UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-98-32-A
		Date:	25 February 2004
		Original:	English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Date: **25 February 2004**

PROSECUTOR

v.

MITAR VASILJEVIĆ

JUDGEMENT

The Office of the Prosecutor:

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

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

CONTENTS

I. INTRODUCTION

1. The municipality of Višegrad is located in south-eastern Bosnia and Herzegovina. Its main town, Višegrad, is situated on the eastern bank of the Drina River. In 1991, about 63% of the population was Muslim and 33% was Serb. Elections were held in the municipality in November 1990; the result, which closely matched the ethnic composition of the municipality, led to mounting tensions. In early April 1991, after requests from the Serb politicians to divide the police along ethnic lines, both groups raised barricades around Višegrad, and over the following months random acts of shooting and shelling occurred. The Yugoslav National Army (JNA) arrived on 14 April 1992, and this at first had a calming effect. However, on 19 May 1992, the JNA withdrew from Višegrad and various Serb para-military units took control. One such group, with a reputation for being particularly violent, was led by Milan Lukić (Milan Lukić group). Although Mitar Vasiljević (Appellant) was not part of the Milan Lukić group, the Trial Chamber found that he was associated with the group and acted as an informant to it. Sometime in May 1992, the Appellant was present when Milan Lukić and his men searched the village of Musići. The Trial Chamber found that on 7 June 1992, the Appellant, together with Milan Lukić and two unidentified men, forcibly transported seven Muslim men to the eastern bank of the Drina River, where they were shot. Five of the seven men died as a result of the shooting and two survived by falling into the river, pretending to be dead. This incident is referred to as the Drina River incident.

2. On 29 November 2002, the Trial Chamber found the Appellant guilty, in relation to the Drina River incident, as a co-perpetrator of persecution as a crime against humanity pursuant to Article 5(h) of the Statute, for the murders of the five Muslim men and the inhumane acts inflicted on the two surviving Muslim men (Count 3) and murder as a violation of the laws or customs of war pursuant to Article 3 of the Statute, for the murder of the five Muslim men (Count 5). The Trial Chamber, however, acquitted the Appellant on the remaining counts, either because it found the evidence to be insufficient or because the convictions would have been cumulative. For the convictions on Counts 3 and 5, the Trial Chamber imposed a prison sentence of twenty years.

3. The Appellant is now appealing both the convictions and sentence. His arguments, raising eight grounds of appeal, are spread out in two separate documents - the Defence Appeal Brief and the Defence Additional Appeal Brief. The Appeals Chamber finds these arguments to be repetitive and unstructured and has, therefore, regrouped them. An overview of the arguments of the Appellant as set out in his submissions is found in the procedural background of these appellate proceedings, set forth in Annex A.

II. APPLICABLE CRITERIA FOR REVIEWING THE ALLEGED ERRORS AND FORMAL REQUIREMENTS OF THE GROUNDS PRESENTED BY THE APPELLANT

A. Standard of review under Article 25 of the Statute and the case-law of the Tribunal

4. The Appeals Chamber finds it appropriate to recall the standard of review by which the Appeals Chamber determines whether a ground of appeal is to be granted or dismissed, and the related formal requirements.

5. On appeal, the parties must limit their arguments to legal errors invalidating the decision and to factual errors occasioning a miscarriage of justice within the scope of Article 25 of the Statute.[1] The appeals procedure provided for under Article 25 of the Statute is corrective and does not give rise to a *de novo* review of the case.[2] The Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chamber.[3] These criteria have been frequently referred to by the Appeals Chambers of the International Tribunal and the ICTR and will therefore only be briefly restated below.[4]

6. A party alleging that there is an error of law must advance arguments in support of the contention and explain how the error invalidates the decision; but, if the arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[5]

7. Regarding errors of fact, the Appeals Chamber will only substitute the Trial Chamber's finding for its own when no reasonable trier of fact could have made the original finding.[6]

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[1] Article 25(1) of the Statute provides: "1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice. 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers." An exception to this general rule is when a party raises a legal issue that is of general significance to the International Tribunal's jurisprudence. *See* for example, *Tadić* Appeals Judgement, para 281; *Kupreškić* Appeals Judgement, para. 22; *Erdemović* Appeals Judgement, para. 16.

[2] *Kupreškić* Appeals Judgement, para. 22.

[3] Article 25(2) of the Statute.

[4] The Appeals Chamber of the Tribunal ruled several times on the review criteria on appeal in the *Erdemović* Appeals Judgement, para. 16; *Tadić* Appeals Judgement, paras 247, 281, 315-316; *Aleksovski* Appeals Judgement, para. 63; *Furundžija* Appeals Judgement, paras 35-37; *Čelebići* Appeals Judgement, para. 435; *Kupreškić* Appeals Judgement, paras 22, 27-30; *Kunarac* Appeals Judgement, paras 35- 47; and *Krnojelac* Appeals Judgement, paras 4-18. Moreover, the Appeals Chamber of the International Criminal Tribunal for Rwanda set out similar criteria in the *Serushago* Appeals Judgement, para. 22; *Akayesu* Appeals Judgement, paras 18-24 and 232; *Kayishema and Ruzindana* Appeals Judgement, para. 143; *Musema* Appeals Judgement, paras 16-21; and *Rutaganda* Appeals Judgement, paras 17-24.

[5] *Krnojelac* Appeals Judgement, para. 10. *See* also, *Furundžija* Appeals Judgement, para. 35. Also held by the Appeals Chamber of the ICTR in *Musema* Appeals Judgement, para 16.

[6] *Krnojelac* Appeals Judgement, para. 12.

8. Further, it is not any error of fact that will cause the Appeals Chamber to overturn a decision by a Trial Chamber, but one which has led to a miscarriage of justice, which has been defined as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of a crime."[7]

9. Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a *de novo* sentencing proceeding. A Trial Chamber has considerable though not unlimited discretion when determining a sentence. As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[8] The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber's discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene.[9]

10. Before considering the arguments of the Appellant on the merits, the Appeals Chamber will, as a preliminary matter, determine whether the Appellant's submissions meet the formal requirements for consideration on the merits. Should the Appeals Chamber be of the view that an argument does not meet these requirements, then it will be dismissed without detailed reasoning.[10] Further, should a party not argue its points in accordance with the requirements of the Practice Direction on Formal Requirements for Appeals,[11] then the Appeals Chamber may reject a filing or dismiss submissions therein.[12]

11. The Appeals Chamber recalls that the formal criteria require an appealing party to provide the Appeals Chamber with exact references to the parts of the records, transcripts, judgements and exhibits to which reference is made.[13] In the *Kunarac* Appeals Judgement, the Appeals Chamber found that:

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[7] *Furundžja* Appeals Judgement, para. 37, quoting Black's Law Dictionary (7th ed., St. Paul, Minn. 1999). *See* also *Kunarac* Appeals Judgement, para. 39, referring to *Furundžija* Appeals Judgement.

[8] *Serushago* Sentencing Appeal Judgement, para. 32. *See* also *Aleksovski* Appeal Judgement, para. 187 and *Tadić* Sentencing Appeal Judgement, paras 20-22; *Čelebići* Appeals Judgement, para. 725.

[9] *Aleksovski* Appeals Judgement, para. 187; *Furundžja* Appeals Judgement, para. 239; *Tadić* Sentencing Appeal Judgement, para. 22; *Čelebići* Appeals Judgement, para. 725; *Jelisić* Appeal Judgement, para. 99; *Serushago* Sentencing Appeal, para. 32; *Akayesu* Appeals Judgement, para. 409.

[10] *Kunarac* Appeals Judgement, para. 48; *Krnojelac* Appeals Judgement, para. 16. The Appeals Chamber of the ICTR has held that claims that are not supported by precise references to the relevant parts of the record on appeal will normally fail, on the ground that the Appellant has not discharged the applicable burden. *Kayeshima and Ruzindana* Appeals Judgement, para. 137.

[11] IT/201, issued 7 March 2002.

[12] *Ibid*, para. 17, which provide "[w]here a party fails to comply with the requirements laid down in this Practice Direction, or where the wording of a filing is unclear or ambiguous, a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein."

[13] *Ibid*, paras 13-16, which provides "13. Where filings of the parties refer to passages in a judgement, decision, transcripts, exhibits or other authorities, they shall indicate precisely the date, exhibit number, page number and paragraph number of the text or exhibit referred to. 14. Any abbreviations or designations used by the parties in their filings shall be uniform throughout. Pages and paragraphs shall be numbered consecutively from the beginning to the end. 15. Any time limits

> [i]n principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those Appellants' submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded. Objections will be dismissed without detailed reasoning where:
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> 1. the argument of the appellant is clearly irrelevant;
>
> 2. it is evident that a reasonable trier of fact could have come to the conclusion challenged by the appellant; or
>
> 3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[14]

12. Further, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[15] An allegation of an error of law which has no reasonable prospect of invalidating the decision may be summarily rejected.[16] A party alleging an error of fact must explain what the alleged error is and why it a reasonable trier of fact could not make this finding and in what way it leads to a miscarriage of justice. Where an appellant only challenges the Trial Chamber's findings and suggests an alternative assessment of the evidence, without indicating in what respects the Trial Chamber's assessment of the evidence was erroneous, then the appellant will have failed to discharge the burden incumbent upon him. In such circumstances, the Appeals Chamber may dismiss the arguments without a reasoned opinion. The Appeals Chamber will examine below, as a preliminary consideration whether the arguments of the Appellant meet these formal requirements or should be dismissed without detailed reasoning.

B. Preliminary considerations of the arguments

13. The Appeals Chamber has identified three categories of formal or procedural deficiencies in the Appellant's submission relating to alleged errors of fact, namely: i) arguments in relation to which the

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prescribed under this Practice Direction shall run from, but shall not include, the day upon which the relevant document is filed. Should the last day of a time prescribed fall upon a non-working day of the International Tribunal it shall be considered as falling on the first working day thereafter. 16. The provisions of this Practice Direction are without prejudice to any such orders or decisions that may be made by a designated Pre-Appeal Judge or the Appeals Chamber. In particular a Pre-Appeal Judge or the Appeals Chamber may vary any time limit or recognise, as validly done any act done after the expiration of a time limit prescribed in this Practice Direction." *See* also *Kunarac* Appeals Judgement, para. 44, "[a]n appellant must therefore clearly set out his grounds of appeal as well as the arguments in support of each ground. Furthermore, depending on the finding challenged, he must set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a miscarriage of justice. Moreover, the appellant must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must be given references to paragraphs in judgements, transcript pages, exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made".

[14] *Kunarac* Appeals Judgement, para. 48.

[15] *Ibid*, para. 43: "As set out in Article 25 of the Statute, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In a primarily adversarial system, like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner. One cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague, or if they suffer from other formal and obvious insufficiencies. Nonetheless, the Appeals Chamber has the obligation to ensure that the accused receives a fair trial".

[16] *Krnojelac* Appeals Judgement, para. 10.

Appeals Chamber cannot identify the alleged error by the Trial Chamber; ii) arguments in relation to which the Appellant fails to make submissions on whether the Trial Chamber's findings are those that a reasonable trier of fact could have found; and iii) arguments in relation to which the Appellant fails to make submissions as to how the alleged error led to a miscarriage of justice. The Appeals Chamber, therefore, dismisses the following submissions that suffer from the above deficiencies and will not discuss them in detail.[17] The Appeals Chamber will address arguments relating to sentencing in the same manner.

14. The Appeals Chamber points out that the Appellant was reminded of the criteria for appeal at the appeal hearing[18] and was requested to clarify some of the issues raised in the Defence Appeal Brief and in the Additional Defence Brief.[19] Despite this reminder, the Appellant failed, in some instances, to provide additional explanations.

15. The Appellant argues that the Trial Chamber did not consider his conduct, while in the detention of the International Tribunal, as a mitigating factor when determining his sentence.[20] This argument was raised for the first time in the Defence Reply. The Appeals Chamber holds that replies should be limited only to arguments rebutting the response arguments and should not include new arguments or amendments of grounds already submitted. This argument will therefore not be considered.

1. Arguments dismissed because no error is identifiable

16. The Appeals Chamber will not consider those arguments where the Appellant has failed to argue an alleged error and instead merely offers an alternative reading of the evidence. The Appeals Chamber identifies two arguments of this kind in the second ground of appeal: i) The Appellant challenges the Trial Chamber's finding that the fact that he failed to sever his relationship with Milan Lukić after the Drina River incident, despite his knowledge of Milan Lukić's very serious criminal activity, raised the suspicion of a closer relationship with the paramilitary group;[21] and ii) the Appellant submits that the Trial Chamber misevaluated his evidence and, in particular, the details he provided about the

[17] The Appeals Chamber cannot be requested to give reasoned opinions on evidently unfounded submissions, see *Kunarac* Appeals Judgement, para. 42.
[18] AT. 18.
[19] The Appeals Chamber noted that the appellant failed to demonstrate the impact of several alleged errors, AT. 13-14, that some of the grounds submitted contained more than one ground, AT. 13, that there was repetition of arguments, AT. 15, and that some of the arguments were not clear enough for the Appeal Chamber to approach them, AT. 16.
[20] Defence Reply, para. 9.10 (under the eighth ground of appeal).
[21] Defence Appeal Brief, para. 107 (under the second ground of appeal). The Appellant restated that his *kum* relationship with the Lukić family was misinterpreted as close relationship with Milan Lukić himself, without explaining what the alleged error was or how this alleged error leads to a miscarriage of justice. AT. 41.

paramilitary group by declining to draw the inference that his behaviour constituted a significant effort to co-operate with the Tribunal.[22]

17. In the third ground of appeal, the Appeals Chamber identifies three arguments of this kind: i) the Appellant argues that he testified about the best-man relationship between his family and the Lukić family and that Milan Lukić, following secondary school, went to Switzerland and that the Appellant did not see Lukić until 1992;[23] ii) the Appellant argues that the Trial Chamber erroneously concluded in paragraph 51 of the Judgement that the non-Serb civilians started to disappear;[24] and iii) the Appellant challenges the Trial Chamber's finding in paragraph 54 of the Judgement regarding the denial of medical treatment of a severely burned Muslim woman.[25]

18. In the sixth ground of appeal, i) the Appellant submits that there was "no chain of command structure" between the Appellant and the Milan Lukić group and, that according to the Appellant the "asserted discriminatory intent of the members of this group cannot be attributed to the accused without further proof to compensate the lack of this chain of command;"[26] and ii) the Appellant takes the view that the Trial Chamber erred in paragraph 256 of the Judgement when it found that the "Accused knew that some evil would befall the Koritnik group when they were being encouraged to stay together in Pionirska Street" and that, in doing so, the Appellant acted with the intent to discriminate on religious or political grounds.[27]

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[22] *Ibid*, para. 102 (under the second ground of appeal). The Appellant submitted during oral argument that his detailed testimony was neither accepted as a mitigating factor nor as co-operation with the Prosecution, AT. 42-43. The Appeals Chamber is considering arguments relating to sentencing in Chapter VI.

[23] Defence Appeal Brief, paras 131-134 (under the third ground of appeal).

[24] *Ibid*, paras 164-165 (under the third ground of appeal). The Prosecution submits that this argument raises a new ground of appeal not contained in the notice of appeal, although the Appellant did not seek leave to do so, and that it should accordingly be rejected on this ground, Prosecution Response Brief, para. 4.26. With regard to the Prosecution's argument that this raises a new ground of appeal, the Appeals Chamber finds that the Notice of Appeal refers to these paragraphs of the Judgement and to the fact that Serbs had been leaving until the arrival of the JNA (the Užice Corps). The Notice of Appeal states in the relevant part that "[w]hen we deal with Findings of Facts to the general requirements under C (para 39-56 pages 2323-2329) the Defence has objections for certain conclusions and states that to the coming of Užice Corps in Višegrad (to this event it came because of the occupation of hydro plant by Mural Sabanović and the threat that they would inflame the barrage and make a great catastrophe) Višegrad authority was kept by the Muslim majority and then the police of Serbian nationality was separated and till then the Serbs were those who had left Višegrad. The Defence states that during Užice corps stay, around 19 May 1992, the state of security was not or less stable and that even after the departure of Užice Corps it came to instability and various paramilitary actions." The Appeals Chamber therefore finds that this is not a new ground of appeal.

[25] *Ibid*, paras 166-167.

[26] Defence Additional Appeal Brief, paras 15-17 (under the sixth ground of appeal) the Appeals Chamber specifically asked for clarification for this argument, *see* AT 16. The Appellant did not clarify this argument during the appeals hearing and the Appeals Chamber is unable to understand this submission.

[27] Defence Appeal Brief, para. 232. The Appeals Chamber notes that this argument is without object as the Appellant has been acquitted for all charges relating to the Pionirska incident.

2. Arguments dismissed because the Appellant fails to submit whether the Trial Chamber's findings were such that no reasonable trier of fact could have made

19. The Appeals Chamber will not consider the following arguments because the Appellant fails to make submissions on whether the Trial Chamber's findings are those that a reasonable trier of fact could not have found or only lists discrepancies between different testimonies without explaining why no reasonable trier of fact could have made the finding. In the second ground of appeal: i) The Appellant contests the Trial Chamber's finding that the Milan Lukić group in the course of a few weeks committed dozens of crimes, and he submits that, notwithstanding the indictment against Milan Lukić *et al.*, which pleads that the group committed dozens of crimes between May 1992 and October 1994, the first facts that Milan Lukić and his men are charged with relate to the events at the Drina River on 7 June 1992; ii) the Appellant submits that the Trial Chamber's finding that he knew the other men associated with Milan Lukić is erroneous; iii) the Appellant argues that the Trial Chamber misinterpreted the fact that the Appellant knew more about the Milan Lukić group than other witnesses who testified; and iv) the Appellant submits, in connection with the search at the house in Musići, where he admits to have been, that he did not stand guard during the search and was not connected to the disappearance of the money or other valuables.[28]

3. Arguments dismissed because the Appellant fails to make submissions as to how the alleged error led to a miscarriage of justice

20. The Appeals Chamber will not consider the following arguments because the Appellant fails to make submissions as to how the alleged error led to a miscarriage of justice. In the third ground of appeal, the Appellant argues that the Trial Chamber erroneously found that he had been seen with the Milan Lukić group on "many occasions" before 7 June 1992.[29] He argues that the only evidence relied upon related to the Musići incident and the Drina River incident, and, therefore, the Appellant was only seen together with the Milan Lukić group on one occasion before the Drina River incident. The Prosecution responds that the Trial Chamber found that he was seen with these men on several occasions "during the period relevant to the indictment" and that no circularity is involved in the Trial Chamber's placing reliance on both the Drina River and Musići incidents to reach this finding.[30] The Appellant replies that reference to the period relevant to the indictment must be limited to the period up to and including 7 June 1992, as he was acquitted of further incidents.[31]

[28] *Ibid*, paras 155-156 (under the third ground of appeal). *See* also AT. 34-35.
[29] *Ibid*, para. 154.
[30] Prosecution Response Brief, para. 4.17.
[31] Defence Reply, para. 4.7.

21. Although the evidence does not appear to establish that the Appellant was seen together with Milan Lukić and his men prior to 7 June 1992 on an occasion other than the Musići incident, the Appeals Chamber finds that the Appellant has not demonstrated that the alleged error led to a miscarriage of justice. The Appeals Chamber therefore dismisses this ground of appeal.

4. Arguments relating to sentencing dismissed due to failure to argue a discernable error

22. The Appeals Chamber finds that the Appellant has failed to identify the alleged error in several arguments in the eighth ground of appeal relating to sentencing and therefore dismisses the Appellant's arguments concerning: i) the Appellant's diminished mental responsibility;[32] ii) the Appellant's surrender to the Tribunal;[33] iii) the role of the Appellant in the broader context of the conflict in the former Yugoslavia;[34] and iv) the Appellant's involvement in the planning of the offences.[35] For the same reasons, the Appeals Chamber dismissed the arguments of the Appellant in the second ground of appeal submitting that the Trial Chamber's finding that he was associated with the Milan Lukić group indisputably influenced the single sentence imposed.[36]

23. The Appeals Chamber has thus dismissed a majority of the Appellant's arguments on the basis that they were not argued in a way that is required by the Practice Directive, the Rules, the Statute and the case-law of the International Tribunal. In the following Chapters, the Appeals Chamber will consider the merits of the Appellant's arguments that have been found to meet the formal requirements.

[32] Defence Appeal Brief, paras 258-265.
[33] *Ibid*, para. 270.
[34] *Ibid*, para. 278; Defence Reply, para. 9.2.
[35] *Ibid*, para. 282.
[36] *Ibid*, para. 91.

