp. On the contrary, he submits that he considered the camp solely his place of work, to which he was assigned by order of his superiors.

Radić's argument as to the lawlessness and anarchy in the camp is inapposite. The existence of the camp and the organization of the guard service required a certain amount of organization. In fact, with regard to the intent of persecution of the non-Serb population of the Prijedor area, the camp functioned with terrible efficiency. The lawlessness and anarchy, referred to by the Trial Chamber, were an integral part of the workings of the camp; these elements allowed the guards to maltreat the detainees at will, but that did not mean that they acted like a disorganized mob outside the joint criminal enterprise. The Appeals Chamber notes that Radić acknowledges that he was aware of the crimes committed in the camp. His argument that he worked in the camp because of his orders and of his fear of the consequences of disobeying them confuses intent and motive. As long as he participated in the functioning of the camp knowingly and willingly, his motives for doing so are irrelevant to the finding of his guilt. For these reasons, this ground of appeal is dismissed.

**Next, for the appellant Žigić:**

In several instances, Žigić has asked the Appeals Chamber to consider his Final Trial Brief as forming part of his Appeal Brief. The Appeals Chamber recalls that an appellant is obliged to provide the Appeals Chamber with exact references to paragraphs in judgements, transcript pages, exhibits or authorities, to which reference is made, so that the Appeals Chamber may fulfil its mandate in an efficient way. General references to the submissions made during trial clearly do not fulfil this requirement and will be disregarded by the Appeals Chamber.

Žigić raises objections relating to the Indictment. The Appeals Chamber understands him to be concerned about the form of the Indictment, in particular the use of Schedules, which he alleges have led to confusion and have hampered his defence. The Appeals Chamber gathers that he is saying that he was not properly charged with some of the crimes of which he was convicted.

In order to address Žigić's complaints, the Appeals Chamber has to determine whether the Trial Chamber returned convictions on the basis of material facts not pleaded in the Amended Indictment; and, if the Appeals Chamber finds that the Trial Chamber did rely on such facts, whether the trial of Žigić was thereby rendered unfair. After considering the specific cases cited by Žigić, for the reasons indicated in the Judgement, the Appeals Chamber concludes that Žigić did not suffer any prejudice from the vagueness in the Indictment.

Žigić argues that the Trial Chamber erred in law by applying an incorrect legal standard in determining whether he had the necessary *mens rea* for persecution. He also submits that the Trial Chamber's findings did not support the conclusion that he acted with discriminatory intent. Furthermore, he argues that the Trial Chamber erred because the rationale behind the persecution was not religion or ethnicity, but the issue of secession.

The Appeals Chamber finds that there is no basis for Žigić's claim that the Trial Chamber erred in law in its definition of discrimination. The Appeals Chamber also considers that Žigić fails to identify any evidence to support his argument relating to secession. The trial record does not support this view; no witness mentioned that he was ever asked about his opinion regarding the secession. The Appeals Chamber notes that there was a large amount of evidence before the Trial Chamber reasonably allowing the conclusion that the detainees in the camps of Omarska, Keraterm and Trnopolje were detained there because they were members of a group defined by "religion, politics and ethnicity".

The vast majority of Žigić's grounds of appeal concern challenges to his convictions for the murders of particular individuals, the torture of specified persons and the beatings of named victims.

After carefully reviewing the trial judgement and the evidence pertaining to these challenges, for the reasons contained in the Judgement of the Appeals Chamber, the latter rejects Žigić's contentions as regards all the individuals concerned.

In addition to the conviction for particular crimes, the Trial Chamber found Žigić responsible "for the crimes committed in the Omarska camp generally" with respect to persecution, murder and torture. Žigić challenges this, arguing that the factual findings of the Trial Chamber do not support this, and that the Trial Chamber erred in finding that his contribution to the functioning of the camp was significant.

The Appeals Chamber is of the opinion that a person need not have any official function in the camp or belong to the camp personnel to be held responsible as a participant in the joint criminal enterprise. It may be argued that the possibility of opportunistic visitors entering the camp and maltreating the detainees at random added to the atmosphere of oppression and fear pervading the camp. However, in such a case a significant contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine. The Appeals Chamber does not wish to minimize the gravity of the crimes which Žigić committed in the camp; they are serious violations of international humanitarian law. On the other hand, the Trial Chamber found that a "regular stream of murders, tortures, and other forms of physical and mental violence" pervaded the camp, and that "extreme brutality was systematic in the camps". The violence was not confined to a small group of perpetrators. The incidents in which Žigić participated, despite their quality of being grave crimes, formed only mosaic stones in the general picture of violence and oppression. The Appeals Chamber finds that, in the absence of further evidence of Žigić's participation in the functioning of the camp, no reasonable tribunal of fact could, based on the evidence before the Trial Chamber, come to the conclusion that Žigić participated in the joint criminal enterprise. His conviction for the crimes committed in this camp "in general" is quashed.