III. ALLEGED FACTUAL ERRORS RELATING TO GENERAL REQUIREMENTS OF ARTICLES 3 AND 5 OF THE STATUTE

24. In his third ground of appeal, the Appellant challenges the Trial Chamber's findings set out in part III of the Judgement entitled "General Requirements of Article 3 and Article 5 of the Statute."[37] The Appeals Chamber has decided to consider the substance of two of the Appellant's arguments: (a) the acts of Appellant were not closely related to the armed conflict, and (b) the acts of the Appellant were not part of a widespread or systematic attack of which he had knowledge. Other alleged factual errors have already been dismissed by the Appeals Chamber for reasons set out above in Chapter II.

A. Alleged error in finding that the acts of the Appellant were closely related to the armed conflict

25. The Appellant argues that, although he agrees that there was an armed conflict in the municipality of Višegrad at all times relevant to the Indictment, his acts were not closely related to it. The Appellant argues that he was not an informant to the Milan Lukić group and challenges the Trial Chamber's finding in paragraph 57 of the Judgement that he was closely associated with the group and acted in furtherance of the conflict or under the guise of the armed conflict.[38] The Prosecution responds that the Appellant has not shown how the Trial Chamber's finding as to the nexus between his acts and the armed conflict was unreasonable.[39]

26. Paragraph 57 of the Judgement states that:

> the acts of the Accused were closely related to the armed conflict. Although he did not take part in any fighting, the Accused was closely associated with Serb paramilitaries, his acts were all committed in furtherance of the armed conflict, and he acted under the guise of the armed conflict.

27. The Appeals Chamber finds that the Appellant has not demonstrated that no reasonable trier of fact could have made this finding. The question whether the Appellant acted as an informant to the group or the exact nature of his relationship with the members of the group is not the determining factor in establishing whether the acts of the Appellant were closely related to the armed conflict. The Appellant does not dispute that the acts of the Milan Lukić group were connected to the conflict. In fact, the acts for which the Appellant has been convicted were carried out while he was together with the Milan Lukić group. The Appeals Chamber is of the view that the Appellant was associated with the Milan Lukić group on that occasion and that this establishes a sufficient nexus between the Appellant's acts and the armed conflict. This sub-ground of appeal therefore fails.

[37] The Appellant's arguments in relation to this ground of appeal are found in Defence Appeal Brief, paras 127-175.
[38] *Ibid*, paras 169-170.
[39] Prosecution Response Brief, para. 4.34.

B. Alleged error in finding that the acts of the Appellant were part of a widespread or systematic attack of which he had knowledge

28. The Appellant argues that the Trial Chamber erroneously concluded that the acts of the Appellant formed part of a widespread and systematic attack and that he knew of the attack.[40] The Appellant submits that he did not know of the attack and that the Trial Chamber's finding is not supported by the evidence.[41]

29. The Prosecution responds that "[t]he Trial Chamber's finding was not that Milan Lukić was the person who told the Appellant about the commission of his crimes, but rather that the Appellant was told that crimes had been committed by Lukić."[42]

30. It must be stressed that the Trial Chamber's finding relevant to the present ground relates to the Appellant's knowledge of on-going attacks against the Muslim civilian population in the region of Višegrad. The Appeals Chamber finds that, although the Trial Chamber does not refer in the relevant footnote to the Appellant's knowledge, it is obvious from the various findings of the Trial Chamber elsewhere in the Judgement that the Appellant participated with Milan Lukić and others in the searching of the house of witness VG-59's father in Musići,[43] and that he was present at the Vilina Vlas Hotel on 7 June 1992 when the seven Muslim men arrived escorted by Milan Lukić and his men.[44] Further, the Trial Chamber found that "in view of the sheer scale and systematic nature of the attack, the Accused must have noticed the consequences of this campaign upon the non-Serb civilian population of the Višegrad municipality."[45] The Appeals Chamber is of the view that a reasonable Trial Chamber could conclude from the above that the Appellant knew about the on-going attack against the Muslim civilian population in Višegrad. This sub-ground of appeal therefore fails.

C. Summary of findings

31. The Appeals Chamber dismisses the Appellant's arguments relating to the general requirements of Articles 3 and 5 of the Statute.

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[40] *Ibid*, para. 171.
[41] *Ibid*, paras 171-175. Footnote 120 of the Judgement, refers to the testimony of the Appellant at T. 1882 and 2103-2105.
[42] Prosecution Response Brief, para. 4.37. *See* also paras 4.35-4.40. Prosecution argues that footnote 120 of the Judgement (and the references to the Appellant's testimony at T. 1882, 2103-2105) clearly show that the person who told him this was Stanko Pecikoza and not Milan Lukić.
[43] Judgement, para. 80.
[44] *Ibid*, para. 100.
[45] *Ibid*, para. 60.

IV. ALLEGED FACTUAL ERRORS RELATING TO THE DRINA RIVER INCIDENT AND THE APPELLANT'S RELATIONSHIP WITH THE MILAN LUKIĆ PARAMILITARY GROUP

32. The Appellant's arguments alleging errors of fact are spread throughout his submissions and frequently repeated in several grounds of appeal. The Appeals Chamber has therefore chosen to deal first with the alleged errors of fact relating to the Drina River incident and the Appellant's relationship with the Milan Lukić para-military group. These arguments are mainly set out in the Appellant's first and second grounds of appeal. The Appellant argues: i) that he was not armed on the day of the Drina River incident; ii) that he was not aware of the homicidal intent of Milan Lukić and his men before they took the seven Muslim men to the bank of the Drina River; iii) that he attempted unsuccessfully to dissuade Milan Lukić from carrying out the act; iv) that he remained at a distance from the armed men when the shooting was taking place; v) that he was not an informant to the group;[46] and vi) that he did not take part in searching the house belonging to witness VG-59's father in Musići.[47]

A. Alleged error in finding that the Appellant was armed on 7 June 1992

33. The Appellant argues that he was not armed on 7 June 1992. He submits that there are contradictions in the testimony of witnesses VG-14 and VG-32, regarding whether he was carrying an automatic rifle on 7 June 1992.[48] He argues that the contradictions are such that they undermine the credibility of the two witnesses and thereby the Trial Chamber's finding that he was armed.[49]

34. The Appellant notes that witness VG-32 stated that, upon entering the Vilina Vlas Hotel, he noticed the Appellant standing a few metres away with his arms folded and without a weapon.[50] Witness VG-32 only noticed that the Appellant was carrying a Kalashnikov when he came over to the vehicle close to where the witness was.[51] The Appellant observes that, on the contrary, witness VG-14 stated that the Appellant was carrying an automatic rifle when he was standing in the very place at the hotel entrance described by witness VG-32.[52] The Appellant maintains that it is not possible for witness VG-32 to have erred when he described having seen the Appellant at the entrance with his arms crossed and without a weapon. In this regard, the Appellant argues that the fact that witness VG-32 was able to

[46] *Ibid*, paras 94-101 and 118-126.
[47] *Ibid*, paras 112-117.
[48] Defence Appeal Brief, para. 22 (under the first ground of appeal); paras 191-194 (under the fourth ground of appeal); Defence Additional Appeal Brief, paras 46-51 (under seventh ground of appeal); AT. 21-22.
[49] *Ibid*, para. 22; AT. 22-24.
[50] *Ibid*, para. 23; AT 24. The Prosecution challenges the Appellant's finding based on the evidence that witness VG-32 confirmed that the Appellant was unarmed in the hotel (contrary to the assertions of witness VG-14). *See* Prosecution Response Brief, para. 2.9.
[51] Prosecution Response Brief, para. 61; AT. 24.
[52] *Ibid*, para. 24. *See* also AT. 24.

describe in detail what he was wearing at the time indicates that, had he been armed, the witness would have noticed it.[53] He submits moreover that the two witnesses asserted that, in the brief interval when Milan Lukić was speaking with Šušnjar and looking for the keys to the room, the Appellant did not leave the area or speak with anyone before going to the cars. In this regard the Appellant states that witness VG-32 did not mention a weapon in his interviews with the Bosnia and Herzegovina police and the investigators. The Appellant considers that the only possible conclusion is that witness VG-32 invented the fact that the Appellant was carrying a weapon when he went to the vehicle, for the sole purpose of incriminating him.[54] The Prosecution contends that the testimony of witnesses VG-14 and VG-32 show that the Appellant was armed when he left the hotel and that the Appellant does not demonstrate how it was unreasonable for the Trial Chamber to have made this finding.[55]

35. The Appellant further submits that the testimony of witness VG-14 concerning the weapon is unreliable since, although witness VG-14 claimed to be familiar with the type of weapon in question from his military service, he told the investigators of the Prosecution that it was a semi-automatic weapon and then stated at trial that it was an automatic weapon. The Appellant submits that the witness would only have made such an error if he had invented the fact.[56] The Prosecution responds that, even if it had been established that witness VG-14's previous statement contradicted his testimony on the type of weapon in question, this would not make it unreasonable to accept the testimony of this witness when establishing whether or not the Appellant was armed when he left the hotel.[57]

36. Based on the testimony of witnesses VG-14 and VG-32, the Trial Chamber

> reject[ed] the Accused's evidence that he was unarmed at the hotel. The Trial Chamber is satisfied that, when the Accused left the Vilina Vlas Hotel with Milan Lukić, the two unidentified armed men, and the seven Muslim men, he was in possession of an automatic weapon, which he carried to the Drina River. VG-32 gave evidence that he first saw the Accused carrying a weapon when he left the Vilina Vlas Hotel, and VG-14 gave evidence that he saw the Accused with an automatic rifle inside the lobby of the hotel. When giving evidence in Court, both witnesses identified the weapon of the Accused as an automatic rifle.[58]

It should also be noted that the Trial Chamber specified that witness VG-14 declared having seen the Appellant with an automatic rifle inside the lobby of the hotel[59] while witness VG-32, although he did

[53] Defence Appeal Brief, para. 26.
[54] *Ibid*, paras 28-32; Defence Additional Appeal Brief, paras 2.9-2.10. The Appellant submits that it was the same approach which led witnesses VG-32 and VG-14 to attempt to convince the Trial Chamber that they heard the exact number of clicks produced by the automatic weapons on the bank of the Drina River at the moment of the shooting, with the sole difference being that the Trial Chamber was not convinced by their testimony on this point and found in paragraph 112 of the Judgement that there must have been a process of unconscious reconstruction on their part, Defence Appeal Brief, para. 30. *See* also AT. 24.
[55] Prosecution Response Brief, para. 2.9.
[56] Defence Appeal Brief, paras 24 and 59-60. *See* also AT. 24.
[57] Prosecution Response Brief, para. 2.9.
[58] Judgement, para. 103.
[59] *Ibid*, footnote 239, which refers to T. 433, 440 and 457.

not see him with a weapon before they left the hotel, did not suggest that he did not have one previously. All he said was that he had not seen him with a weapon inside the hotel.[60]

37. The Appeals Chamber finds that the arguments presented by the Appellant do not establish that no reasonable tribunal could have found, based on the testimony of witnesses VG-14 and VG-32, that the Appellant was carrying an automatic rifle when he left the Vilina Vlas Hotel. Both witnesses described the Appellant when he was in the lobby of the Vilina Vlas Hotel. Witness VG-32 testified that the Appellant was unarmed in the hotel lobby: "[h]is arms were crossed, and he was leaning against this little desk," four or five metres from the reception area where the witness was, which was unlit save for the natural light coming from the entrance.[61] However, witness VG-14 described the Appellant "in the hotel lobby" with an automatic rifle. Given the configuration of the place[62] and given that the respective testimony does not show that the two witnesses looked at the Appellant at exactly the same time, the two testimonies cannot be considered to be incompatible when determining whether the Appellant was carrying a weapon in the hotel lobby at any one moment. In any event, as stated by the Trial Chamber, both witnesses confirmed having seen the Appellant with a weapon when he went to the vehicle after leaving the hotel. The alleged contradiction as to the type of weapon described by witness VG-14 in his successive statements is not such that no reasonable trier of fact could have found that the Appellant was armed with an automatic weapon when he left the hotel.

38. The Appellant further relies on the testimony of witnesses Petar Mitrović, Ilija Zečević, Živorad Savić, Miloje Novaković, Radomir Vasiljević, Ratomir Šimšić, VG-13, VGD-22, VGD-24 and VG-87 to support his argument that after handing in his gun to the Territorial Defence (TO) command in Višegrad and being placed in detention in late May or around 1 June 1992 he no longer had a weapon. The Appellant states that when he left prison in early June he was assigned to "town cleaning" which he carried out until 14 June 1992 when he fell off a horse and was taken to hospital.[63] During the Appeals hearing, the Appellant admitted that the Prosecution is correct when stating that it was possible that he was armed on 7 June 1992 but that it was close to impossible since he had given his weapon back to the TO before he was sent to prison.[64]

39. The Appeals Chamber finds that this argument is unfounded because the fact that the Appellant returned his weapon before being arrested and was seen unarmed by various witnesses in the months of May and June 1992 does not call into question the testimony of witnesses VG-14 and VG-32 that he was

[60] *Ibid*, footnote 239, which refers to T. 261, 271 and 275.
[61] T. 261 and 271.
[62] *See* exhibit P. 132.
[63] Defence Appeal Brief, paras 34-51; Defence Reply, paras 2.11-2.13. *See* also AT. 25.
[64] AT. 22.

armed when he left the Vilina Vlas Hotel on 7 June 1992. The Appellant could have obtained another weapon after handing in his own.

40. The Appellant draws attention to other contradictions, some of which, he accepts, are more significant than others, in support of his assertion that the testimony of witnesses VG-14 and VG-32 is generally not reliable.[65] The Prosecution argues that a Trial Chamber could find all or some of a testimony to be reliable, even if discrepancies exist between that testimony and other statements, and the Appellant does not, in this case, demonstrate that the Trial Chamber's findings based on the testimony are unreasonable.[66] During the hearing, the Appellant contended that these minor discrepancies point to the witnesses' inability to remember the events in exact detail and the possibility that they may have been wrong about more important facts such as whether he had a weapon or not.[67] Having considered the above alleged contradictions, the Appeals Chamber holds that they are too minor or relate to details of the event which are irrelevant in supporting the Appellant's submission that the Trial Chamber erred in relying on the testimony of witnesses VG-14 and VG-32.

41. The Appeals Chamber has held above that the Trial Chamber's finding that the Appellant was armed at the Vilina Vlas Hotel was reasonable**.** The following considerations focus on the Trial Chamber's findings that, after having left the Vilina Vlas Hotel, i) the Appellant was armed when he and the Milan Lukić group parked in Sase and walked down to the Drina River, and ii) that he pointed his gun at the seven men and prevented them from fleeing.

42. The Appellant submits that he was not carrying a weapon when the seven Muslim men were escorted down to the Drina River. He further argues that witnesses VG-14 and VG-32 gave different testimonies as to whether the Appellant pointed a weapon at them and prevented their escape.[68]

43. The Trial Chamber found that

> Milan Lukić, the Accused and the other two unidentified men pointed their guns, which had their safety catches off, at the Muslim men, as they walked towards the bank of the Drina River.[69]

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[65] Defence Appeal Brief, paras 63-74. These alleged contradictions relate to the order in which the two vehicles (Yugo and VW Passat) used by Lukić and his men to take the victims to the scene of the crime arrived at the hotel and how Lukić's men were divided between the two vehicles when they left the hotel, Defence Appeal Brief, paras 64-67; the way in which the victims, the Appellant and Lukić's men proceeded towards the scene of the crime and whether or not the Appellant replied to the victim Meho Džafić on that occasion that he did not know him, Defence Appeal Brief, paras 68-71. The Prosecution responds that the fact that witness VG-32 did not hear the Appellant talking while they were on the bank does not mean that he said nothing, Prosecution Response Brief, para. 2.14. The question of knowing whether the shooting began immediately after this alleged exchange or after the co-perpetrators of the shooting spoke about whether to fire individually or in bursts, Defence Appeal Brief, paras 72-74. On this last point, the Appellant alleges a contradiction in the testimony of witness VG-14; AT.25-26.
[66] Prosecution Response Brief, para. 2.13.
[67] AT. 25.
[68] Defence Appeal Brief, paras 196-197.
[69] Judgement, para. 108.

44. The Appeals Chamber notes that, contrary to witness VG-32, witness VG-14 was not asked any questions and did not testify as to whether the Appellant and the other three men pointed their guns at them (the seven Muslim men) during the time they were escorted from the place in Sase where the cars were parked until they were lined up in front of the Drina River. As to witness VG-32, he testified that the behavior of the soldiers changed drastically when they got out of the car, and he was then asked to describe in what way it changed. Witness VG-32 indicated that when they got out of the car the soldiers stepped back and had their weapons on the ready. Witness VG-32 then testified that:

> Q. I want to ask you -- you said they had their weapons "on the ready." What exactly do you mean by that?
>
> A. I mean that the weapons were pointed at us, and of course the rifles had their safeties off.
>
> Q. I want to ask you specifically about Mitar Vasiljević. Did he have his rifle or did he still have a weapon at this time?
>
> A. Yes.
>
> Q. And did he too have his weapon pointed at the detained men?
>
> A. Yes.[70]

45. The Appeals Chamber holds that the Appellant has failed to show that no reasonable Trial Chamber could have made the findings that the Appellant was armed at the Vilina Vlas Hotel, and that he pointed his gun at the seven Muslim men and prevented them from fleeing at the Drina River. This sub-ground of appeal is therefore dismissed.

B. Alleged error regarding the moment from which the Appellant had knowledge that the seven Muslim men were going to be killed and not exchanged

46. The Appellant argues that the Trial Chamber erred in finding that the Appellant knew that Milan Lukić and his para-military group committed serious crimes before 7 June 1992. The Appellant asserts that there was no way for him to determine Milan Lukić's homicidal intent vis-à-vis the group of seven Muslim men before they stopped at Sase and started walking towards the Drina River.[71] The Appellant maintains that he became aware of Milan Lukić's intent at the same time as the seven Muslim men.[72] He points out that he was neither a member of the Milan Lukić group nor did he take part in the arrest of the seven Muslim men or in their transfer to the Vilina Vlas Hotel. He further submits that he was unarmed and happened to be present in the Vilina Vlas Hotel, when the Milan Lukić group arrived. He adds that the testimony of witness VG-32 shows that it is because Milan Lukić could not find the keys to the hotel

[70] T. 274-275.
[71] Defence Appeal Brief, paras 92-93.
[72] *Ibid*, paras 77-81.

room in which he had intended to lock up the seven Muslim men, that he decided to bring them to the cars and leave the Viliana Vlas Hotel with them.[73]

47. The Prosecution submits that the Appellant does not establish how the Trial Chamber's finding is unreasonable, in view of all the evidence relied on in concluding that the Appellant knew when he left the Vilina Vlas Hotel that the men were not to be exchanged but killed.[74]

48. The relevant findings of the Trial Chamber are as follows:

> [t]he Trial Chamber is satisfied that, when the Accused left the Vilina Vlas Hotel, he knew that the men were not to be exchanged but were to be killed. The evidence of the Accused himself was that he knew that Milan Lukić had committed serious crimes, including killings, in the area of Višegrad shortly prior to the Drina River incident. On the afternoon of 7 June 1992, during the drive from Višegrad to the Vilina Vlas Hotel, he had been told by the man who had driven him there that Milan Lukić had, on several occasions, taken out Muslim employees from the Varda Factory in order to mistreat or kill them. The Trial Chamber rejects the Accused's evidence that it was only when Milan Lukić stopped the cars near Sase and ordered the seven men to walk towards the bank of the Drina River that he understood that these men were not to be exchanged, but that they were to be killed.[75]

49. As to the specific finding emphasised above, the Appellant submits under his third ground of appeal[76] that he had no knowledge of Milan Lukić having committed murders prior to the Drina River incident. He argues that the incident of the Varda factory at which people were allegedly killed could not have been the subject of the conversation he had with Stanko Pecikoza on 7 June 1992 because the events in question took place three days later, on 10 June 1992. The Appeals Chamber finds that the above argument is consistent with the wording of Counts 8 and 9 of the Indictment, charging Milan Lukić for the Varda factory events, which reads as follows:

> [o]n or about 10 June 1992 , Milan Lukić and another uncharged individual drove to the Varda sawmill and furniture factory in Višegrad, entered the factory and forced seven Bosnian Muslim men to go to the bank of the river by the factory. Milan Lukić then shot them repeatedly with an automatic weapon thereby causing the death of: Nusret Aljošević, Nedžad Bektaš, Mušan Čančar, Ibrišim Memišević, Hamed Osmanagić, Lutvo Tvrtković and Sabahudin Velagić.

During the Appeals hearing the Presiding Judge invited the Prosecution to elaborate on the apparent contradiction existing between the Judgement and the amended indictment as to the date of the Varda factory incidents.[77] The Prosecution responded by referring to the cross-examination of the Appellant by Counsel for the Prosecutor (Mr. Groome) at trial on this point at page 2105 of the transcripts. The Prosecution stressed that, after having been asked about incidents at the Varda factory as well as at Stanko Pecikoza's factory,[78] the Appellant was asked whether Stanko told him what Milan Lukić was doing with the men he took from these various places and that he answered "killing them, I don't know.

[73] Defence Appeal Brief, para. 79.
[74] Prosecution Response Brief, para. 2.15.
[75] Judgement, para. 105 (emphasis added).
[76] Defence Appeals Brief, paras 172-175; AT. 33.
[77] AT. 116-117.

I think they found the body of that young man Velagić, somewhere in the vicinity of the village."[79] The Prosecution submits that the fact that Milan Lukić was charged with this incident on 10 June 1992 should not be taken to mean that there were not other occasions when Milan Lukić took out men from the Varda factory and indeed other factories in Višegrad. According to the Prosecution, the Trial Chamber was more than reasonable in finding, on the basis of the Appellant's testimony of what Stanko Pecikoza had told him, that people were being taken out and mistreated, and that he knew that they were being killed.[80]

50. The Appeals Chamber notes that the Trial Chamber expressly referred in footnote 245 of the Judgement to the testimony of the Appellant during trial and to his previous statement given to investigators as the sources for reaching its conclusion. Reviewing the relevant excerpts of the evidence, it appears that the testimony of the Appellant is unclear as to what he was told by Stanko Pecikoza on 7 June 1992 on their way to the Vilina Vlas Hotel.

51. The Appeals Chamber notes, first, that some confusion arose as to the ownership of the Varda factory. As a result of this confusion, when the Appellant refers in his statement to the fact that Milan Lukić mistreated Stanko Pecikoza's employees, it is unclear whether the Appellant actually refers to incidents at the Varda factory or to other incidents. The Prosecution seemed to be unclear at trial about this issue[81] and the Appeals Chamber considers, contrary to the Prosecution statement at trial that it was not "important to the case," that this issue requires clarification. The Appeals Chamber recalls that the Appellant testified that Stanko Pecikoza had a private business, namely, a sawmill and a carpentry shop.[82] The Appeals Chamber notes that when asked by the Prosecution during his cross-examination about the name of this business and whether it was not "Varda" or "Partizan," the Appellant answered in the negative and explained that the two enterprises in question where socially owned, while Stanko Pecikoza's sawmill and carpentry shop was a private business.[83] This was confirmed by the Appellant during the hearing of the appeal.[84]

52. Second, the Appeals Chamber notes that further confusion arose from the fact that, despite the Prosecution efforts to focus on what the Appellant was told by Stanko Pecikoza on 7 June 1992, the Appellant answered in a manner that leaves doubts as to the extent of his testimony (*see* first excerpt below from the Appellant's statement to the investigators on 16 November 2000 - exhibit 15.1), or even clearly includes information regarding events that occurred after 7 June 1992 according to the Appellant himself or according to the indictment (*see* third excerpt below from the Appellant's testimony at trial):

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[78] *See* para. 51 below where it is clarified that Stanko Pecikoza's factory was not the Varda or the Partizan Factory.
[79] AT. 118, Prosecution was citing from trial transcript T. 2105.
[80] AT. 119.
[81] During the Appeals hearing the Prosecution seemed to believe that Pecikoza's factory was called Partizan, AT. 118.
[82] T. 2088.
[83] T. 2090.
[84] AT. 75.

> Groome : Did Stanko at that time ever tell you that he thought that Milan was taking men from his factory and killing them ?
>
> Vasiljević : I think they were taken from the Varda factory. I think that he also came to his house and that he was mistreating some Muslims over there.
>
> Groome : And Stanko told you this while he you [sic] spoke with him on the road?
>
> Vasiljević : Yes.
>
> Groome : He actually told you that people had been killed by Milan Lukić?
>
> Vasiljević : You mean did he mention their names?
>
> Groome : Not the men that were killed but that Milan Lukić was killing the men?
>
> Vasiljević : Yes, that he was causing problems, that he didn't know what to do with him[85].

In spite of the use of the word "yes" by the Appellant, the Appeals Chamber is of the view that this excerpt does not allow for a conclusion that the Appellant was told by Stanko Pecikoza about the killings allegedly committed by Milan Lukić, since his statement, seen in context, was followed by the expression "that he was causing problems." Therefore, his prior statement (exhibit 15.1) does not support a finding in relation to killings. The corresponding section of the testimony of the Appellant on 26 October 2001 during trial is as follows:

> Q: Did he [Stanko] tell you that Milan Lukić was coming to his factory, taking men away and killing them?
>
> A: Not that he was killing them but that he also went to his home, to his place, and that he also harassed his employees, Muslims[86].

The Appellant's testimony does not allow for a conclusion as to killings. The Appeals Chamber finds, however, that the conclusion made by the Trial Chamber as to mistreatment is reasonable on the basis of the above-mentioned excerpts. The Appeals Chamber notes that the Prosecution tried to obtain a more precise answer from the Appellant as to information related to killings, and that having reminded him of his ambiguous prior answer, it added:

> Q: My question is did Stanko tell you whether or not Milan Lukić was killing members of his staff from his factory?
>
> A: Workers from the Varda factory, I don't think he -- he didn't kill any of his employees. I just think that at one point in time he took them away while Stanko was in town. But luckily for those people, because they were about to be taken away -- or they were already taken away, but he sent his son and his brother and they managed to catch up with the vehicle transporting them somewhere near Banja, and they took them off of the vehicle, his son and his brother did. So again, they were lucky that he was on time. But that happened only later, after the 7th.[87]

[85] Exhibit P 15.1, Statement by Appellant to the Office of the Prosecutor of 17 November 2000, p. 87 (emphasis added).
[86] T. 2103-2104 (emphasis added.)
[87] T. 2104.

Having reviewed the transcripts, the Appeals Chamber is of the view that the only part of the Appellant's testimony that positively refers to killing is the following:

> Q: Did Stanko also tell you that Milan Lukić was taking men from the Partizan factory as well as other places?
>
> A: Yes, yes. And I think that he was particularly angry because of a neighbour of his […] by the surname of Velagić.
>
> Q: […] did he tell you what Milan Lukić was doing with these men that he took from these various places?
>
> A: Killing them. I don't know. I think they found the body of that young man, Velagić, somewhere in the vicinity of the village[88].

The testimony of the Appellant is ambiguous given the use of the expression "I don't know". It is unclear whether the Appellant was told about the discovery of the body of the young man Velagić by Stanko Pecikoza in the car on the way to the hotel, or whether Stanko Pecikoza only expressed his suspicion that Milan Lukić had killed Velagić. Furthermore, it must be noted that a certain Velagić was, according to paragraph 15 of the Indictment, killed on 10 June by Milan Lukić at the Varda factory. This fact renders the testimony of the Appellant even more unclear as to which killings he was referring to.

53. For the above-mentioned reasons, the Appeals Chamber is of the view that the evidence in question does not support the Trial Chamber's finding that Stanko Pecikoza told the Appellant about any killings of workers from the Varda factory that would have taken place before 7 June 1992. Even if it were admitted that the Appellant had been told by Stanko Pecikoza that the young man Velagić had been killed by Milan Lukić, this would still be insufficient to safely infer that the Appellant knew when he left the hotel that the seven Muslim men were going to be killed and not exchanged. Therefore, the Appeals Chamber finds that no reasonable trier of fact could have made this finding, on the basis of the evidence. In this respect, the Appeals Chambers also takes into consideration the following elements: i) the Appellant's actions at the hotel as described by the witnesses, including the fact that he had a weapon, do not by themselves reveal anything as to his knowledge about the homicidal intent of Milan Lukić; ii) the version given by the Appellant that Milan Lukić pretended at the time that the men were to be exchanged is consistent with the fact that witness VG-32 testified that, while in the car on the way to Sase, he was told about the exchange by one of the soldiers; iii) witness VG-32 testified that it was from the moment Milan Lukić ordered them to leave the car that the behaviour of the soldiers changed drastically;[89] iv) the Appellant's testimony as to the fact that no violence was committed by Milan Lukić and his men during the search at witness VG-59's father's house in Musići is supported by the testimonies of witnesses VG-

[88] T. 2105 (emphasis added.)
[89] T. 274-275.

55; and VG-59; and v) lack of clear evidence that the Appellant knew prior to 7 June 1992 about killings committed by Milan Lukić.

54. The Appeals Chamber will consider whether this error led to a miscarriage of justice in the context of the alleged error relating to the Appellant's *mens rea* to kill the seven men (*see* discussion paragraphs 128-132 below).

C. Alleged error in finding that the Appellant pointed a gun at the seven Muslim men while at the Vilina Vlas Hotel

55. The Appellant argues that the Trial Chamber erred in finding that he was armed at the hotel and that he pointed his gun at the seven Muslim men.[90] He submits that the evidence relied on by the Trial Chamber (witnesses VG-14 and VG-32) does not support such a finding.[91]

56. The Prosecution submits that witness VG-14 testified that the Appellant had a gun, did not testify that the Appellant actually pointed it at the victims inside the hotel, and that witness VG-32 testified that it was one of the unidentified perpetrators, not the Appellant, who was pointing a rifle at the victims in the hotel.[92] The Prosecution further submits that it was open to a reasonable trier of fact to conclude that the Appellant was present at the hotel with a rifle contributing to preventing the victims from fleeing the hotel.

57. The issue of whether the Appellant was armed has been dealt with above and the Appeals Chamber concluded that it was reasonable of the Trial Chamber to find that the Appellant was armed at the Vilina Vlas Hotel.[93] Therefore, the issue to be considered at this stage is limited to whether it was reasonable of the Trial Chamber to find that the Appellant pointed his gun at the seven Muslim men at the hotel in paragraph 209 of the Judgement. This conclusion is not supported by the Trial Chamber's own finding in paragraph 100 of the Judgement where it found that "[o]ne of the unidentified armed men guarded them [the seven Muslim men], pointing his automatic rifle at them, preventing any of them from leaving the lobby of the hotel." Further, the evidence presented at trial does not support, as admitted by the Prosecution, a finding that the Appellant pointed his gun at the seven Muslim men. The Appeals Chamber considers that no reasonable trier of fact could have found that the Appellant pointed a gun at the seven Muslim men at this stage. However, this finding was only one of several relating to the actions of the Appellant from which the Trial Chamber inferred that the Appellant shared the intent to

[90] Defence Appeal Brief, paras 191-194 (under fourth ground of appeal). Further the Appellant argues in the Defence Additional Appeal Brief, para. 58, that the Trial Chamber made an error of fact by accepting criminal responsibility of murder on the basis of inferences stemming from the testimony of witnesses VG-14 and VG-32.
[91] Defence Appeal Brief, para. 193.
[92] Prosecution Response Brief, para. 5.12, referring to the testimony of witness VG-32, T. 268.
[93] *See* paras 33-45 above.

kill. It is therefore in the context of the alleged error relating to the *mens rea* of the Appellant to kill the seven Muslim men that the Appeals Chamber will determine whether the error made by the Trial Chamber, when it found that the Appellant pointed a gun at the men in the hotel, led to a miscarriage of justice.[94]

D. Alleged error in dismissing the Appellant's argument that he attempted to dissuade Milan Lukić from killing

58. The Appellant challenges the fact that the Trial Chamber dismissed his assertion that he attempted to dissuade Milan Lukić from killing the Muslim men, arguing that this was not confirmed by witnesses VG-14 and VG-32, who were, in any event of the view that no one could have influenced Milan Lukić.[95] On this point, the Prosecution responds that the Trial Chamber, in paragraph 107 of the Judgement, expressly rejected the Appellant's submission that he could not have dissuaded Milan Lukić from pursuing his criminal purpose. The Prosecution considers that this is an irrelevant question since the Trial Chamber found the Appellant shared the criminal purpose.[96]

59. The Trial Chamber's findings on this point are as follows:

> [t]he Trial Chamber rejects as wholly untrue the evidence of the Accused that he tried to persuade Milan Lukić to spare the life of Meho Džafić or any other man in that group. The Trial Chamber accepts the evidence of VG-32 that the Accused said nothing in response to the pleas of Meho Džafić as the men were marched towards the bank of the Drina River.[97]

> [t]he Trial Chamber also rejects the evidence of the Accused that, in any event, he was powerless to stop Milan Lukić from killing the Muslim men. VG-32 and VG-14 gave evidence of their impression that throughout the entire incident there was no one around Milan Lukić who could have affected him or his decisions and orders in a meaningful way. However, the Accused's claim of duress is inconsistent with the evidence that, one week prior to the shooting at the Drina River and during the Musići incident, he had successfully pleaded with Milan Lukić not to mistreat and harass the people in that house. He asserted that he was the only person who could help on that occasion, and that he had prevented the people living in that house from being mistreated and harassed by Milan Lukić. The Trial Chamber has already rejected that claim, but the inconsistent claims by the Accused as to his relationship with Milan Lukić has persuaded the Trial Chamber that the Accused is prepared to give false versions of that relationship according to the benefit he seeks to obtain at the time each version is given. There was no other acceptable evidence that the Accused was under duress vis-à-vis Milan Lukić. The Trial Chamber is satisfied that the Accused willingly accompanied Milan Lukić and his group with the seven Muslim men to the Drina River[98].

60. The Appeals Chamber finds that the Appellant has not demonstrated how the Trial Chamber's rejection of his assertion that he had attempted to dissuade Milan Lukić from carrying out the killings was unreasonable. The Appellant has also failed to demonstrate how the fact that none of the persons

[94] *See*, paras 115-132 below.
[95] Defence Appeal Brief, paras 83-85 (under first ground of appeal); Defence Additional Appeal Brief, paras 43-45 (under seventh ground of appeal); Judgement, paras 82-86.
[96] Prosecution Response, para. 2.16.
[97] Judgement, para. 106 (footnotes omitted).
[98] *Ibid*, para. 107 (emphasis added, footnotes omitted).

present could have influenced Milan Lukić would be relevant to the assessment as to whether or not the Appellant attempted to dissuade Milan Lukić. The Appeals Chamber finds that the Appellant has failed to show that no reasonable tribunal could have made this finding. This sub-ground of appeal therefore fails.

E. Alleged error in dismissing the argument that the Appellant remained at a distance from the scene of the crime

61. The Appellant considers that it must be inferred that he did not share the homicidal intent of Milan Lukić and his group since he remained at a distance from them as soon as that intent became clear to him.[99] The Appellant maintains that his submission that he did not approach the scene of the crime, but kept his distance amongst the trees, is corroborated by the testimony of witness VG-79 who observed the scene through binoculars from the other bank of the Drina River. The Appellant emphasises that when he gave his statement to the Prosecution's investigators on 16 and 17 November 2000, in which he claimed that he remained at a distance from the others, he could not have known that witness VG-79 had observed the event.

62. The Appellant submits that, witness VG-79 testified that he "also saw […] seven not armed men in civilian clothes and three or four armed men. They approached the river and those seven men were gathered near the bank. He also recognised the two of his friends and the three other people who were standing behind them before they started shooting them."[100] The Appellant adds that when the Defence requested witness VG-79 to confirm his written statement during the cross-examination, regarding the presence of seven unarmed and three armed men, the witness replied: "Yes, seven and three, but the fourth individual, he was near a tree and we couldn't see properly from that angle, and I say that it – now that it was 10 or 11, probably 10 or 11 people, because on the left-hand side he was probably partly covered by the tree, as you go towards the Drina River."[101] The Appellant submits that the witness then confirmed not having mentioned the fourth man because the Appellant was partially obscured by the tree and the witness could not see him clearly. The Appellant notes, furthermore, that the fact that witness VG-79 was in a position to notice that one of the members of the group had very light-coloured hair demonstrates that he could see the scene very clearly.[102]

[99] Defence Appeal Brief, paras 5, 87.
[100] Defence Appeal Brief, paras 5-7 (emphasis omitted); AT. 30. Moreover, the Appellant refers to witness VG-79's sketch, presented by the Defence as exhibit D-1, Defence Appeal Brief, para. 8.
[101] T. 334.
[102] T. 338, Defence Appeal Brief, para. 15.

63. The Appellant submits that, had he been one of the three armed men, witness VG-79, who knew him, would have recognised him.[103] He maintains, moreover, that the argument that he was at a distance from the other three men is supported by witness VG-79's testimony on the colour of the uniforms of the various protagonists.[104] The Appellant states that witnesses VG-14 and VG-32 thought they were going to die, had lost close relations in the Drina River incident, and saw in the Appellant the only person who might pay for those crimes.[105] By contrast, witness VG-79 was not in such a difficult situation from a psychological point of view and this makes his statement more objective.

64. The Prosecution understands that the Appellant is thus seeking to confirm his argument at trial that, having realised that he would not succeed in persuading Milan Lukić to spare the victims, he stopped 10 or 15 metres from the Drina River. The Prosecution responds that witness VG-79 did not testify to this effect. The Prosecution adds that the Trial Chamber did not discount the testimony of witness VG-79 and, on the contrary, considered it to be compatible with its findings. It further states that the Appellant does not demonstrate how any aspect of the Trial Chamber's findings relating to witness VG-79 is unreasonable.[106]

65. The relevant findings of the Trial Chamber on this point are as follows:

> The Trial Chamber is satisfied that Milan Lukić, the Accused and the other two unidentified men pointed their guns, which had their safety catches off, at the Muslim men, as they walked towards the bank of the Drina River. The Trial Chamber is satisfied that the Accused followed the men to the banks of the Drina River, and it rejects as untruthful the Accused's evidence that, when he realised that he could not persuade Milan Lukić to spare the men, he turned away from the group and stopped some 10 to 15 metres away from the river.[107]

66. The Appeals Chamber first notes that the testimony of witness VG-79 does not confirm the Appellant's submission that he was unarmed. Witness VG-79 described the scene as observed by him from the other bank of the Drina River and stated: "[i]n front, there were about seven people, and behind there were three and sometimes four, I guess, as they were going towards the Drina."[108] He confirmed that a tree prevented him from seeing the fourth person properly. It should also be noted that, in his sketch,[109] the witness placed three circles representing three men behind seven circles representing the seven Muslims. The Trial Chamber clearly indicated that it was not satisfied that the Appellant had

[103] Defence Appeal Brief, para. 16.
[104] *Ibid*, paras 13-14; AT. 30-31. The Appellant states that, according to the witness, the three men were wearing a dark coloured uniform whereas it is unchallenged that he himself was wearing a light coloured olive green SMB uniform that day. Furthermore, he states that the fact there was a group of willows at a distance from the sandy plateau where the shooting took place was borne out by witness VG-32 when he described the move towards the bank of the Drina River, paras 88-89.
[105] *Ibid*, paras 17-19. The Appellant specifies that Milan Lukić was not arrested and that the two witnesses did not know who his two associates were.
[106] Prosecution Response Brief, paras 2.5-2.6.
[107] Judgement, para. 108 (emphasis added, footnotes omitted).
[108] T. 323-324.
[109] Exhibit, D1.

opened fire at the same time as the three men who were with him.[110] With regard to assessing whether the Appellant should be viewed as a co-perpetrator in the joint criminal enterprise to kill the seven Muslim men the Trial Chamber considered that

> the Accused personally participated in this joint criminal enterprise by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started.[111]

67. The Trial Chamber considered it to be established beyond reasonable doubt that the Appellant had escorted the seven Muslim men to the bank of the Drina River, and had a gun aimed at them to prevent them from fleeing. The Appeals Chamber finds that, even if the testimony of witness VG-79 effectively confirms the Appellant's version that he was several metres away from Milan Lukić and the two other armed men during the shooting, the Appellant has not established that the Trial Chamber erred when it found that he was behind the seven Muslim men with his weapon, together with the three other perpetrators, shortly before the shooting. Additionally, in the view of the Appeals Chamber, assuming that the Trial Chamber erred in concluding as it did, the Appellant has not demonstrated that this error would have had an impact on the inference made by the Trial Chamber as to the Appellant's intent. In other words, the Appellant has not established that the error in question would lead to a miscarriage of justice. Furthermore, the Trial Chamber found that it had not been established beyond reasonable doubt that the Appellant fired his weapon at the same time as the other three or that he personally killed anyone or more of the victims.[112] It is therefore not necessary to go into the question of where exactly the Appellant stood during the shooting. The Appeals Chamber cannot find any error committed by the Trial Chamber in its treatment of the testimony of witness VG-79 or its assessment of the evidence presented at trial. This sub-ground of appeal is rejected.