**Finally, the Appeals Chamber turns to the appellant Prać:**

Prač submits that the Trial Chamber effectively accepted all of his arguments. As a result, Prać contends that the Trial Chamber should have acquitted him of all charges. The Appeals Chamber considers it to be evident from the list of findings contained in the Trial Judgement that the Trial Chamber did not accept all of Prać's arguments. This ground of appeal therefore fails.

Next, Prać focuses on what he terms the "identity between the indictment and the [Trial] Judgement". He submits that the Trial Chamber made a number of findings of fact which were not pleaded in the indictment. The Appeals Chamber notes that Prać has not set out in detail the inconsistencies between the indictment and the trial Judgement that are subject to appeal, except for a reference to the finding that he was an administrative aide. In the indictment, Prać was alleged to have arrived at the Omarska camp to replace Kvočka as deputy camp commander. However, the Trial Chamber found that he was not deputy camp commander but was, in fact, an administrative assistant to the "security commander" of the camp. Prać argues that by ignoring the parameters of the indictment and finding that he had fulfilled the functions of an administrative assistant, the Trial Chamber improperly took on the role of the Prosecutor and convicted him on the basis of facts with which he was not charged.

The Appeals Chamber notes that the issue raised is whether the finding that Prać was an administrative assistant bears on his responsibility for the crimes committed in the Omarska camp. The Appeals Chamber also notes that the description of Prać's duties contained in the Trial Judgement was not contradicted by the Defence at trial; rather, it was confirmed. Prać even referred to himself as an "administrative worker" in his Final Trial Brief. Prać has therefore failed to show that no reasonable trier of fact could have reached the finding of the Trial Chamber that he was an administrative aide at the camp. More importantly, the Appeals Chamber considers that the title of administrative aide used by the Trial Chamber to describe him is not material to the finding that he was a co-perpetrator in a joint criminal enterprise. The Trial Chamber did not consider the fact of being an administrative aide to be indicative of criminal responsibility. The title itself was given only to sum up his duties, which were different from those of the other guards or their superiors. The Trial Chamber correctly assigned responsibility on the basis of Prać's actual duties rather than on the basis

of a mere descriptive label. The Appeals Chamber considers that Prcać has failed to show that no reasonable trier of fact could have reached the finding of the Trial Chamber that he contributed to the joint criminal enterprise at the Omarska camp in a significant way. Accordingly, this ground of appeal is dismissed.

Prcać alleges that a number of errors of fact and law were committed by the Trial Chamber relating to his administrative function, his role in the preparation and reading of lists of detainees and other errors. He submits that, had such errors not been committed, the Trial Chamber “would have certainly rendered a judgement of acquittal”.

Prcać argues that the Trial Chamber erroneously ascertained from his Pre-Trial Brief that he was essentially claiming that he was merely an administrative aide to Željko Meakić in the Omarska camp. Prcać contends that he never claimed this, only that he performed administrative work on an *ad hoc* basis. The Appeals Chamber finds that Prcać’s argument is unfounded. The Trial Chamber never stated that Prcać claimed to have held a formal administrative position. In asserting that the Defence was, in essence, claiming that Prcać was merely an administrative aide, the Trial Chamber was simply summing up the nature of Prcać’s duties at the camp on the basis of the evidence presented at trial, including Prcać’s own submissions that he worked as an “administrative worker”. The Trial Chamber’s assessment of that evidence is entirely reasonable.

Prcać also argues that the Trial Chamber erroneously ascertained that “[m]any prosecution witnesses supported Prcać’s description of his administrative duties in the camp”. According to Prcać, none of these witnesses described his duties as being administrative, nor did anything in their trial testimony indicate that he was “in charge of administrative work” at the camp. In the view of the Appeals Chamber, the Trial Chamber’s finding that Prcać was an administrative aide was based on the nature of the tasks he performed in the camp, as described by numerous Prosecution witnesses, as well as by Prcać himself, and not on any label used to describe these tasks. Moreover, since Prcać was never found by the Trial Chamber to have held a *formal* position of “administrative aide”, the Appeals Chamber is of the view that the lack of more explicit references in the evidence presented at trial to the administrative nature of Prcać’s work at the camp is immaterial.