F. Alleged error in finding that the Appellant was an informant to the Milan Lukić group

68. The Appellant submits that the Trial Chamber committed a factual error in paragraph 75 of the Judgement when it held that, although he was not a member of Milan Lukić's paramilitary group, he did have some association with the group and, in particular, acted as an informant to it.[113] He maintains that the finding that he had given information to the group with the full realisation that it would be used to

[110] Judgement, para. 206.
[111] *Ibid*, para. 209 (footnote omitted).
[112] *Ibid*, para. 112.
[113] Defence Appeal Brief, para. 94 (under second ground of appeal); Defence Appeal Brief, paras 226-230 (under the sixth ground of appeal); AT. 36-37.

persecute Muslims was especially unreasonable.[114] In support of this complaint, the Appellant argues not only that the Trial Chamber failed to state the basis for its conclusion but also that there was no evidence on the basis of which it could have reached that conclusion beyond all reasonable doubt. He emphasises that the only evidence on which the Trial Chamber relied in reaching this conclusion was the evidence of witness VG-14 who testified that, in Sase, the Appellant had replied to Milan Lukić that the house near which they had stopped belonged to Muslims.[115] The Appellant contends that even if this was true, which he disputes,[116] it could not form a sufficient basis for the Trial Chamber's finding that he acted as an informant to the group and knew that the information he supplied would be used to persecute Muslims. He adds that the Trial Chamber accepted that the group included Serbs from Višegrad, that Milan Lukić himself was from the town and that the group therefore had no need of external informants.[117] He concludes by pointing out that he knew that witness VG-59 and his brother were reserve police officers but that he said nothing about this to Milan Lukić, thereby proving that he did not act as his informant.[118]

69. The Prosecution responds that the Appellant's piecemeal approach of attacking each finding of the Trial Chamber one by one leads to his failure to appreciate "as a whole" the findings regarding his relationship with Milan Lukić's group. The Prosecution states that paragraph 75 of the Judgement is a "summary" of the Trial Chamber's lengthy and sophisticated analysis of a large amount of evidence which led it to make careful findings as to the association in question.[119] The Prosecution submits that the Appellant fails to show how it was unreasonable for the Trial Chamber to make the findings it did, given the Appellant's detailed knowledge of the group and its activities as revealed by his testimony, the evidence regarding his close (*kum*)[120] relationship with Milan Lukić, the evidence regarding his participation in the search of the house of witness VG-59's father in Musići[121] and the evidence of witness VG-14 regarding the fact that the Appellant informed Milan Lukić that the person who owned the house in front of which the vehicle had stopped in Sase was Muslim.[122] On this last point, the Prosecution states that the finding that the Appellant was a ready source of local information for the

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[114] *Ibid*, para. 99. The Appellant reiterates this complaint in support of his sixth ground of appeal regarding persecution, para. 229.
[115] *Ibid*,, paras 118-121.
[116] As of the trial, the Appellant asserted that the house in question actually belonged to a Serb, Stojan Kosorić, and denied that Milan Lukić and he had ever discussed the house as claimed by witness VG-14, Defence Appeal Brief, para. 124. In a decision dated 21 October 2003, the Appeals Chamber denied the Defence Motion for Additional Evidence filed on 24 June 2003 and the Addendum to Defence Additional Evidence Motion filed on 11 July 2003 in which the Defence requested that five Višegrad municipality documents, a video cassette and the transcript of a statement it had been given by Stojan Kosorić be admitted as additional evidence pursuant to Rule 115 of the Rules.
[117] Defence Appeal Brief, paras 95-96.
[118] *Ibid*, para. 126.
[119] Prosecution Response Brief, para. 3.11.
[120] According to Trial Chamber, *kum* is a Serbian strong family bond. The Appellant was Milan Lukić's best man at his wedding and the godfather of Milan Lukić's child, Judgement, paras 46, 72-77.
[121] Prosecution Response Brief, para. 3.12.
[122] Prosecution Response Brief, paras 3.29-3.35; AT. 95.

group about the location of Muslims in the area was not crucial or instrumental to his conviction for persecution.[123] In conclusion, the Prosecution submits that there may have been many reasons why the Appellant might have been reticent about giving details concerning some people but not others.[124]

70. As regards the Trial Chamber's evaluation of the nature of the Appellant's relationship with Milan Lukić's group and, in particular, his role as an informant, the relevant findings are as follows:

> [t]he Trial Chamber is satisfied that the Accused did have some association with Milan Lukić's paramilitary group, but it is not satisfied that he was a member of that group or that (except as otherwise stated) he participated directly in the crimes which that group committed in Višegrad. The Trial Chamber is satisfied that Milan Lukić and most of his associates had not lived in Višegrad for some time, and that they sought the assistance of local Serbs to help them identify the targets of their crimes. The Trial Chamber is satisfied that the Accused was acquainted with many members of the group prior to the events of 1992 and that, because of his close relationship with Milan Lukić, the Accused was a ready source of local information for the group about the location of Muslims in the area of Višegrad, and that he gave that information to the group with the full realisation that it would be used to persecute Muslims. The Trial Chamber is not satisfied that that association is a sufficient basis by itself for any finding that the Accused shared the general homicidal intentions of that group.[125]
>
> To conclude, and as already stated, the Trial Chamber is not satisfied that the Accused was a member of Milan Lukić's paramilitary group, or that his association with that group was such that it is possible to draw an inference beyond reasonable doubt that the Accused shared the general homicidal intentions of that group. The Trial Chamber is satisfied that he had some association with that group, in that he willingly acted as an informant to that group, and that this willingness arose from his close relationship with Milan Lukić.[126]

71. Three pieces of evidence were cited by the Trial Chamber in support of the challenged finding. The Trial Chamber relies on the fact that: First, Milan Lukić and his men, who had not been living in the Višegrad area for some time, needed information on the Muslims living in the area; second, the Appellant was acquainted with most of Milan Lukić's associates and had a close relationship with Milan Lukić himself; and, third, the Appellant was a ready source of information about the location of Muslims in the area and he gave that information to the group with the full realisation that it would be used to persecute Muslims. The first two of these three pieces of evidence show that the group needed an informant and that the Appellant was able to fulfil that role, but only the third piece of evidence demonstrates that the Appellant actually did so. It must therefore be determined whether, as the Appellant claims, no reasonable trier of fact could to draw the inference the Trial Chamber did based on the evidence available.

72. The only evidence cited by the Trial Chamber[127] to suggest this conclusion is the testimony of witness VG-14 who testified that, while he was in the hands of the Appellant and Milan Lukić in the red VW Passat, the Appellant pointed out a nearby house and told Milan Lukić that it belonged to a Muslim

[123] *Ibid*, para. 3.34.
[124] *Ibid*, para. 3.36. *See* also AT. 94.
[125] Judgement, para. 75 (emphasis added and footnotes omitted).
[126] *Ibid*, para. 95 (emphasis added).
[127] *Ibid*, footnote 148.

family. A reading of the relevant transcripts[128] shows that the Prosecution did not focus on this issue and that the witness's remark was incidental. It should also be noted that, during his testimony, the Appellant was invited by Judge Janu to comment on the words attributed to him by witness VG-14. The Appellant denied that he had ever said such a thing or that he had even been in the same car as witness VG-14 and he asserted that the house in question belonged to a Serb.[129]

73. Regarding the role that the Appellant played for the paramilitary group, the Prosecution only alleged that he acted as an informant to the group in its Final Trial Brief and then reproduced this submission in its closing arguments.[130] In its Final Trial Brief, the Prosecution referred the Trial Chamber to other evidence than that given by witness VG-14.[131] However, the Trial Chamber expressly rejected the evidence of witnesses VG-115[132] and VG-81[133] as not being sufficiently reliable or credible. Moreover, it may by no means be inferred from the Trial Chamber's findings of fact on the Musići search that it was satisfied that the Appellant had pointed out the house in question to Milan Lukić and his men.

74. For the above reasons, the Appeals Chamber finds that no reasonable tribunal could find that the Appellant was an informant to the Milan Lukić group and that he had knowledge that the information would be used to persecute Muslims, based solely on the testimony of witness VG-14. However, the Appeals Chamber is of the view that this erroneous finding does not lead to a miscarriage of justice. In fact, the Trial Chamber found that the Appellant was associated with the Milan Lukić group and held in paragraphs 57, 58 and 60 of the Judgement that the acts of the Appellant were closely related to the armed conflict and that his acts formed part of the widespread and systematic attack against the non-Serb population of the municipality of Višegrad.

75. Further, the Appellant challenges the Trial Chamber's finding regarding his discriminatory intent, in paragraph 251 of the Judgement, which he submits is based on the erroneous finding that he

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[128] T. 436, which reads as follows: "Q. [Once in Sase] where did the cars stop? A. The cars stopped in front of a house. Mitar Vasiljević, as he was talking to Lukić, said that this was a Muslim house. Q. When the cars stopped, what happened? A. They ordered us to get out of the car and told us not to try to escape."

[129] T. 2265, which reads as follows: "A. Milan Lukić knew which were the Muslim and which were the Serb houses, and the house that is shown on the photograph is not a Muslim house. It's a Serb house. Kosorić is the surname. Stojan is his first name. Judge Janu: You know, I'm not familiar with the area, but the witness VG14 said when you stopped, you told to Milan Lukić that this is a Muslim house. That is in his statement. A. When the car stopped -- I couldn't have said that. I wasn't with Milan in the car. He said that in -- that there were six people in the Yugo. Judge Janu: With him in the car -- you were not in the car with Milan Lukić? A. I was in the Yugo, with Meho Džafić, the second car, another car." It should be noted that both witness VG-14, who was in the Passat, (T. 435), and witness VG-32, who was in the Yugo, (T. 272), stated that the Appellant and Milan Lukić were in the Passat when they went from the hotel to Sase.

[130] Prosecution closing arguments, T. 4751-4752. *See* Prosecution Final Trial Brief, para. 72.

[131] Prosecution Final Trial Brief, paras 54-83.

[132] Judgement, para. 90.

[133] *Ibid*, para. 86.

was an informant to the Milan Lukić group.[134] The Prosecution responds that the Trial Chamber did not rely exclusively on the finding that the Appellant was providing information to the Milan Lukić group when it concluded that he had committed the crime with the required criminal intent, but rather the Trial Chamber was clear that the criminal intent must be provided specifically in relation to the Drina River incident.[135]

76. The relevant findings of the Trial Chamber were:

> The Trial Chamber has already found that the Accused acted as an informant to Milan Lukić's group, assisting that group in locating the Muslim population of Višegrad. The Trial Chamber has already satisfied itself that the Accused did so with full awareness that the intent of Milan Lukić's group was to persecute the local Muslim population of Višegrad through the commission of the underlying crimes. The Trial Chamber is satisfied that, in providing information to the group led by Milan Lukić, the Accused shared the intention of that group to persecute the local Muslim civilians on religious or political grounds. In order to convict the Accused for the crime of persecution, however, the Prosecution must also establish that the Accused participated in the commission of a persecutory act with a discriminatory intention.[136]

77. The Trial Chamber distinguished between the issue of the Appellant's sharing the intent of Milan Lukić and his men to persecute Muslim civilians "in general" and the issue of his specific discriminatory intent with respect to the crimes for which he was found guilty, i.e., the killing of five of the seven Muslim men at the Drina River and the inhumane acts committed against the two survivors. With regard to the first point, the Trial Chamber relied on its findings on the Appellant's role as an informant.[137] On the latter point, the Trial Chamber noted that:

> [t]he Trial Chamber is satisfied that the only reasonable inference available on the evidence is that these seven Muslim men were singled out for religious or political reasons, and that the killing of five of them were acts carried out on discriminatory grounds, namely, religious or political.[138]

78. However surprising this distinction might be, the Appeals Chamber is of the view that the first finding is superfluous and that the Trial Chamber clearly believed that, even if the Appellant had acted with discriminatory intent in providing information to the group, this by itself did not prove that he had acted with discriminatory intent when he took part in the Drina River incident. Contrary to the submissions of the Appellant, the Trial Chamber did not deduce the discriminatory intent of the Appellant from the fact that he was an informant of the group. The Trial Chamber affirmed that "the acts of the Accused were *in fact* discriminatory, in that the men were killed only because they were

[134] Defence Appeal Brief, paras 225-230 (under sixth ground of appeal).
[135] Prosecution Response Brief, para. 7.4.
[136] Judgement, para. 251.
[137] The Trial Chamber refers in footnote 627 to paragraphs 75 and 95 of the Judgement.
[138] Judgement, para. 254.

Muslim."[139] Indeed, no evidence seems to have been tendered which would indicate that the seven Muslims were singled out for any other reason than their ethnicity.

79. The Appellant has, therefore, not shown how the Trial Chamber's finding that he was an informant led to a miscarriage of justice. This sub-ground of appeal is, therefore, dismissed.

G. Alleged error as to the role of the Appellant during the searching of the house of witness VG-59's father in Musići

80. The Appellant challenges the Trial Chamber's finding that he participated with Milan Lukić and others in searching the house of witness VG-59's father in Musići. The Appellant maintains that the Trial Chamber erred by not accepting any of his evidence and favouring the version of events provided by witnesses VG-55 and VG-59.[140] The Appellant alleges that these two witnesses' accounts do not match on some important facts, such as whether Milan Lukić and the Appellant arrived together or separately[141] and the reasons that the Appellant gave for being there.[142] The Prosecution contends that the Appellant simply repeats once again his trial submissions without showing how the Trial Chamber committed an error occasioning a miscarriage of justice. The Prosecution further states that the discrepancies in the evidence pointed out by the Appellant are minor and understandable given the time that had elapsed between the events in question and their testimony and that the discrepancies have no bearing on the finding that the Appellant stood guard during the search, armed with his automatic rifle.[143]

81. The relevant findings by the Trial Chamber are as follows:

> [t]he Trial Chamber is satisfied that the Accused participated with Milan Lukić and others in the searching of the house of VG-59's father in Musići in late May 1992. The Accused admitted that he was present during this incident and that he was armed. The Trial Chamber accepts the version of events given of that incident by witnesses VG-59 and VG-55, notwithstanding the different account given by the Accused, which the Trial Chamber rejects as an untruthful attempt to exculpate himself. The evidence of the Accused did not cause the Trial Chamber to have any doubt as to the truth of the evidence of these two witnesses. Both VG-59 and VG-55 knew the Accused from childhood, and neither had any bias against him which would cause them to colour their testimony. In fact, had they wanted to give false evidence against the Accused, they could have exaggerated his role in the crimes committed against the people of Musići, which they did not. They did not suggest that he was otherwise

[139] Judgement, para. 254.
[140] Defence Appeal Brief, para. 113.
[141] *Ibid*, para. 114. The Appellant points out that witness VG-55 testified that they arrived at the house together and that the Appellant stood by the door whereas witness VG-59 stated that Milan Lukić entered the house after the Appellant. The Appellant claims that this second version of events is untrue because he stayed on the steps near the door while Milan Lukić began the search.
[142] *Ibid*, para. 115. The Appellant points out that witness VG-55's evidence shows that he gave no reply to the witness' question on this issue whereas witness VG-59 stated at the hearing that the Appellant had spoken of some individual wanted for murder but did not discuss this in his statement.
[143] Prosecution Response Brief, paras 3.21-3.25 and 3.28.

> involved in any criminal conduct. Indeed, the Accused gave evidence that, in his view, VG-59's and VG-55's evidence was accurate, despite the discrepancies between their account and his own.[144]

82. The transcript shows that there is some ambiguity as to who actually said that the Milan Lukić group were looking for someone. Witness VG-55 testified that she heard a person say that Milan Lukić was looking for someone who he thought was hiding at their place, and witness VG-59 testified that the Appellant said this. A further reading of the relevant transcripts reveals that witness VG-55 testified that the Appellant remained on the doorstep as Milan Lukić went inside the house and carried out the search.[145]

83. Witness VG-55 testified that the Appellant, Milan Lukić and five or six other men arrived at the house of VG-59's father and that the Appellant stood in front of the house armed while Milan Lukić was searching it. When asked whether she was told what the men were looking for she replied:

> [t]hey were looking for people. They thought someone was hiding there, and they were looking for people to see if they were hiding there then.
>
> Q. Were you told this by anybody?
>
> A. They said Milan Lukić was looking for some people. He thought that we were harbouring some people, hiding some people in our house.
>
> Q. If you say "they," who do you refer to, VG-55?
>
> A. Milan Lukić.[146]

As for the testimony of witness VG-59, he gave evidence that, on that day, the villagers were assembled by the White Eagles[147] at his father's house and that when his wife, his children and he were taken there, he noticed the Appellant standing on the doorstep. Witness VG-59 further stated that it was the Appellant who actually said that the group was looking for someone.

> Q. Did Milan Lukić tell you that he was looking for this Avdo who had allegedly killed a Serb woman?
>
> A. No. Mitar Vasiljević said that.[148]

84. The Appeals Chamber finds that the two witnesses' accounts are compatible. The transcripts show that witness VG-55 was at the house of VG-59's father even before the Appellant and the

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[144] Judgement, para. 80 (footnotes omitted).
[145] Witness VG-55 testified that "Q. That evening, how did Mitar Vasiljević and Milan Lukić arrive? A. They came as dusk was falling, Mitar Vasiljević, and Lukić, Milan Lukić. And there were five or six other people. They stormed my father-in-law's house. Mitar stood in front of the door. And when I went outside the house I said to Mitar, "How's Milojka?" I just didn't want him to kill me, that's all I was thinking of at the time. […] Q. You said you were afraid that he would kill you. How was Mitar Vasiljević dressed? A. Yes, that's right. He had black trousers on. I don't know what he had above that. All I know is that he was armed; he had a rifle. Q. Do you remember what kind of rifle? A. I don't really know. He was holding a rifle and the rifle was cocked. I don't know. That's all I know. And he was pointing it", T. 563.
[146] T. 564.
[147] This is how, according to witness VG-59, the group of about ten men introduced itself, T. 656.

paramilitary group arrived and that witness VG-59 and his wife and children were only taken later to the house. It is therefore more than likely that when witness VG-59 arrived at the house with other members of his family Milan Lukić had already completed the search described by witness VG-55 and had come back outside, either to take part in assembling the other villagers who were then gathered together at the house of witness VG-59's father whilst the Appellant continued to stand watch, or to search other houses. It should be noted that witness VG-59 provided no account of Milan Lukić's search of his father's house, which was described in detail by witness VG-55.[149] However, the testimony of witness VG-59 describes the fact that, while searches were carried out in the other houses in the village and valuables were taken from these houses, the Appellant was standing guard in front of his father's house.

85. The Appeals Chamber finds that the alleged contradictions are non-existent, minor or immaterial and that the Appellant has failed to show that no reasonable trier of fact could rely on this evidence in reaching the finding that the Appellant was indeed standing armed guard at the entrance to the house of witness VG-59's father during the events there and thereby participating in the search of the house. This sub-ground of appeal therefore fails.

H. Summary of findings

86. The Appeals Chamber dismisses the Appellant's alleged errors regarding: i) the finding of fact that he was armed on 7 June 1992; ii) the finding of fact that he tried to dissuade Milan Lukić from committing the crimes; iii) the finding of fact that the Appellant was standing some distance away from the group during the shooting; iv) the finding of fact that Appellant was an informant to the Milan Lukić group; and v) the finding of fact regarding the Appellant's role during the search in Musići. The Appeals Chamber finds that the Trial Chamber erred when it found: i) that the Appellant knew at the Vilina Vlas Hotel that the seven Muslim men were going to be killed; and ii) that the Appellant pointed his gun at the seven Muslim men whilst at the hotel. The question of whether these errors led to a miscarriage of justice will be considered below in relation to the Appeals Chamber's assessment of whether or not the Appellant shared the intent to kill.[150]

[148] T. 670-671.
[149] T. 564.
[150] *See* paras 115-132 below.

V. THE APPELLANT'S PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE AND HIS RELATED INDIVIDUAL CRIMINAL RESPONSIBILITY

87. The Appellant's fourth (murder), fifth (inhumane acts), sixth (persecution) and seventh (joint criminal enterprise) grounds of appeal are interlinked and share, as a central issue, the Appellant's *mens rea* in relation to the Drina River incident. Therefore, the Appeals Chamber has decided to address these four grounds of appeal in the same Chapter of this Judgement. Before presenting the various arguments submitted under these grounds of appeal, the Appeals Chamber will recall the relevant findings of the Trial Chamber.

88. The Trial Chamber found that the Appellant incurred individual criminal responsibility for the crime of murder (as a crime against humanity) under Count 4 of the Indictment, and for the crime of murder (as a violation of the laws or customs of war) under Count 5 of the Indictment in respect of Meho Džafić, Ekrem Džafić, Hasan Kustura, Hasan Mutapčić and Amir Kurtalić,[151] as well as for the crime of inhumane acts (as a crime against humanity) under Count 6 of the Indictment in respect of witnesses VG-14 and VG-32 and persecution by way of murder and inhumane acts under Count 3 of the Indictment.[152] The Trial Chamber applied the established test for determining whether cumulative convictions are permissible and found that persecution pursuant to Article 5(h) of the Statute requires the materially distinct element of a discriminatory act and a discriminatory intent compared to the crimes of murder and inhumane acts. Therefore a conviction was entered for persecution pursuant to Article 5(h) of the Statute, but not for murder and inhumane acts pursuant to Article 5 of the Statute. As a result, the Appellant was convicted for persecution as a crime against humanity under Article 5 of the Statute (Count 3) and for murder under Article 3 of the Statute (Count 5).[153]

89. The Trial Chamber found that: i) There was an understanding amounting to an agreement between Milan Lukić, the Appellant and two unidentified men to kill the seven Muslim men, including the two survivors;[154] ii) the Appellant participated in this joint criminal enterprise to murder by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other offenders shortly before the shooting occurred;[155] iii) the attempted murder of witnesses VG-14 and VG-32 constituted a serious attack on their human dignity, and caused witnesses VG-14 and VG-32

[151] Judgement, para. 211.
[152] *Ibid*, para. 240.
[153] *Ibid*, paras 266-268.
[154] *Ibid*, para. 208.

immeasurable mental suffering;[156] iv) the Appellant, by his acts, intended to seriously attack the human dignity of witnesses VG-14 and VG-32;[157] and v) the murders and the inhumane acts were discriminatory and that the Appellant shared the discriminatory intent for persecution. The Trial Chamber further considered that, if the agreed crime is committed by one or other of the participants in the joint criminal enterprise, all of them are guilty of the crime regardless of the part played by each in its commission. The Trial Chamber found it unnecessary to deal with the alternative basis of criminal responsibility upon which the Prosecution relied – that of aiding and abetting.[158]

90. The Appellant argues, under the seventh ground of appeal, that the Trial Chamber erred in law and in fact when it applied the concept of joint criminal enterprise in this case. The three alleged errors of law relate to the elements required to prove the existence of a joint criminal enterprise. The Appellant submits that the Trial Chamber failed to explicitly indicate the criteria it applied,[159] that it erred in finding that an agreement existed[160] and that the Trial Chamber erred in holding that the participants in a joint criminal enterprise are equally guilty.[161] The errors of fact relate to the *mens rea* of the Appellant and constitute the principal submission common to the Appellant's fourth, fifth, sixth and seventh grounds of appeal, where he argues that the Trial Chamber erred in determining that he shared the intent to kill the seven Muslim men[162] and to cause witnesses VG-14 and VG-32 "serious mental or physical suffering."[163] The Appellant also argues in his Additional Appeal Brief that the Trial Chamber erred in finding that he shared the intent of the principal offender. In this respect, the Appellant challenges the Trial Chamber's finding that the Appellant provided assistance to the other perpetrators[164] and submits that there is no proof of his actual participation in the shooting.[165]

91. Under the sixth ground of appeal the Appellant submits that the Trial Chamber erred in finding him guilty of persecution as a crime against humanity for the murder of five Muslim men and the inhumane acts inflicted on two other Muslim men in relation to the Drina River incident under Count 3 of the Indictment. The main argument presented by the Appellant is that he did not act with the requisite

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[155] *Ibid*, para. 209.
[156] *Ibid*, para. 239.
[157] *Ibid*.
[158] *Ibid*, para. 210.
[159] Defence Additional Appeal Brief, para. 29.
[160] *Ibid*, paras 30-38. *See* also Defence Appeal Brief, para. 238, where it was submitted that: "the Prosecution in this case didn't establish the proof of this existence of an arrangement or understanding amounting to an agreement."
[161] Defence Appeal Brief, para. 241 (under the seventh ground of appeal) and paras 202-212 (under the fourth ground of appeal).
[162] *Ibid*, paras 183 to 216 and Defence Additional Appeal Brief, paras 39-42 and 59.
[163] *Ibid*, paras 222-224.
[164] Defence Additional Appeal Brief, paras 32-38.
[165] *Ibid*, paras 52-53. The Appellant also reiterates arguments already addressed in relation to the absence of proof that he carried a weapon and to the Trial Chamber's reliance on his failure to prevent Milan Lukić from committing the crime (*see Ibid*, paras 43-51, *see* also Section A and D of Chapter IV above).

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

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

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

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

1. Joint criminal enterprise

94. Article 7(1) of the Statute sets out certain forms of individual criminal responsibility which apply to the crimes falling within the International Tribunal's jurisdiction. It reads as follows:

> **Article 7**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

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

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[166] *Ibid*, paras 10-14.
[167] *Ibid*, paras 5-6.
[168] Defence Appeal Brief, paras 217-219.
[169] *See Tadić* Appeals Judgement, para. 188 and para. 226, which provides that "[t]he Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law." To reach this finding the Appeals Chamber interpreted the Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council

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

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

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

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

Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993. It also considered the specific characteristics of many crimes perpetrated in war. In order to determine the status of customary law in this area, it studied in detail the case-law relating to many war crimes cases tried after the Second World War (paras 197 et seq.). It further considered the relevant provisions of two international Conventions which reflect the views of many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, adopted by a consensus vote by the General Assembly in its resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998; Article 25 of the Statute of the International Criminal Court, adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome) (paras 221-222). Moreover, the Appeals Chamber referred to national legislation and case-law stating that it was a matter of specifying that the notion of "common purpose," established in international criminal law, has foundations in many national systems, while asserting that it was not established that most, if not all of the countries, have the same notion of common purpose (paras 224-225). The *Tadić* Appeals Chamber used interchangeably the expressions "joint criminal enterprise," "common purpose" and "criminal enterprise," although the concept is generally referred to as "joint criminal enterprise," and this is the term used by the parties in the present appeal. *See* also, *Ojdanić* Decision, para. 20 regarding joint criminal enterprise as a form of commission.

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

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

[172] *Tadić* Appeals Judgement, paras 202-203. Although the participants in the joint criminal enterprises of this category tried in the cases referred to were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. The *Krnojelac* Appeals Judgement found that this "systemic" category of joint criminal enterprise may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, para. 89.

[173] *Ibid,* para. 204, which held that "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk." The Appeals Chamber came to the conclusion that this form of liability was applicable to Duško Tadić, para. 232.

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

100. The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements: First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.[174] Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[175] Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.[176]

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

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

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

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a

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

crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*"[179] – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

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

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

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

B. Alleged errors of law

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

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

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

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

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

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

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

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

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

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

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

109. It clearly results from *Tadić* Appeals Judgement that "[t]here is no necessity for th[e] plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise."[185] The Appeals Chamber in the *Furundžija* Appeals Judgement relied on this reasoning, when it identified the legal elements of co–perpetration in a joint criminal enterprise.[186] The Appeals Chamber finds, therefore, that the Appellant's submission is not well founded and this sub-ground of appeal must fail.

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

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

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

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

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

113. The Appeals Chamber does not subscribe to the views of the Appellant that the Trial Chamber erred in finding him guilty of persecution "solely on the basis of one incident,"[195] First, the Drina River incident consists of the murder of five people and the inhumane acts inflicted on two others. This incident cannot be described as a single act but rather as a series of acts. Second, as held by the Appeals Chamber in the *Krnojelac* Appeals Judgement, persecution is "an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[196] Although persecution often refers to a series of acts, a single act may be sufficient,[197] as long as this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds. The Appeals Chamber therefore finds that this sub-ground of appeal is without merit.

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

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

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

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

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

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

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

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

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

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

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

participated in one aspect of the common purpose (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators) even if he or she did not physically commit the crime; and ii) the accused, even if not personally effecting the crime, nevertheless intended this result.

120. The Appeals Chamber further recalls that the standard of proof to be applied is beyond a reasonable doubt, and the burden lies on the Prosecution as the accused enjoys the benefit of the presumption of innocence. The Appeals Chamber agrees with the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.[204]

121. The Appeals Chamber is to determine whether the Trial Chamber erred in applying the above burden of proof standard in concluding:

> [a]lthough the Trial Chamber is not satisfied that it has been established that the Accused actually killed anyone or more of the victims, it is nevertheless satisfied that the only reasonable inference available on the evidence is that the Accused, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself.[205]

In other words, the question is whether no reasonable tribunal could have found that the only reasonable inference from the evidence was that the Appellant by his actions intended to kill the seven Muslim men.

122. The analysis of the Appellant's intent is broken down below into two stages. First, the Vilina Vlas Hotel stage: with respect to which the Trial Chamber concluded that the Appellant knew that the seven Muslim men were going to be killed. Second: the stage from the time they parked the cars in Sase, at which point the Appellant admits that he knew that the seven Muslim men were going to be killed.

1. The intent of the Appellant at the time the group left the Vilina Vlas Hotel

123. The Appeals Chamber notes that the Trial Chamber found that the Appellant did not share the general homicidal intent of the Milan Lukić group.[206] The Trial Chamber found that the Appellant was armed in the Vilina Vlas Hotel, pointing his gun at the seven Muslim men to prevent them from fleeing and that he knew that the seven Muslim men were going to be killed and not exchanged.[207]

124. The Appeals Chamber found above that the Trial Chamber was reasonable in finding that the Appellant was armed in the Vilina Vlas Hotel but that it erred in finding that the Appellant pointed his

[203] *Ibid*, para. 5.10.
[204] Judgement, para. 68.
[205] *Ibid*, para. 113 (emphasis added). *See* also para. 208.
[206] *Ibid*, para. 95.
[207] Judgement, paras 103, 105 and 209.

gun at the seven men, whilst at the hotel.[208] Moreover, the Appeals Chamber has found that the Trial Chamber erred in finding that the Appellant had knowledge that the seven Muslim men were to be killed and not exchanged based on the information provided to him by Stanko Pecikoza in the car going from Višegrad to the Vilina Vlas Hotel.[209] The question of whether these errors led to a miscarriage of justice will now be considered in relation to the Appeals Chamber's assessment of whether or not the Appellant shared the intent to kill.

125. The Trial Chamber found that Milan Lukić and two unidentified men forcibly detained the seven Muslim men,[210] took them to the reception area of the Vilina Vlas Hotel, where Milan Lukić was searching for some keys,[211] while one of the unidentified armed men guarded them by pointing his automatic rifle at them.[212] The Trial Chamber found that when one of the Muslim men asked about their fate, this unidentified man answered that they were to be exchanged.[213] Furthermore, the Trial Chamber was satisfied that when Milan Lukić could not find the keys, he ordered the group to get into the cars. The Muslim men in one of the two cars[214] were once again told that they were going to be exchanged.[215]

126. The issue of whether the Appellant pointed his gun at the seven Muslim men at the hotel is not, as such, a decisive factor in determining the intent of the Appellant to kill the seven Muslim men. He was armed in the hotel and thereby assisted in preventing the seven Muslim men from fleeing. However, the Appeals Chamber finds that since the Appellant lacked, at that time, the knowledge that the seven Muslim men were to be killed, the fact that he prevented the Muslim men from fleeing at the hotel is not decisive as to whether or not he shared the intent to kill them. Therefore, no reasonable trier of fact could rely on the actions of the Appellant while at the hotel in support of a conclusion that he had the intent to kill the seven Muslim men at that time.

127. In concluding that the Appellant had the intent to kill the seven Muslim men, the Trial Chamber also relied on his actions from the moment the Lukić group parked the cars in Sase. The Trial Chamber found in this respect that the only reasonable inference available on the evidence was that the Appellant intended that the Muslim men be killed. The Appeals Chamber will now consider whether a reasonable Trial Chamber could have reached this conclusion.

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[208] *See* paras 33-45 and 55-57 above.
[209] *See* paras 46-54 above.
[210] Judgement, para. 99.
[211] *Ibid*, para. 100.
[212] *Ibid*, para. 100. The Appeals Chamber notes that this Trial Chamber's finding, which is not disputed, differs from the one at paragraph 209 that the Appellant pointed a gun at the Muslim men while they were detained at the Vilina Vlas Hotel.
[213] *Ibid.*, paras 100 and 102.
[214] The Yugo.
[215] *Ibid*., para. 102.

2. The intent of the Appellant from the time the group parked their cars in Sase

128. The Trial Chamber found that the only reasonable inference from the Appellant's actions was that he shared the intent to kill the seven Muslim men. The Appeals Chamber concurs with the Trial Chamber that the test when inferring intent from the acts of an accused is that the inference has to be "the only reasonable inference available."[216] At the time the cars containing the seven Muslim men, the Milan Lukić group and the Appellant, were parked in Sase, the Appellant admits that he knew that the seven Muslim men were to be killed.[217] The Appeals Chamber recalls that it has dismissed the Appellant's alleged errors regarding the fact that he was not armed on 7 June 1992 and the fact that he was standing at a distance away from the group during the shooting. The Appeals Chamber has also dismissed the claim by the Appellant that the Trial Chamber erred by not believing that he tried to prevent Milan Lukić from committing the murders. The Appeals Chamber notes that the Trial Chamber does not refer to this element in paragraph 209 of the Judgement when it lists the Appellant's actions relied on to infer his intent.

129. The actions of the Appellant from the moment the cars stopped in Sase, upon which the Trial Chamber relied to infer that he intended that the seven Muslim men to be killed, are the following: While Milan Lukić, the two unidentified men and the Appellant escorted the seven Muslim men to the bank of the Drina River, the Appellant pointed a gun at them to prevent their escape. Then, the Appellant stood behind the seven Muslim men with his gun shortly before the shooting occurred. The Trial Chamber did not find, however, that the Appellant acted at the same level of authority or with the same degree of control over the killings as the other three actors. To the contrary, the Trial Chamber stated that it is "is not satisfied that the Prosecution has established beyond reasonable doubt that the Accused fired his weapon at the same time as the other three, or that he personally killed anyone or more of the victims".[218] The Trial Chamber did not even explicitly find that the Appellant pointed his gun at the seven Muslim men while they were lining up facing the Drina River.

130. In addition to these findings, the Appeals Chamber takes into consideration: i) the overall context of the Drina River incident; ii) the previous association of the Appellant with the Milan Lukić group at Musići as well as at the Vilina Vlas Hotel, although he was not found to be a member of the group; iii) the Appellant's participation with Milan Lukić and others in searching the house of witness VG-59's father in Musići; iv) the fact that Milan Lukić and the two unidentified men forcibly detained the seven Muslim men; the Appellant, who was armed in the hotel, thereby assisted in preventing the seven Muslim men from fleeing from the hotel; v) the fact that the Appellant did not know until the car

[216] *Ibid*, para. 68. *See* above para. 120.
[217] Testimony of the Appellant, T. 1892-1893, 2124-2125.
[218] Judgement, para. 112.

stopped in Sase that the seven Muslim men were to be killed; vi) the behaviour of the soldiers changed drastically from the moment Milan Lukić ordered them to leave the car;[219] vii) that throughout the entire incident the impression of the two survivors was that no one around Milan Lukić could have influenced him or his decisions;[220] and viii) that the Appellant willingly accompanied Milan Lukić and his group with the seven Muslim men to the Drina River.[221]

131. The Appeals Chamber recalls that the question before it is whether no reasonable tribunal could find that the only reasonable inference available on the evidence cited above was that the Appellant shared the intent to commit murder. The Appeals Chamber considers that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences. The Appeals Chamber is satisfied that no reasonable tribunal could have found that the only reasonable inference available on the evidence, as cited above, is that the Appellant had the intent to kill the seven Muslim men. The Trial Chamber found that the Appellant assisted Milan Lukić and his men by preventing the seven Muslim men from fleeing.[222] It did not find, however, that the Appellant shot at the Muslim men himself, nor that he exercised control over the firing. Compared to the involvement of Milan Lukić and potentially one or both of the other men, the participation of the Appellant in the overall course of the killings did not reach the same level. The above-mentioned acts of the Appellant were ambiguous as to whether or not the Appellant intended that the seven Muslim men be killed. This conclusion is further supported by the relatively short period of time between the change of attitude of Milan Lukić and the shooting, the strong personality of Milan Lukić compared to the Appellant, as well as the factors mentioned in paragraph 130. The Appeals Chamber, therefore, concludes that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men.

132. The error made by the Trial Chamber led to a miscarriage of justice since, without the proof the Appellant's intent, the Appellant would not be responsible as a co-perpetrator in the joint criminal enterprise. The Appeals Chamber will now consider whether the Appellant is, nevertheless, responsible as an aider and abettor.

[219] T. 274-275, testimony of witness VG-32.
[220] Judgement, para. 107. Testimony of witnesses VG-14 and VG-32.
[221] *Ibid*, para. 107.
[222] *Cf.* for a comparable situation in a national jurisdiction *Prosecutor v. Novislav Djajić*, 3St 20/96, Supreme Court of Bavaria, 23 May 1997. In this case, the accused was found guilty of, *inter alia*, aiding and abetting 14 murders by standing with a gun in the middle of a semi-circle that Serbs had formed around a group of Muslims who were then shot.

3. Aiding and abetting

133. The Appeals Chamber has found above that the Trial Chamber erred by finding that the only reasonable inference from the evidence was that the Appellant shared the intent to kill the seven Muslim men. The Appellant argues under his fourth ground of appeal that his actions do not in fact amount to aiding and abetting, as he did not facilitate the commission of the crime. He submits that Milan Lukić and the two unidentified men did not need any help from the Appellant at the Vilina Vlas Hotel or at the Drina River,[223] since they had managed to detain the seven Muslim men on the hill of Bikavac by themselves, despite the fact that the seven Muslim men could have resisted.[224] The Appellant infers from this that it would not be logical to conclude that Milan Lukić and his men needed the assistance of the Appellant at the Vilina Vlas Hotel or at the Drina River as the risk that the seven Muslim men might resist was less important at this stage.[225]

134. The Appeals Chamber has already found that the Appellant knew that the seven Muslim men were to be killed; that he walked armed with the group from the place where they had parked the cars to the Drina River; that he pointed his gun at the seven Muslim men; and that he stood behind the Muslim men with his gun together with the other three offenders shortly before the shooting started. The Appeals Chamber believes that the only reasonable inference available on the totality of evidence is that the Appellant knew that his acts would assist the commission of the murders. The Appeals Chamber finds that in preventing the men from escaping on the way to the river bank and during the shooting, the Appellant's actions had a "substantial effect upon the perpetration of the crime."[226]

135. The Appeals Chamber finds that the acts of the Appellant were specifically directed to assist the perpetration of the murders and the inhumane acts and his support had a substantial effect upon the perpetration of the crimes. The Appeals Chamber therefore finds the Appellant guilty for aiding and abetting murder pursuant to Article 3 of the Statute (Count 5). Further, the Appeals Chamber finds the Appellant guilty as an aider and abettor for murder as a crime against humanity pursuant to Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (Count 6). However, the Appellant is not convicted of the murder as a crime against humanity pursuant to Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (Count 6) in accordance with the Tribunal's jurisprudence on cumulative convictions.[227]

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[223] Defence Appeal Brief, para. 216, which refers to the Appellant's arguments in paras 205-212.
[224] *Ibid*, para. 206.
[225] *Ibid*, paras 206-212.
[226] *Tadić* Appeals Judgement, para. 229.
[227] *See* paras 145-147 below.

D. The alleged errors relating to persecution

1. The Appellant's intent to persecute

136. First, the Appellant contends that the Trial Chamber erred in finding that the Appellant had the requisite discriminatory intent as he did not take part in the "singling out" of the seven Muslim men, he did not know why they were arrested or what Milan Lukić wanted to do with them. In addition, the Appellant argued that he did not take part in the planning of the execution of the Muslim men but only became involved at a later stage.[228] In response, the Prosecution submits that the Trial Chamber's conclusion, that the Appellant acted with the relevant discriminatory intent when participating in the Drina River incident, was "the only reasonable conclusion open to a reasonable trier of fact" in light of all the evidence in the case as a whole.[229] That the Appellant did not participate in the "singling out" of the Muslim men, the Prosecution submits is unfounded. According to the Prosecution, there is no reason "why a relevant discriminatory intent cannot be inferred from an accused's knowing participation in the joint criminal enterprise to commit a crime on relevantly discriminatory grounds merely because the accused does not personally select the victims."[230]

137. Second, the Appellant submits that a discriminatory intent by itself is insufficient to establish the crime of persecution; the particular act or omission must also have discriminatory consequences. The Appellant cannot be found responsible for the discriminatory consequences of the persecution as he did not personally participate in the "singling out" of the seven Muslim men.[231] In response, the Prosecution recalls that the Trial Chamber expressly found in relation of the Drina River incident that "the acts of the Accused were in fact discriminatory, in that the men were killed only because they were Muslims."[232]

138. Third, the Appellant takes the view that the Trial Chamber did not apply the Tribunal's case law relating to persecution and did not assess whether the "accused *consciously* intend[ed] to discriminate."[233] Since the evidence in this case shows at the most that the "Appellant was possibly aware of the discriminatory intentions of Mr Lukić," the intent to discriminate, which must be a "significant intent," was not proven beyond reasonable doubt.[234] In response, the Prosecution argues that the Trial Chamber expressly found that the requirement of "conscious" intent was satisfied on the evidence in this case and that the Defence did not demonstrate that this finding was unreasonable.[235]

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[228] Defence Appeal Brief, para. 23; Defence Additional Appeal Brief, paras. 10-14; Defence Additional Reply, paras 11-12.
[229] Prosecution Response Brief, paras 7.6-7.10.
[230] *Ibid*., paras 7.17-7.18.
[231] Defence Additional Appeal Brief, para. 21.
[232] Prosecution Response Brief, para. 7.22.
[233] Defence Additional Appeal Brief, para. 22.
[234] *Ibid*. para. 23.
[235] Prosecution Response Brief, paras 7.23-7.24.