In addition, Prcać challenges the Trial Chamber’s findings on his responsibility for the handling of lists of detainees who were to be interrogated, transferred, exchanged or released. The Appeals Chamber cannot find any error on the part of the Trial Chamber in this regard. The Appeals Chamber points out that the handling of lists of detainees was found to have been one of Prcać’s tasks at the camp which, together with the other tasks he was found to have performed, was indicative of the nature of his duties and position of authority at the camp. As such, the Appeals Chamber finds no reason to disturb the findings of the Trial Chamber on this matter. Prcać also objects to the Trial Chamber’s findings regarding his reading out of the lists of detainees. The Appeals Chamber finds Prcać’s arguments to be without merit. The Trial Chamber never stated that Prcać claimed to have performed that task on a frequent basis or that he was the only one doing so. Furthermore, the Appeals Chamber observes that the occasions on which Prcać was found to have read out lists of detainees were merely considered by the Trial Chamber to have provided evidence of the nature of his duties at the camp and in no way constituted a crime for which he was convicted. Prcać claims that, as he had no knowledge of the fate of the detainees who, after being called out from the lists, were never seen again, the Trial Chamber erred in holding him criminally responsible for what happened to them. The Appeals Chamber points out that Prcać was not found to have been accountable for any specific crimes against detainees. Rather, he was found to have participated in a joint criminal enterprise of persecution at Omarska camp. Accordingly, whether or not Prcać was aware of the fate of the detainees who were never seen again is immaterial to his criminal responsibility under Article 7(1) of the Statute.

Further, Prcać argues that the Trial Chamber’s conclusion that he did not work at the camp under duress was incorrect. Referring to the Trial Chamber’s finding that he “never mentioned any threats when he was interviewed by the Prosecution”, he submits that he did state in his interview with the Prosecution that he went to the camp under threat, that he raised this again in his Pre-Trial Brief and opening statement, and that two witnesses corroborated his assertion. The Appeals Chamber notes that the assertion that Prcać never mentioned any threats in his interview with the Prosecution was only one of the factors relevant to the Trial Chamber’s finding. In light of the totality of material

available to the Trial Chamber, the Appeals Chamber is of the view that Prać has not established that no reasonable trier of fact could have found that he did not work at the camp under duress.

Prač argues that, in the Trial Judgement, the Trial Chamber did not provide “a single explanation” as to the credibility of witnesses, or as to whether it accepted as credible, and, if so, to what degree, the testimony of a certain witness. In particular, he claims that the Trial Chamber erred in not explaining whether it believed the testimony of witness Jesić and himself.

The Appeals Chamber notes that, contrary to Prać’s argument, the Trial Judgement is full of references relating to the assessment of the credibility of witnesses. In any event, the Appeals Chamber considers that the Trial Judgement need not contain findings as to the credibility of each and every witness heard. The Appeals Chamber also notes that Prać is not arguing that some or all of the Prosecution witnesses were not eye-witnesses or that they did not have first-hand knowledge about what they testified to before the Trial Chamber. Prać has therefore failed to make out a factual or legal error.

Prač also alleges that the testimony of certain witnesses was inconsistent with the “real situation” and contained “falsehoods”. The Appeals Chamber considers that Prać does not identify any particular finding of the Trial Chamber he is challenging through this sub-ground and fails to identify the material fact with respect to which these witnesses allegedly gave false evidence. This ground of appeal is thus dismissed.

Finally, Prać claims that there was a breach of his right to a fair trial since he was not given adequate time to prepare for proper cross-examination and presentation of the evidence of ten witnesses. The Appeals Chamber considers that this issue was raised before the Trial Chamber and finally disposed of by it; at times the Appeals Chamber itself decided the matter during the trial on interlocutory appeal. There is, furthermore, no merit in Prać’s submissions regarding the delayed disclosure or the revision of witness lists.

Prač also argues that the Trial Chamber failed to rule on the motion of the Defence for access to trial transcripts from the *Sikirica* case. The Appeals Chamber notes that the oral motion of Prać was raised in court on 28 May 2001, and that the Trial Chamber made an oral ruling on it immediately. Prać has failed to show any error on the part of the Trial Chamber in connection with the oral motion in question. For these reasons this ground of appeal is dismissed.

**The Appeals Chamber will now turn to the question of sentencing:**

All the appellants appeal their sentences. Kvočka considers that the Trial Chamber failed to take certain mitigating factors into account when it determined his sentence and that his sentence is disproportionately high in comparison with other sentences imposed by the Tribunal. Prać contends that the Trial Chamber failed to take a number of mitigating circumstances into account when determining his sentence and that, as a result, the sentence imposed by the Trial Chamber was too severe. Radić argues that there is insufficient reasoning on the part of the Trial Chamber to justify his sentence, that the Trial Chamber erroneously took into consideration certain aggravating factors, that insufficient weight was afforded to certain mitigating factors and that a comparison of his sentence with other sentences imposed by the Tribunal indicates that his sentence should be reduced. Žigić submits that the Trial Chamber failed to take a number of mitigating circumstances into account.