139. The Trial Chamber's finding on the requisite discriminatory intent of the Appellant was based on the acts of the Appellant during the Drina River incident, considered in their overall context. Contrary to the submissions of the Appellant, the Trial Chamber made it clear in paragraph 251 of the Judgement, that regardless of whether or not the Appellant was an informant, or whether or not he shared the intention of the group to persecute the Muslim population, the Prosecution has to establish that the Accused participated in the commission of a persecutory act with a discriminatory intention.[236] In paragraphs 254 and 255, the Trial Chamber assessed whether the acts of the Appellant during the Drina River incident showed that he possessed the requisite *mens rea* for the crime of persecution.[237] This approach was recently upheld by the Appeals Chamber in the *Krnojelac* Appeals Judgement.[238]

140. Furthermore, contrary to the submissions of the Appellant, the Trial Chamber did not deduce the discriminatory intent of the Appellant from the fact that the seven Muslim men were singled out by him. The Trial Chamber affirmed that "the acts of the Accused were *in fact* discriminatory, in that the men were killed only because they were Muslims."[239] His participation in the joint criminal enterprise at the Vilina Vlas Hotel, during the transfer of the victims to the bank of the Drina River and the events that took place there, represent, the concrete acts of the Appellant from which the Trial Chamber inferred that his actions had discriminatory consequences and that he possessed the requisite discriminatory intent for the crime of persecution. The Appellant's arguments with respect to the approach taken by the Trial Chamber in assessing whether he had the discriminatory intent to persecute are therefore rejected.

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[236] The Trial Chamber found in paragraph 251 of the Judgement that "The Trial Chamber has already found that the Accused acted as an informant to Milan Lukić's group, assisting that group in locating the Muslim population of Višegrad. The Trial Chamber has already satisfied itself that the Accused did so with full awareness that the intent of Milan Lukić's group was to persecute the local Muslim population of Višegrad through the commission of the underlying crimes. The Trial Chamber is satisfied that, in providing information to the group led by Milan Lukić, the Accused shared the intention of that group to persecute the local Muslim civilians on religious or political grounds. In order to convict the Accused for the crime of persecution, however, the Prosecution must also establish that the Accused participated in the commission of a persecutory act with a discriminatory intention. It is not sufficient to merely establish an intention to persecute. Where that act is not one of the offences enumerated in the Statute, it must be an act of equal gravity to those enumerated acts in order to form the basis of a charge of persecution", (footnotes omitted).

[237] The Trial Chamber found in paragraphs 254-255 that "254. The Trial Chamber has already found that the Accused has individual criminal responsibility for murder punishable under Article 5 of the Statute in relation to five victims, pursuant to a joint criminal enterprise to kill the seven Bosnian Muslim men on the banks of the Drina River. The Trial Chamber is satisfied that the only reasonable inference available on the evidence is that these seven Muslim men were singled out for religious or political reasons, and that the killing of five of them were acts carried out on discriminatory grounds, namely, religious or political. The Trial Chamber is also satisfied that the acts of the Accused were in fact discriminatory, in that the men were killed only because they were Muslims. Accordingly, the Accused incurs individual criminal responsibility for the crime of persecution on the basis of the underlying crime of murder of five of the Bosnian Muslim civilians. 255. In addition, the Trial Chamber has already found that the Accused committed the offence of inhumane acts, a crime against humanity pursuant to Article 5(i) of the Statute in relation to the two survivors of the Drina River shooting. Those acts amounting to inhumane acts under Article 5 of the Statute are of sufficient gravity to constitute persecution. The Trial Chamber is satisfied that the only reasonable inference available on the evidence is that the intention to kill these two men, and the attempt to do so, were acts carried out on one of the prohibited discriminatory grounds and that these two men, like the five who were killed, were singled out for religious or political reasons. As stated in the previous paragraph, the Trial Chamber is satisfied that the acts of the Accused were in fact discriminatory in that inhumane acts were inflicted against these men only because they were Muslims" (footnotes omitted).

[238] *See Krnojelac* Appeals Judgement, para. 184.

[239] Judgement, para. 254. On the interpretation given by the Appeals Chamber on the requirement to "discriminate in fact", *see* also *Krnojelac* Appeals Judgement, para. 185.

141. The Appeals Chamber also has to determine whether the Trial Chamber erred in finding that the Appellant incurred individual criminal responsibility for the crime of persecution based on the underlying crimes of murder and inhumane acts.[240] The Appeals Chamber already concluded that the Trial Chamber erred in finding that the Appellant possessed the intent to kill. The intent to kill the seven Muslim men, including the two survivors, constituted the basis for the Trial Chamber's finding that the Appellant was a co-perpetrator to a joint criminal enterprise.[241] In the absence of this intent, no reasonable trier of fact could have found the Appellant responsible for committing the crime of persecution by way of murders and inhumane acts as a co-perpetrator to the joint criminal enterprise. This error resulted in a miscarriage of justice.

2. Aiding and abetting the joint criminal enterprise of persecution

142. The Appeals Chamber will now consider whether the Appellant incurs individual criminal responsibility under Article 7(1) of the Statute for aiding and abetting the persecution of the Muslim men by his participation in the killings on the bank of the Drina River. In order to convict him for aiding and abetting the crime of persecution, the Appeals Chamber must establish that the Appellant had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate against the Muslim population, and that, with that knowledge, the Appellant made a substantial contribution to the commission of the discriminatory acts by the principal perpetrators.[242]

143. In the Appeals Chamber's view, it is beyond doubt that the acts committed by Milan Lukić and the two other men amount to the crime of persecution: They killed the five Muslim men and committed inhumane acts against the two survivors with the deliberate intent to discriminate on religious or political grounds. Furthermore, the Appeals Chamber concurs with the findings of the Trial Chamber that the Appellant participated in the Drina River incident "with full awareness that the intent of the Milan Lukić's group was to persecute the local Muslim population of Višegrad through the commission of the underlying crimes."[243] The only reason why the seven Muslim men were arrested and killed was because of their belonging to the Muslim population of Višegrad. The Appellant was aware of these facts and he willingly participated in the Drina River incident by pointing his gun at the victims and preventing them from fleeing. Even if it has not been established beyond reasonable doubt that he personally killed the five Muslim men, his support had a substantial effect upon the perpetration of the crimes on the bank of the Drina River. He was at that time fully aware that his participation assisted the commission of the crime of persecution by the principal perpetrators. The Appellant is therefore

[240] *See* Judgement, paras 254 and 261.
[241] *See* Judgement, paras 238 and 261.
[242] *See Krnojelac* Trial Judgement, para. 488.

responsible for having aided and abetted the crime of persecution by way of murder of the five Muslim men and of inhumane acts against the two other Muslim men (Count 3). The finding that the Appellant is responsible for aiding and abetting persecution has an impact on other crimes for which he is found responsible, and the cumulative conviction is discussed below.

E. Alleged error in applying cumulative convictions for Article 3 and Article 5 of the Statute

144. The Appellant argues that he cannot be convicted cumulatively, in respect of the same conduct, of both murder under Article 3 of the Statute (Count 5) and persecution by way of murder under Article 5(a) of the Statute (Count 4).[244]

145. The Appeals Chamber considers that this as an alleged error of law. The jurisprudence of the Tribunal on this issue is settled and it holds that it is permissible to convict for a murder under Article 3 of the Statute and persecution by way of murder under Article 5 of the Statute as each of them has a materially distinct element from the other: "Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3."[245] The Appeals Chamber therefore finds that this sub-ground fails.

146. With respect to the other charges within Article 5 of the Statute, the Trial Chamber found that persecution under Article 5(h) of the Statute (Count 3) requires the materially distinct elements of a discriminatory act and a discriminatory intent and is therefore more specific than murder as a crime against humanity under Article 5(a) of the Statute (Count 4) and inhumane acts as a crime against humanity under Article 5(i) of the Statute (Count 6). By applying the case-law on cumulative convictions to the present case, the Appellant is convicted of murder under Article 3 of the Statute (Count 5) and persecution under Article 5(h) of the Statute (Count 3).

F. Summary of findings

147. The Appeals Chamber finds the Appellant guilty of aiding and abetting the crime of murder as a violation of the laws or customs of war under Article 3 of the Statute (Count 5) and the crime of persecution under Article 5(h) of the Statute by way of murder of the five Muslim men and of inhumane acts against the two other Muslim men (Count 3).

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[243] Judgement, para. 251.
[244] Defence Appeal Brief, paras 217-219 (under the fourth ground of appeal).
[245] *Jelisić* Appeals Judgement, para. 82. *See* also *Kunarac* Appeals Judgement, para. 176.

VI. SENTENCING

148. The Appellant submits in his eighth ground of appeal that the Trial Chamber erred both in law and fact when it sentenced him to twenty years of imprisonment for persecution as a crime against humanity (Count 3) and murder as a violation of the laws or customs of war (Count 5). The Appellant argues that the sentence imposed upon him is extremely high and that he was sentenced more than once for the same act despite the Trial Chamber's statement to the contrary. The Appellant requests that the Appeals Chamber acquit him or grant him a new trial. Alternatively, the Appellant submits that the sentence should be reduced.[246] The Prosecution argues that the Appellant did not establish in this ground of appeal that the Trial Chamber committed a discernible error in the exercise of its discretion and thus the appeal against sentence should be dismissed.[247]

149. The Appeals Chamber has overturned the Trial Chamber's finding that the Appellant was responsible, as a co-perpetrator in a joint criminal enterprise, for murder as a violation of the laws or customs of war under Article 3 of the Statute and persecution by way of murder and inhumane acts under Article 5(h) of the Statute. Instead, the Appeals Chamber has found the Appellant responsible as an aider and abettor. This new finding in relation to the form of responsibility raises the question as to whether an adjustment of the sentence is necessary. This matter does not warrant a complete rehearing on the issue of sentence. However, it is appropriate that the Appeals Chamber first considers and resolves the issues raised in the Appellant's grounds of appeal relating to sentence before considering what, if any, adjustment, arising out of this appeal, should be made.

A. The Appellant's arguments relating to sentencing

1. Sentence of the Appellant is too high in comparison with previous case-law[248]

150. The Appellant submits that the Trial Chamber erred in finding that, even though it had considered sentences in other cases in accordance with the *Kupreškić* Appeals Judgement, such consideration was of little assistance in this case.[249] According to the Appellant, a review of the case-law of the International Tribunal relating to sentencing reveals that he was given an exceptionally high sentence.[250] In support of his argument, the Appellant refers to sentences imposed in other cases.[251]

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[246] Defence Appeal Brief, paras 302-303.
[247] Prosecution Response Brief, paras 9.1-9.20.
[248] This part of the ground of appeal is brought in the last part of the Defence Appeal Brief.
[249] Judgement, para. 306.
[250] Defence Appeal Brief, paras 283-286.
[251] *Ibid*, paras 287-299; Duško Tadić, Miroslav Kvočka, Dragoljub Pracać, Mlado Radić, Milorad Krnojelac, Duško Sikirica, Damir Došen, Dragan Kolundžija, Dario Kordić, Zdarvko Mučić, were all convicted for different counts of crimes against humanity and violations of the laws and customs of war, sentenced to prison terms ranged from 3 to 25 years (only Kordić was sentenced to 25 years, Tadić and Radić were sentenced to 20 years).

151. The Prosecution submits that the only case that may resemble the circumstances of the present case is *Tadić*, who was convicted of murder under Articles 2, 3 and 5 of the Statute despite the fact that it was not proven that he personally killed any of the victims.[252] Following the final sentencing appeal, Duško Tadić was sentenced to twenty years imprisonment.[253]

152. The Appeals Chamber finds that, even though circumstances in one case may resemble the circumstances in another, the Appellant has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion by imposing the sentence. Therefore, this sub-ground of appeal is dismissed.

2. Alleged errors relating to aggravating factors

153. The Appellant raises several sub-grounds of appeal relating to the aggravating factors that the Trial Chamber considered in sentencing.

(a) The method of killing

154. The Appellant submits that the Trial Chamber erred in finding that the victims were killed "efficiently" to avoid the problem of having to bury them. He argues that it could not be an aggravating factor as it is unclear whether the Trial Chamber considered shooting as the method of killing as aggravating or whether it considered the issue of burying as aggravating.[254] He further submits that it cannot be an aggravating factor in relation to his sentence because he neither knew nor decided where and how Milan Lukić and the other men were to shoot the seven Muslim men.[255]

155. The Prosecution submits that the Trial Chamber referred to the cold-blooded nature of the killings of multiple victims rather than the efficiency of the commission of the crime[256] and that it is within the Trial Chamber's discretion to regard this as an aggravating factor.[257]

156. The Appeals Chamber has ruled that

> [t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. [258]

[252] Prosecution Response, para. 9.19. *Tadić* Appeals Judgement, paras 185-237.
[253] *Tadić* Sentencing Appeal, paras 55-57 and 76.
[254] Defence Appeal Brief, para. 250.
[255] *Ibid*, para. 255.
[256] The Prosecution during the oral hearing distinguished between the efficiency of the crime, i.e. organization of the killing in such a way that no burying was necessary, and the cold-bloodedness of the killings i.e. the discussions in front of the victims whether to shoot individually or not, AT. 138.
[257] Prosecution Response, para. 9.5.
[258] *Furundžija* Appeals Judgement, para. 249; *Aleksovski* Appeals Judgement, para. 182; referring to *Kupreškić* Trial Judgement, para. 852. *See* also *Jelisić* Appeals Judgement, para. 94.

157. The Appeals Chamber notes that the method and circumstances surrounding a killing are factors which normally would be taken into account in a Trial Chamber's consideration of the "inherent gravity" of the offence. In the present case, it was considered as an aggravating factor. The Appeals Chamber holds that the Trial Chamber did not err in doing so. The Appeals Chamber considers that it is irrelevant whether the Appellant was personally involved in the decision-making prior to the killing or in determining the method used to kill the seven Muslim men. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber committed an error in exercising its discretion. Therefore, this sub-ground of appeal is dismissed.

(b) Verbal abuse of the victims

158. The Appellant submits that the Trial Chamber erred by accepting verbal abuse of the victims as an aggravating factor. He challenges whether the verbal abuse occurred and whether he personally so abused anyone.[259]

159. The Prosecution submits that one of the main witnesses in the Drina River incident, witness VG-32, testified that verbal abuse occurred.[260] The Prosecution argues that the Trial Chamber has the discretion to consider verbal abuse as an aggravating factor and that the question of whether the Appellant took part in the abuse has no relevance, since the abuse lends seriousness to the joint criminal enterprise.[261]

160. The fact that the victims were verbally abused was accepted by the Trial Chamber[262] based on the testimony of VG-32, who stated that "they were cussing [sic], swearing, cussing [sic] our balija mothers, saying 'walk up there, you balija' and all other swear words."[263] The other main witness of the Drina River incident, witness VG-14, did not testify about verbal abuse.[264] However, he was not asked whether they occurred or not. The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that verbal abuse took place although only VG-32 gave evidence about it.

161. Verbal abuse has not been used previously at the International Tribunal as an aggravating factor. The Statute and the Rules provide the Trial Chambers with a wide of discretion in determining the sentence and in considering factors in aggravation. In the view of the Appeals Chamber, verbal abuse can be taken into account as an aggravating factor by Trial Chambers.

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[259] Defence Appeal Brief, para. 251; Defence Reply, para. 9.3.
[260] Prosecution Response Brief, para. 9.6.
[261] *Ibid*, para. 9.6.
[262] Judgement, para. 276.
[263] T. 278.
[264] S*ee, inter alia*, T. 439, the conversation referred to is that between the Appellant and Meho Džafić.

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

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

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

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

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

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

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

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

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

(d) Discriminatory state of mind

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

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

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

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

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

> Chamber must ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. [274]

171. When discussing the sentence, the Trial Chamber found that a discriminatory state of mind may constitute an aggravating factor when it is not an element of the crime in question. In paragraph 277 of the Judgement, the Trial Chamber held that a discriminatory state of mind is an element of the crime of persecution pursuant to Article 5(h) of the Statute and "may not additionally aggravate that offence." In paragraph 278, however, the Trial Chamber held that a discriminatory state of mind may be used in aggravation in relation to offences for which it is not required as an element and accepted that, in relation to the conviction for murder pursuant to Article 3 of the Statute, the Appellant's discriminatory state of mind does constitute an aggravating factor.

172. Several questions arise before the Appeals Chamber. The first issue is whether discriminatory intent can be used as an aggravating factor. To that question the answer is in the affirmative. The Appeals Chamber has already held in the *Kunarac* Appeals Judgement that

> it is alleged that the Trial Chamber erred in regarding the discriminatory objective as an aggravating factor, as this constitutes an element of Article 5 crimes. In this context, the Appeals Chamber recalls the *Tadić* Appeal Judgement, which states that a discriminatory intent "is an indispensable legal ingredient of the offence only with regards to those crimes for which this is expressly required, that is, for Article 5(h) of the Statute, concerning various types of persecution." It is not an element for other offences enumerated in Article 5 of the Statute.[275]

The Prosecution submitted and the Appeals Chamber agrees that "[t]here is a sound reason why the Trial Chamber mentioned discriminatory intent as an aggravating factor for the war crime of murder despite the fact that it cannot aggravate the global sentence. The reason is that every conviction should stand on its own. Consequently, aggravating circumstances must be considered for every crime separately. As discriminatory intent is an aggravating circumstance for the war crime of murder the Trial Chamber had to regard this fact."[276]

173. The Appeals Chamber finds that the Trial Chamber did not err in holding that "a discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element."[277] A discriminatory state of mind is not an element of the crime of murder under Article 3 of the Statute and was not therefore taken into account in convicting the Appellant for the crime of murder. It could however be taken into account in estimating the gravity of the murder. This is the way the Trial Chamber used it. The discriminatory state of mind was used once in order to assess the gravity of the crime of murder and, of course on another occasion, in order to establish that the Appellant had the requisite discriminatory intent of the crime of persecution. The Trial

[274] Judgement, para. 266.
[275] *Kunarac* Appeals Judgement, para. 357 (footnote omitted).
[276] AT. 137 (emphasis added).

Chamber committed no error in holding that a discriminatory state of mind can be regarded as an aggravating factor in relation to the crime of murder. This sub-ground of appeal is dismissed.

3. Alleged errors relating to mitigating factors

174. The Appellant submits that the Trial Chamber erred in failing to consider as a mitigating factor the remorse shown by him after the incident and his co-operation with the Prosecution.