The Appeals Chamber reiterates that sentencing is essentially a discretionary process on the part of a Trial Chamber. Appellate proceedings do not constitute a trial *de novo* and are, rather, of a corrective nature. For these reasons, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless it can be shown that the Trial Chamber made a discernible error. The Appeals Chamber finds that the Trial Chamber committed an error when it declined to consider Žigić’s voluntary surrender to the Tribunal a mitigating factor. However, little weight will be given to this mitigating circumstance given that Žigić was in prison at the time of his surrender. Aside from this, the appellants’ grounds of appeal relating to their sentences are dismissed.

**To sum up:**

For the reasons set forth above, which are more fully explored in the Judgement, the appeal of Kvočka with respect to the conviction of the murder of Ahil Dedic and Ismet Hodzic and the conviction for rape and sexual assault as persecution is allowed. The appeal of Žigić with respect to his conviction for crimes in the Omarska camp in general is also allowed as well as his sub-ground of appeal relating to the failure of the Trial Chamber to treat voluntary surrender as a mitigating factor. All other grounds of appeal are dismissed.

I will now read out in full the operative paragraphs of the Appeals Chamber's Judgement, that is the disposition:

I would invite the appellants to stand.

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

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

**NOTING** the respective written submissions of the parties and the arguments they presented at the hearings of 23 – 26 March 2004 and 21 July 2004;

**SITTING** in open session;

**UNANIMOUSLY**

**WITH RESPECT TO KVOČKA'S GROUNDS OF APPEAL:**

**NOTES** that Kvočka's first ground of appeal has been withdrawn;

**ALLOWS**, in part, Kvočka's fourth ground of appeal in so far as it relates to his conviction as a co-perpetrator of persecution for rape and sexual assault under count 1 of the Indictment, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 1 (persecution, a crime against humanity) in so far as this conviction relates to rape and sexual assault, **AND AFFIRMS** his remaining conviction pursuant to Article 7(1) of the Statute under count 1;

**ALLOWS**, in part, Kvočka's fifth ground of appeal in so far as it relates to the murder of Ahil Dedić and Ismet Hodžić, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 5 (murder as a violation of the laws or customs of war) in so far as this conviction relates to the murder of Ahil Dedić and Ismet Hodžić, **AND AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 5 for the murder of Mehmedalija Nasić and Bećir Medunjanin;

**DISMISSES** Kvočka's remaining grounds of appeal against convictions in all other respects;

**DISMISSES** Kvočka's appeal against sentence and **AFFIRMS** the sentence of seven years of imprisonment as imposed by the Trial Chamber;

**WITH RESPECT TO RADIĆ'S GROUNDS OF APPEAL:**

**DISMISSES** all of Radić's grounds of appeal and **AFFIRMS** the sentence of twenty years of imprisonment as imposed by the Trial Chamber;

**WITH RESPECT TO ŽIGIĆ'S GROUNDS OF APPEAL:**

**ALLOWS** Žigić's grounds of appeal concerning his responsibility for crimes committed in the Omarska camp generally, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 1 (persecution as a crime against humanity) in so far as this conviction relates to the crimes committed in the Omarska camp generally, **REVERSES** his conviction pursuant to Article 7(1) of the

Statute under count 7 (murder as a violation of the laws or customs of war) in so far as this conviction relates to the crimes committed in the Omarska camp generally, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 12 (torture as a violation of the laws or customs of war) in so far as this conviction relates to the crimes committed in the Omarska camp generally, and **AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 1 in so far as his conviction relates to the crimes committed against Bećir Medunjanin, Asef Kapetanović, Witnesses AK, AJ, T, Abdulah Brkić, Emir Beganović, Fajzo Mujkanović, Witness AE, Redžep Grabić, Jasmin Ramadanović, Witness V, Edin Ganić, Emsud Bahonjić, Drago Tokmadžić and Sead Jusufagić, **AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 7 in so far as his conviction relates to the crimes committed against Bećir Medunjanin, Drago Tokmadžić, Sead Jusufagić and Emsud Bahonjić and **AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 12 in so far as his conviction relates to the crimes committed against Abdulah Brkić, Witnesses T, AK, AJ, Asef Kapetanović, Fajzo Mujkanović, Witness AE, Redžep Grabić and Jasmin Ramadanović;

**DISMISSES** Žigić's remaining grounds of appeal against convictions in all other respects;

**DISMISSES** Žigić's appeal against sentence and **AFFIRMS** the sentence of 25 years of imprisonment as imposed by the Trial Chamber;

**WITH RESPECT TO PRCAĆ'S GROUNDS OF APPEAL:**

**DISMISSES** all of Prcać's grounds of appeal and **AFFIRMS** the sentence of five years of imprisonment as imposed by the Trial Chamber;

and finally,

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

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

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

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*The full text of the Judgement is available on the Tribunal's website [www.un.org/icty](http://www.un.org/icty).  
Hard copies can also be obtained from the Media Office.*