(a) The Appellant's remorse

175. The Appellant submits that the Trial Chamber erred by finding that he had not shown any remorse for his participation in the killing of the five Muslim men, including his friend Meho Džafić, that were killed on the bank of the Drina River.[278] The Appellant submits that he expressed his remorse for the death of the five men in the statement he gave to the investigators of the Prosecution and during the trial, and he refers to the testimony of witness Milojka Vasiljević. However, the Appellant argues that he could not express remorse for his "participation in the killing" since he considers that he did not participate in the killing.[279] Further, the Appellant argues that the Trial Chamber erred by not accepting his testimony that he reported the killing to the Chief of Police, Mr. Tomić, who was killed a short time later. The Trial Chamber did not accept the Appellant's testimony and failed to address the testimony of his wife Milojka Vasiljević.[280] The Prosecution submits that the Appellant did not identify any specific error in the Trial Chamber's finding and did not establish that this finding was unreasonable.[281]

176. The Trial Chamber found that it was not satisfied that the Appellant "showed any remorse for his participation in the deaths of the five men, even though one of the victims was a person well known to him. Nor does the Trial Chamber accept the Accused's evidence that, on the day after the Drina River incident, he went to the police to report the killing."[282]

177. Previous case-law from the Trial Chambers of the Tribunals states that in order for remorse to be considered as a mitigating factor it has to be sincere.[283] The Appeals Chamber is of the view that an accused can express sincere regrets without admitting his participation in a crime, and that that is a factor which may be taken into account. The Trial Chamber considered a number of factors put forward by the

[277] Judgement, para. 258.
[278] Defence Appeal Brief, para. 267-268.
[279] Defence Reply, para. 9.7.
[280] Defence Appeal Brief, para. 268.
[281] Prosecution Response Brief, paras 9.13.
[282] Judgement, para. 297 (emphasis added).
[283] *See Todorović* Sentencing Judgement, para 89; *Erdemović* Second Sentencing Judgement, p. 16; *Blaškić* Trial Judgement, para 775; *Serushago* Sentencing Judgement, paras 40-41; *Ruggiu* Trial Judgement, paras 69-72; *Simić* Sentencing Judgement, para. 92; *Banović* Sentencing Judgement, para 70.

Appellant as mitigating circumstances, including his repentance or remorse.[284] In the Trial Chamber's finding that the Appellant did not show any remorse for his participation in the Drina River incident, the Appeals Chamber understands that the Trial Chamber exercised its own discretion in deciding that the words used by the Appellant did not show real remorse and could not therefore be considered as a mitigating circumstance. The Appellant has not shown that the Trial Chamber committed any error in the exercise of its discretion.

178. Similarly, the Appellant has not shown any error committed by the Trial Chamber when it rejected the Appellant's evidence that, on the day of the Drina River incident, he went to the police to report the killings. The view of the Appeals Chamber is that, in rejecting the Appellant's testimony on this point, the Trial Chamber is to be understood as necessarily also having considered the evidence of others to the same effect. This sub-ground of appeal is, therefore, dismissed.

(b) Co-operation with the Prosecution

179. The Appellant challenges the Trial Chamber's finding that his co-operation with the Prosecution was not "substantial co-operation" within the meaning of Rule 101(B)(ii) of the Rules and therefore was not considered as a mitigating factor.[285] The Appellant submits that he willingly gave a statement to the Prosecution in November 2000 and that he told the Prosecution everything he knew. The Appellant argues that the fact that he provided more information than other witnesses is an indication that his co-operation was substantial.[286] The Prosecution submits that the Appellant does not show any discernible error in the exercise of the Trial Chamber's discretion in this respect.[287]

180. Co-operation with the Prosecution is the only mitigating factor that Trial Chambers are specifically required to consider pursuant to Rule 101 (B)(ii) of the Rules.[288] The Trial Chamber did not accept the Appellant's co-operation with the Prosecution as substantial but it did accept his co-operation as modest and gave it some, albeit very little, weight in mitigation.[289] The Appeals Chamber therefore

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[284] *See* Judgement, para. 296.
[285] Defence Appeal Brief, paras 271-272; Defence Reply, para. 9.8.
[286] Defence Appeal Brief, para. 273, the Appellant also argues that the other witnesses either did not want or did not dare to testify since the other accused are still at large, para. 274.
[287] Prosecution Response Brief, para. 9.16.
[288] Rule 101(B)(ii) provides: "any mitigating circumstances including the substantial co-operation with the Prosecution by the convicted person before or after conviction."
[289] The Trial Chamber held that "[t]he Prosecution submitted that the fact that the Accused gave a statement to the Prosecution did not amount to "substantial co-operation" pursuant to Rule 101(B)(ii) as his statement "was self-serving and does not rise to the level of 'substantial co-operation.'" The Trial Chamber does not accept the Prosecution's argument insofar as it suggests that only a self-incriminatory statement could justify granting some mitigation of the accused for making a statement. It is true that the statement given by the Accused did not disclose anything which was not already known, or very little. But the actual content of such a statement is relevant to the amount of mitigation to give to the Accused for making it. The fact that he did give such a statement may in itself in some case be a sign of co-operation, however modest. The Trial Chamber is not satisfied that the statement given by the Accused in the present case represented "substantial" co-operation pursuant to Rule 101(B)(ii), but it does not interpret Rule 101(B)(ii) as excluding the fact that a statement was made from the

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

B. The Appeals Chamber's considerations

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

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

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

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

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

VII. DISPOSITION

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

PURSUANT to Article 25 of the Statute and Rules 117 and 188 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 18 November 2003;

SITTING in open session;

ALLOWS, Judge Shahabuddeen dissenting**,** Mitar Vasiljević's appeal in so far as it relates to his convictions as a co-perpetrator of persecution, a crime against humanity (murder and inhumane acts) under Count 3 of the Indictment, and of murder, a violation of the laws or customs of war, under Count 5 of the Indictment;

SETS ASIDE, Judge Shahabuddeen dissenting**,** these convictions, and **FINDS**, Judge Shahabuddeen dissenting**,** Mitar Vasiljević guilty of Counts 3 and 5 of the Indictment as an aider and abettor to persecution, a crime against humanity (murder and inhumane acts), and as an aider and abettor to murder, a violation of the laws or customs of war, pursuant to Article 7(1) of the Statute;

DISMISSES Mitar Vasiljević's appeal against convictions in all other respects;

DISMISSES Mitar Vasiljević's appeal against sentence and **IMPOSES**, Judge Shahabuddeen dissenting**,** a new sentence, taking into account his responsibility established on the basis of the new convictions entered on appeal;

SENTENCES Mitar Vasiljević to fifteen years' imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules for the period Mitar Vasiljević has already spent in detention, that is from 25 January 2000 to the present day;

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

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

Judge Theodor Meron
Presiding

Judge Mohamed Shahabuddeen

Judge Mehmet Güney

Judge Wolfgang Schomburg

Judge Inés Mónica Weinberg de Roca

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

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

VIII. SEPARATE AND DISSENTING OPINION OF JUDGE SHAHABUDDEEN

A. Preliminary

1. Seven men were lined up on the bank of the Drina River; they were made to face the river; they were unarmed civilians. Then, five to six metres behind them, another group lined up; it was armed; it included the appellant. This group shot in the direction of the seven men. Five of these were killed; they fell into the river. Pretending to have been shot, the two others also fell into the river; they lived to tell the tale.

2. The Trial Chamber was not satisfied beyond reasonable doubt that the appellant himself had killed anyone. Nevertheless, on the theory of joint criminal enterprise, it convicted him of murder as a co-perpetrator.

3. I agree with the Appeals Chamber that the appellant had criminal responsibility. Where I differ is on the question of the level of that responsibility. The Appeals Chamber substitutes a conviction for aiding and abetting murder for the conviction for murder as a co-perpetrator which was imposed by the Trial Chamber. The Trial Chamber's conviction for persecution, as a co-perpetrator, through murder of the five victims and inhumane acts inflicted on the remaining two has likewise been revised to one of aiding and abetting persecution.

4. With respect, I consider that the Trial Chamber was right. These are my reasons.

B. Background

5. In the territory concerned, ethnic cleansing was in progress. In the context of that phenomenon, an attack took place in the municipality of Višegrad. In the words of the Trial Chamber:

> The attack took many forms, starting with the Serb take-over of the town and the systematic and large-scale criminal campaign of murders, rapes and mistreatment of the non-Serb population of this municipality, particularly the Muslims, which eventually culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the Bosnian conflict. Within a few

> weeks, the municipality of Višegrad was almost completely cleansed of its non-Serb citizens, ….[292]

A previous Muslim majority had disappeared; indeed, "by the end of 1992, there were very few non-Serbs left in Višegrad."[293] In paragraph 56 of its judgment, the Trial Chamber found that "proportionally the changes in Višegrad were second only to those which occurred in Srebrenica."

6. Ethnic cleansing was carried out, *inter alia*, by paramilitary groups. One of these was Milan Lukić's group. Local residents called it the "White Eagles". In the words of the Trial Chamber, the White Eagles was a "particularly violent and feared group of Serb paramilitaries."[294] According to paragraph 75 of its judgment, Lukić and most of his associates had not lived in Višegrad for some time; consequently, they sought the assistance of local Serbs to help them identify the targets of their crimes.

7. The appellant was a Serb resident in Višegrad; he had been there all the time. The Trial Chamber found that "in view of the sheer scale and systematic nature of the attack, the Accused must have noticed the consequences of this campaign upon the non-Serb civilian population of the Višegrad municipality."[295] In its turn, the Appeals Chamber said "that a reasonable Trial Chamber could conclude from the above that the Appellant knew about the on-going attack against the Muslim civilian population in Višegrad."[296]

8. Further, the appellant was in a *kum* relationship – a strong Serbian family bond – with Lukić.[297] The Trial Chamber was "satisfied … that, because of his close relationship with Milan Lukić, the Accused was a ready source of local information for the group about the location of Muslims in the area of Višegrad, and that he gave that information to the group with the full realisation that it would be used to persecute Muslims."[298] The Appeals Chamber rejected the finding of the Trial Chamber that he was acting as an informant to the Lukić group.[299] Also, the Appeals Chamber accepted the Trial Chamber's finding that it was not satisfied that the appellant was a member of Lukić's paramilitary group or "that his association with that group was such that it is possible to draw an inference beyond reasonable doubt that [he] shared the *general* homicidal intentions of that group."[300] The question, however, is whether the

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[292] Impugned judgment, para. 58.
[293] Impugned judgment, para. 56.
[294] Impugned judgment, paras. 46 and 72.
[295] Impugned judgment, para. 60.
[296] Judgment of the Appeals Chamber, para. 30.
[297] Impugned judgment, para. 46.
[298] Impugned judgment, para. 75. See also para. 95.
[299] Judgment of the Appeals Chamber, paras. 74.
[300] Impugned judgment, paragraph 95. Emphasis added.

appellant shared the homicidal intentions of Lukić's group on the *particular* occasion involved in this case.

9. The Trial Chamber found that, on the afternoon of 7 June 1992, Milan Lukić and two other unidentified men forcibly detained seven Muslim men and took them by two motor cars to Vilina Vlas Hotel in Višegradska Banja. That hotel was accepted by the parties as the headquarters of Lukić's paramilitary group. Throughout the entire incident involved in this case Lukić carried a sniper rifle with a silencer, while the two other men each carried an automatic rifle.[301] At the hotel, they were joined by the appellant, who was already there. The Trial Chamber rejected his claim that he did not have a gun there; the Appeals Chamber agreed that he had a gun when he left the hotel.[302]

10. At the hotel, Lukić tried unsuccessfully to find some keys. Eventually, on his orders, the group (including the appellant) entered the cars. After a short drive, the cars stopped at a place called Sase, adjoining the killing field.

C. Intent of the appellant before arriving at Sase

11. The appellant's case is that, until the cars arrived at Sase, he had been under the impression that the seven Muslim men were to be exchanged. When the cars stopped at Sase, he realised that this was not to be – that the men were to be killed. The Trial Chamber found against that claim to late discovery of the true purpose in view. It said that it was "satisfied that, when the Accused left the Vilina Vlas Hotel, he knew that the men were not to be exchanged but were to be killed."[303] The Appeals Chamber disagrees; it states that it would not be reasonable to conclude "that the Appellant knew when he left the hotel that the seven Muslim men were going to be killed and not exchanged."[304] I have difficulty with this finding.

12. The Appeals Chamber "takes into consideration [that].… iii) witness VG-32 testified that it was from the moment Milan Lukić ordered them to leave the car [i.e., at Sase] that the behaviour of the soldiers changed drastically."[305] The reference to "the soldiers" was a reference to the captors, including the appellant. I understand that excerpt to mean that the Appeals Chamber considered that the appellant did not expect that change. So, the evidence may be consulted. The Appeals Chamber refers to the

[301] Impugned judgement, para. 99.
[302] Judgment of the Appeals Chamber, para. 37.
[303] Impugned judgment, para.105.
[304] Judgment of the Appeals Chamber, para. 53. See also, ibid., para. 124.
[305] Judgment of the Appeals Chamber, para. 53.

evidence of witness VG-32 in footnote 220 of its judgment. As recorded in the transcript of the Trial Chamber, at p. 274, the evidence of that witness reads:

> A … We stopped behind them [i.e., the other car] and we were ordered to go out. The moment we got out – at the moment we got out and stood in the road, on the left-hand side, the behaviour of the soldier changed drastically.
> Q. When you say "changed drastically," would you describe his demeanour or behaviour now at this stage?
> A. I'm sorry, I don't know who you are referring to. Are you referring to everyone or to individuals?
> Q. You just referred to a soldier whose behaviour changed drastically. Which soldier are you referring to?
> A. I meant everybody. I meant all four of them, actually, who were present there.
> Q. Would you please describe how their behaviour changed?
> A. I said that the soldier who was sitting in the car as we were driving back from the hotel offered us cigarettes. He talked to us very nicely. But the moment we got out of the car, they stepped back. They moved a few metres to the side, and their weapons were on the ready, and they spoke to us very harshly. They used very harsh words to order us to walk in the direction of the river.
> Q. I want to ask you – you said they had their weapons "on the ready." What exactly do you mean by that?
> A. I mean that the weapons were pointed at us, and of course the rifles had their safeties off.

13. On allegedly learning for the first time at Sase that the men were to be killed, the appellant did not protest or in any other way demonstrate surprise or dissatisfaction. Asked, in effect, "whose behaviour changed drastically," the witness replied: "I meant everybody. I meant all four of them, actually, who were present there." That included the appellant; so he changed his behaviour too. He was fully identified with the other members of the captor group; he was not, as the captives were, an unprepared spectator of the change. Certainly, the previous behaviour of the captors appeared to have changed, and that apparent change in behaviour could indeed have taken the captives by surprise, but not the appellant.

14. An obvious reflection – not requiring evidence – is that, for ease of security, the captors would not tell the captives of their impending doom while the cars were on the move. However, the real purpose of their mission would of necessity be laid bare when they reached the killing field. So, the fact that the captives were earlier told that they were being taken to be exchanged did not reasonably imply that the appellant himself believed that or that he was taken by surprise by the contrary disclosure at the killing field. There is no suggestion that at that point his conduct differed from that of his colleagues. His actions were those of a killer who knew all along what fate would befall the captives.

15. In effect, the fact that the appellant did not show any surprise in reaction to the disclosure at Sase that the captives were to be killed can be taken into account in determining whether a reasonable tribunal of fact could have found, as the Trial Chamber did, that before the cars arrived at Sase the appellant knew that the intention was to kill the captives. Thus, even if an inference to this effect cannot be grounded on the particular matter mentioned by the Trial Chamber concerning the Varda factory,[306] the appellant's behaviour at Sase was itself material which justified that finding by the Trial Chamber. The above-mentioned transcript was referred to[307] by the Appeals Chamber *ex mero motu* in the belief that the drastic change which it mentioned undermined the finding of the Trial Chamber; in my view, the transcript supports the finding of the Trial Chamber and has to be considered by the Appeals Chamber. Evidence before a Trial Chamber is notoriously voluminous: a Trial Chamber cannot be expected to refer to all of it. It is good law that the Appeals Chamber has to presume that all relevant evidence was taken into consideration by the Trial Chamber even if not expressly referred to by it.[308]

16. In brief, the material on record does not enable the Appeals Chamber to say that no reasonable tribunal of fact could have come to the conclusion reached by the Trial Chamber "that, when the Accused left the Vilina Vlas Hotel, he knew that the men were not to be exchanged but were to be killed."[309] Therefore, the Appeals Chamber cannot disturb the Trial Chamber's finding on that point.

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[306] See judgment of the Appeals Chamber, paras. 46-54.
[307] See judgment of the Appeals Chamber, para. 53.
[308] In *Musema*, ICTR-96-13-A, of 16 November 2001, para. 20, the ICTR Appeals Chamber said, "It does not necessarily follow that because a Trial Chamber did not refer to any particular evidence or testimony in its reasoning, it disregarded it." In paragraph 21 it added: "It is for an appellant to show that the finding made by the Trial Chamber is erroneous and that the Trial Chamber indeed disregarded some item of evidence, as it did not refer to it." In this regard, unless the Trial Chamber has remained silent before a startling piece of evidence, its silence does not show that it failed to take account of the evidence. See and consider *R. v. London Borough of Brent B.C., ex parte Barisse* (1999), 31 HLR 50 at 58. There is nothing particularly startling about the particular piece of evidence in this case, more especially as, on my interpretation, it coincides with the conclusion reached by the Trial Chamber.
[309] Impugned judgment, para.105, and judgment of the Appeals Chamber, para. 53.

D. Intent of the appellant after arriving at Sase

17. In any event, as the Appeals Chamber recalls, at the time when the cars parked at Sase, "the Appellant admits that he knew that the seven Muslim men were to be killed."[310] Thus, if he did not know of the intent before, he knew of it then. Did he also share the intent? The shortness of time which elapsed between the arrival at Sase and the killing on the bank of the Drina River is not decisive. What is decisive is the evidence of what happened between the arrival at Sase and the time when the killings took place.

18. In this respect, paragraph 104 of the judgment of the Trial Chamber states:

> [T]he seven Muslim men were instructed to get out of the cars and ordered by Milan Lukić to walk through a field towards the bank of the Drina River, which was 100 metres away. The Trial Chamber is satisfied that they were forced to walk at gunpoint towards the River. The Trial Chamber is satisfied that the seven Muslim men were told that they would be killed if they tried to escape.

Thus, from where the cars were parked, the appellant walked 100 metres through a field to the river bank, his gun pointed at the captives with its safety catches off. Since he now knew that the captives were to be killed, he could not claim that he was barring escape to ensure availability for exchange. He was demonstrating willingness to participate in the imminent act of killing.

19. The appellant claimed that, during that walk, he pleaded with Lukić to spare the men. The Trial Chamber rejected the claim. The Appeals Chamber agreed with the Trial Chamber.[311] The Trial Chamber was "satisfied that some of the Muslim men begged for their lives and that their pleas were ignored;"[312] it found that, contrary to his claim, the appellant "said nothing in response to the pleas of" one of the victims.[313] That the appellant in fact remained both armed and silent before the victims' pleas for their lives suggests that he did more than know of the intent to kill. This conclusion is reinforced by what follows.

[310] Judgment of the Appeals Chamber, para. 128. See also, ibid., para. 132.
[311] Judgment of the Appeals Chamber, paras. 60 and 86.
[312] Impugned judgment, para. 111.
[313] Impugned judgment, para. 106.

E. The appellant, with his gun, stood in line with other members of the firing party at the time of the shooting

20. Before the Trial Chamber, the appellant claimed that he "was standing 10 to 15 meters behind those seven men, between the trees …"[314], that he was "left behind among the trees,"[315] and that "he stayed behind in the bushes."[316] The Trial Chamber dismissed these claims, stating:

> The Trial Chamber is satisfied that Milan Lukić, the Accused and the two unidentified men pointed their guns, which had their safety catches off, at the Muslim men, as they walked towards the bank of the Drina River. The Trial Chamber is satisfied that the Accused followed the men to the banks of the Drina River, and it rejects as untruthful the Accused's evidence that, when he realised that he could not persuade Milan Lukić to spare the men, he turned away from the group and stopped some 10 to 15 metres from the river.[317]

21. Thus, the Trial Chamber had before it the appellant's contention that he had turned away from the group and had stopped some distance away – that, in effect, he had dissociated himself from the killings. With some dismay, the Trial Chamber rejected that claim as "untruthful,"[318] as it likewise dismissed the appellant's related claim that he reported the matter to the police on the following day.[319] These decisions were accepted by the Appeals Chamber,[320] which specifically said that it "dismisses the Appellant's alleged errors regarding … (iii) the finding of fact that the Appellant was standing some distance away from the group during the shooting."[321] The Appeals Chamber also accepted that the appellant had a gun at the Drina River, contrary to the appellant's denial.[322]

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[314] Defence Respondent's Brief against Prosecution Respondent's Brief of 18 August 2003, dated 2 September 2003, para. 2.6. See also Defence Appellant's Brief Against Judgment of November 29, 2002, dated 24 June 2003, paras. 5, 9, 10, 12, 87 and 89
[315] Transcript of the Appeals Chamber, 18 November 2003, p. 30, Mr Domazet.
[316] Transcript of the Appeals Chamber, 18 November 2003, p. 149, where Mr Domazet said "that the fact that he didn't come up close, that he stayed behind in the bushes was when [sic] he saw Lukic lining them up and that the three of them were taking up positions like a firing squad and that they were going to kill them and there was nothing more that he could do."
[317] Impugned judgment, para. 108 (footnotes omitted).
[318] See paragraph 24 below on consciousness of guilt, discussed in, *inter alia*, *R. v. Franklin*, [2001] A Crim R 223.
[319] Impugned judgment, para. 297.
[320] Judgment of the Appeals Chamber, paras. 67, 177 and 179, respectively.
[321] Judgment of the Appeals Chamber, para. 86. See also, ibid., paras. 67 and 128.
[322] Judgment of the Appeals Chamber, paras. 45, 67 and 134.

22. Then, as to what happened when the party reached the river bank, the Trial Chamber made this finding:[323]

> The Trial Chamber is satisfied that, when they reached the bank of the river, the seven Muslim men were lined up facing the river, and that Milan Lukić, the Accused and the other two unidentified men lined up approximately five to six metres behind the Muslim men.

After considering certain discrepancies in the evidence, the Trial Chamber likewise said that it was "satisfied that all four men stood behind the seven Muslims and that the accused was one of them."[324]

23. In effect, the appellant stood with the other members of the firing party. According to the Trial Chamber, they had all "lined up". That means that the appellant stood in line with the other offenders; and he was armed. The Trial Chamber used the words "shortly before" in stating that the Accused was "standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started,"[325] but it is not credible that the formation which existed "shortly before the shooting started" had lost a member just before the shooting started. This was not the understanding of the Trial Chamber when it stated "that it has been established beyond reasonable doubt that the Accused participated in the shooting and that he did so sharing the intention of the others in the group that the seven Bosnian men be killed."[326] Nor was it the understanding of the Appeals Chamber when it dismissed the appellant's claim that he "was standing some distance away from the group during the shooting."[327] Thus, at the time of the shooting, the appellant was standing armed and in line with his colleagues as a member of the firing party.

24. The appellant told lies to the Trial Chamber about not being armed at the hotel, about not being armed at the Drina River, about responding to the pleas of the victims, about asking Lukić to spare their lives, about being some distance away from the actual shooting, and about reporting the matter to the police station on the following day. As lies can be told by an accused for reasons which do not necessarily imply guilt, it is a forbidden line of reasoning that the telling of lies demonstrates guilt.[328] But that reasoning may be employed where the court is satisfied that the lies (whether told in court or out of court) were told from a consciousness of guilt, provided they are not the only basis of conviction. In my opinion, the lies told by the appellant fall into this category. They show that he was seeking to evade

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[323] Impugned judgment, para. 109 (footnotes omitted).
[324] Impugned judgment, para. 110.
[325] Impugned judgment, para. 209; and see judgment of the Appeals Chamber, para. 134.
[326] Impugned judgment, para. 98.
[327] Judgment of the Appeals Chamber, para. 86. See also, ibid., paras. 67 and 128.
[328] See *R. v. Franklin*, [2001] A Crim R 223, and the authorities collected in it.

his criminal responsibility as one of the main actors; they therefore imply an acknowledgment of that responsibility. The responsibility of a main actor which was thus acknowledged was that of a co-perpetrator – and not that of a lesser actor such as an aider and abettor.

F. The Trial Chamber's finding that there was no sufficient proof of any actual killing by the appellant

25. However, as it stated in paragraph 113 of its judgment, the Trial Chamber was "not satisfied that it has been established that the accused actually killed anyone or more of the victims". Its views are as follows:[329]

> 112. The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt that the Accused fired his weapon at the same time as the other three, or that he personally killed anyone or more of the victims. VG-32 gave evidence that, immediately before the shooting started, he heard three clicks, which were produced by the specific devices of the automatic rifles of the Accused and the two other unidentified men. VG-32 said that, by adjusting those devices, the method of shooting was adjusted from bursts of gunfire to individual shots. Milan Lukić's sniper rifle did not have such device. VG-14 gave evidence that the first sequence of shots consisted of three loud shots and one "bluff" or muted shot. He specified that the three loud shots came from the automatic rifles of the Accused and of the other two unidentified men, and that the "bluff" shot came from Milan Lukić's sniper rifle, which had a silencer. Because of the extraordinarily tense situation in which they were at the time, the evidence given by VG-32 and VG-14 that they remembered the number of shots fired is not sufficiently reliable to base a finding beyond reasonable doubt on that evidence only that the Accused actually pulled the trigger. Even the most honest witnesses can convince themselves of what must have happened by a perfectly natural process of unconscious reconstruction. The Trial Chamber accepts that these two witnesses honestly believed that this is what happened, but it cannot exclude the very understandable and natural possibility that they have unconsciously reconstructed it.
>
> 113. Although the Trial Chamber is not satisfied that it has been established that the Accused actually killed anyone or more of the victims, it is nevertheless satisfied that the only reasonable inference available on the evidence is that the Accused, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself. One member of the Trial Chamber accepts the evidence relating to the number of clicks, although this

[329] Impugned judgment, paras. 112-113, footnotes omitted.

evidence is not regarded by that Judge as essential or necessary to the determination of the accused's intention. The majority has no doubt that VG-32 honestly believed that he heard three clicks, but the majority is not satisfied that there is no element of perfectly natural reconstruction involved in that belief. The majority of the Trial Chambers makes an identical finding in relation to the evidence of VG-14 concerning the number of shots and the nature of the noise produced by the weapons being fired. The conclusion of all three members of the Trial Chamber in relation to the intent of the Accused that those seven men be killed is thus identical.

26. The finding by the Trial Chamber that it was "not satisfied that it has been established that the accused actually killed anyone or more of the victims" is not the same as a finding – and the Trial Chamber did not find - that the accused had withdrawn[330] from the intent of the group to kill, which, in my view and in the view of the Trial Chamber, he shared. More importantly, as the above excerpts show, that holding was not made on evidence solely applicable to the accused: it could apply to any of the offenders. The holding reflected the simple fact that it is evidentially difficult – although not impossible - to establish that a particular member of a firing party actually pulled his trigger or that, if he did, he actually killed any of a number of victims: they might have been killed by other members of the firing party.

27. The resulting situation is not unknown to the law. It is usually solved by saying that, if a person is a party to a joint criminal enterprise (by whatever name called), he is a co-perpetrator of the ensuing crime, although it is not shown that he took part in the actual killing.[331] That was the approach taken by the Trial Chamber.[332]

G. The argument that the appellant lacked power to prevent the commission of the crime

28. However, an objection of substance to that approach has been raised by co-counsel for the appellant.[333] As I understand it, his submission is this: The doctrine of joint criminal enterprise is accepted. But, in judging whether a person was a participant in a joint criminal enterprise, it must be found that his participation was substantial. Substantial participation means that the person must be

[330] For the effect of withdrawal, see *Pinkerton v. United States*, 328 U.S. 640 (1946) at 646.
[331] See judgment of the Appeals Chamber, para. 111. And see *R. v. Salmon* (1880) 6 Q.B.D.79; *R. v. Swindall and Osborne* (1846) 2 C. & K. 230; and *Du Cros v. Lambourne* [1907] 1 K.B. 40. It is different if all that can be proved is that one of the persons, but not whether any particular person, committed the crime and there is no proof that they all shared a common intent to commit it or that there is no criminal legal nexus among them.
[332] See impugned judgment, paras. 209-210.
[333] The argument seems to be alluded to in paragraph 129 of the judgment of the Appeals Chamber, which reads: "The Trial Chamber did not find, however, that the Appellant acted at the same level of authority or with the same degree of control over the killings as the other three actors."

shown to be "in a position with power to prevent the work of the joint criminal enterprise and the corresponding criminal activity."[334] The appellant was not in that position, because the evidence showed that he "was not in a position to stop Mr Lukić and his men from committing their crimes."[335] Therefore, he could not have criminal responsibility as a co-perpetrator.

29. I believe that the submission is based on the following argument. The leading principle, as recognised in *Tadić*, is that "the foundation of criminal responsibility is the principle of personal culpability."[336] An accused does not engage criminal responsibility as the perpetrator of a crime unless he was in control of the commission of the crime. A person is in control of the commission of a joint criminal enterprise crime only if his contribution was indispensable to its commission, in the sense that non-fulfilment of his part of the enterprise would have ruined the efforts of his colleagues to commit the crime.[337] If he is regarded as culpable as a co-perpetrator of the crime although it could have been committed without his participation in that sense, this can only be because his culpability as a co-perpetrator derives from that of the real actor: the culpability of the latter as a perpetrator is being imputed to the former. That is not the same as saying that an accused should only be culpable for what he himself has done.[338] Consequently, runs the argument, where the act of the accused does not rise to the level of control over the commission of the crime, his culpability is not that of a co-perpetrator.

30. *Tadić* goes beyond that argument, for there the Appeals Chamber recalled, with evident approval, the charge of Judge Advocate Honig in the *Ponzano* case that it was not necessary to show that the defendant's participation was a *sine qua non*, "or that the offence would not have occurred but for his participation."[339] So, if *Tadić* is wrong on that point, it could be argued that the appellant in this case was not in control of the commission of the crime of murder because the actual killing was done by others and his non-contribution did not ruin their efforts to commit the crime. More specifically, the appellant

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[334] Mr Knoops, co-counsel for the appellant, Transcript of the Appeals Chamber, 18 November 2003, p. 50. And see, ibid., pp. 47, 48, 49, 126, 127, 144, 145, 154 and 155, for defence and prosecution arguments on the point.

[335] Mr Knoops, co-counsel for the appellant, Transcript of the Appeals Chamber, 18 November 2003, p. 50. See also (Additional) Defence Appeal Brief, dated 24 June 2003, para. 56, stating "the Trial Chamber deduces this alleged personal participation of the accused in this joint criminal enterprise from his assumed possibility and power to intervene in the actions of Milan Lukić and his group."

[336] *Tadić*, IT-94-1-A, 15 July 1999, para. 186.

[337] Claus Roxin, *Täterschaft und Tatherrschaft*, 6th ed. (Berlin and New York, 1994), pp. 278-279, cited in *Stakić*, IT-97-24-T, 31 July 2003, para. 440 (the two pages from *Roxin* being translated into English by the Registry of the ICTY). The famous *Sirius* case in Germany shows the excesses resulting from a subjective approach. In contrast, there is the more objective approach of the control theory. As it is put in Nigel Foster and Satish Sule, *German Legal System and Laws*, 3rd ed. (Oxford, 2002), at p. 331, "Control over the crime may arise from …, in cases of jointly committed offences, control over a contributing act that is necessarily causal for commission of the crime." That is to say, if the contribution is not made, the joint offence cannot be committed; thus the contributing offender has control over the joint offence.

[338] G. P. Fletcher, *Rethinking Criminal Law* (Oxford, 2000), p. 642, and Andrew Ashworth, *Principles of Criminal Law,* 2nd ed. (Oxford, 1995), pp. 410, 415, 439 and 441.

[339] *Tadić*, *supra*, para. 199, recalling *Trial of Valentin Feurstein and others*, Proceedings of a Military Court held at Curiohaus, Hamburg, B.A.O.R., Germany (4-24 August, 1948), summing up of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

claimed that the power to make decisions rested with Lukić and that he was incapable of influencing Lukić. Thus, the appellant lacked power to prevent the commission of the crime by his colleagues. The result is that he was not guilty, as co-perpetrator, of the murder committed by them.

31. This is not a case in which it is said that the act was the act of the appellant because it was done on his behalf by an innocent agent used as his instrument. It is therefore not necessary to consider the matter from the point of view appropriate to a situation in which it turns out that the allegedly "innocent" agent himself intended the crime – a situation in which the accused might be held to be guilty only as an aider and abettor.340 Here, what is said is that the appellant was a party to a joint criminal enterprise to commit the crime. One party to such an enterprise is not acting as the agent of another – at least, not in the ordinary sense. All the parties are acting together to achieve an agreed result. In acting together, they are really acting as one. On this basis, the acts of each are the acts of all.

32. Transposing this model to this case, one may say that the other offenders acted pursuant to an understanding to which the appellant was an active party at the time of the commission of the act. In performing the act, they were of course carrying out their own will, but they were also carrying out his will under that understanding. The perspective is important. The focus is not on whether he had power to prevent them from acting as they did; the focus is on whether, even if he could not prevent them from acting as they did, he could have withheld his will and thereby prevented their act from being regarded as having been done pursuant to his own will also.

33. Participation has of course to be real; courts can determine whether it is. What gives rise to difficulty is the proposition that a person must be shown to have had power to prevent the activity of a joint criminal enterprise from being accomplished before he can be held to have been a real participant in the enterprise. He might have been playing a subordinate role in the enterprise and might have had no power to prevent its activity from being accomplished; he could still have been participating. Examples could be easily found. The degree of participation goes to sentence, not to guilt.

34. In sum, even if Lukić's personality was the dominant one, it does not follow that the appellant had no will of his own. The Appeals Chamber does not say that; it dismissed a defence of duress.[341] The appellant exercised his will when he joined the joint criminal enterprise led by Lukić, whom he had previously known. Under the joint criminal enterprise, his colleagues were acting pursuant to his will, as well as their own, when they committed the crime; thereupon, the crime became his crime also.

[340] See, for example, *R. v. Franklin*, [2001] A Crim R 223, at paras. 35ff of the judgment of Brooking JA.
[341] Impugned judgment, IT-98-32-T, of 29 November 2002, paras. 107 and 305. See also para. 41 below.

Accordingly, his conviction as a co-perpetrator of the murders committed by them satisfied the leading principle that "the foundation of criminal responsibility is the principle of personal culpability."[342]

35. Finally, it may be observed that the appellant's submission that the decision-making power lay with Lukić exclusively was dismissed by the Trial Chamber when it said that it "rejects the evidence of the Accused that, in any event, he was powerless to stop Milan Lukić from killing the Muslim men."[343] The Appeals Chamber does not disagree.[344] Thus, the foundation of co-counsel's argument fails.

H. The appellant was not an aider and abettor

36. For the foregoing reasons, no question of aiding and abetting arises. A comparison may be made with the decision of the Supreme Court of Bavaria in Prosecutor v. Djajić.[345] An examination of that case will show that its reasoning is reconcilable with the foregoing.

37. There, 14 Muslim captives were made to line up on a bridge with their backs to the railing. Opposite to them some soldiers and military police took up positions. There were also some Serbian guards; their position was designed to prevent the Muslims from fleeing and to make it possible to kill them.[346] The guards formed a semicircle; the appellant was somewhere in the middle of the semicircle. He was holding his weapon with both hands in front of his chest like the rest of the guards. The 14 Muslim captives were killed. The killing was done by a certain man and by the military police. There was no proof that the killing was done by the guards (including the appellant). The appellant was held to be an aider and abettor, and not a co-perpetrator. The judgment said:

> When assessing the overall circumstances, the senate was unable to determine whether the accused's connection to the killing was so close that his contribution might be considered to be a part of the killing and conversely whether the killing might be considered a consequence of the accused's part in the crime.[347]

[342] *Tadić*, IT-94-1-A, 15 July 1999, para. 186.
[343] Impugned judgment, para. 107.
[344] See para. 60 of the judgment of the Appeals Chamber.
[345] 3 St 20/96, 23 May 1997, referred to in footnote 223 of the Appeals Chamber's judgment. See also a review of the *Djajić* decision by Christoph J.M. Safferling in (1998) 92 *A.J.I.L.* 528.
[346] 3 St 20/96, 23 May 1997., p. 39; English translation by the Registry of the ICTY.
[347] Ibid., p. 90.

38. So, the contrast is between whether the accused's connection with the killing was so close that his contribution might be considered to be part of the killing and whether the killing might be considered a consequence of the accused's part in the crime. That is, with respect, a helpful formula. In opting for the lesser conviction, the court said:

> The extent of his objective participation in the overall course of the killings was slight. Through his co-operation in the semi-circle of guards, he objectively reduced the defenceless victims' chance of escaping. However, the accused had no control over the killings, begun by Lazarević and carried out by several marksmen. There were no sure indications either that the accused at least intended to participate in the killings.[348]

39. In that case, there were "no sure indications" of intent to participate in the killings. I apprehend that the reason for this is that, inter alia, the court found that, even though he did eventually join the Serbs in the semicircle which was taking shape, "the accused … hung back somewhat when the group of Muslims and the guards walked onto the bridge …"[349] In the instant case, the Trial Chamber dismissed – in its entirety - the defence claim about standing at a distance from the actual shooting, and the Appeals Chamber has upheld that dismissal.

40. In brief, in Djajić the only function of the accused was to guard the victims to ensure that they were killed by others. In the instant case, the accused guarded the victims but he also took his position with the killers. In standing armed with the killers drawn up in a line at the time of the shooting, and in allowing it to be thought that to all intents and purposes he was one of them, he was demonstrating his willingness to participate in the act of killing rather than his indifference as to whether that act was in fact done or not.[350] In terms of the Djajić test, his "connection to the killing was so close that his contribution might be considered a part of the killing." Consequently, to adopt and adapt the words of Tadić,[351] to hold him liable only as an aider and abettor might be to understate the degree of his criminal responsibility.

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[348] Ibid., p. 91.
[349] Ibid., p. 39.
[350] See the reasoning relating to aiding and abetting in *National Coal Board v. Gamble*, [1959] 1 Q.B. 11, concurring opinion of Devlin J, and in *DPP for Northern Ireland v. Lynch*, [1975] AC 653, HL, dissenting opinion of Lord Simon of Glaisdale.
[351] *Tadić*, IT-94-1-A, 15 July 1999, para. 192.

41. Finally, as mentioned above, a claim of duress has been rightly rejected by the Trial Chamber.[352] The Appeals Chamber has not disturbed this finding, although it did mention "the strong personality of Milan Lukić compared to the Appellant"[353] – a differential situation which often occurs in many a collection of human beings in which leadership is required. Further, it has to be borne in mind that the Appeals Chamber in *Erdemović* stated that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings…;"[354] in such a case, it may be pleaded only in mitigation. It does not operate to reduce a conviction as a co-perpetrator to a conviction as an aider and abettor.

I. Persecution

42. The Trial Chamber clearly found that the appellant had the requisite intent to discriminate.[355] The Appeals Chamber has not overturned that finding; it has dismissed certain arguments by the appellant on the subject.[356] So the finding of the Trial Chamber that the appellant had the requisite discriminatory intent stands.

43. The real reason why the Appeals Chamber overturned the persecution conviction was that the offences on which it was founded could not be made out because, in the view of the Appeals Chamber, there was lack of proof of intent to kill. This is mentioned in paragraph 141 of the judgment of the Appeals Chamber which states that in "the absence of this intent [to kill], no reasonable trier of fact could have found the Appellant responsible for committing the crime of persecution by murders and inhumane acts as a co-perpetrator to the joint criminal enterprise."

44. Hence, the judgment of the Appeals Chamber on persecution is a sequel to its judgment on murders and inhumane acts: the appellant was not guilty of persecution through offences which could not be proved for want of proof of intent to kill. My opinion being that the appellant had the intent to kill and was thus guilty of those offences, it follows that the conviction for persecution as handed down by the Trial Chamber stands.

[352] Impugned judgment, paras. 107 and 305. And see paragraph 34 above.
[353] Judgment of the Appeals Chamber, para. 131.
[354] Case IT-96-22-A, 7 October 1997, p. 17, para. (4) of part iv of the judgment, a majority one.
[355] Impugned judgment, paras. 254 and 255.

J. Conclusion

45. The Appeals Chamber has not found that any errors of law were committed by the Trial Chamber. The Appeals Chamber considers that the Trial Chamber has committed certain material errors of fact. I respectfully disagree; at any rate, I do not think that it has been demonstrated that no reasonable tribunal of fact could have assessed the relevant evidence differently from the way in which the Trial Chamber assessed it. I would accordingly affirm the judgment of the Trial Chamber that, both on murder and on persecution, the criminal responsibility of the appellant was that of a co-perpetrator and not that of an aider and abettor.

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

Mohamed Shahabuddeen

Dated 25 February 2004
At The Hague
The Netherlands

[356] See para. 60 of the judgment of the Appeals Chamber.

IX. ANNEX A: PROCEDURAL BACKGROUND

A. Notice of appeal

183. On 30 December 2002, in accordance with Rule 108 of the Rules, the Appellant, Mitar Vasiljević, filed his first notice of appeal from the Judgement of 29 November 2002.[357]

184. The Prosecution filed a motion regarding defects in the First Notice of Appeal, seeking an order that the Appellant be required to re-file the Notice of Appeal since he did not comply with the requirement of the Rules and the practice Direction.[358]

185. On 29 January 2003, the Pre Appeal Judge found that the First Notice of Appeal did not conform to the requirements of Rule 108 of the Rules and that the Appellant had to re-file a notice of appeal within 14 days.[359]

186. The Appellant submitted a new Notice of Appeal on 12 February 2003.[360]

B. Briefs filing

187. On 29 May 2003, the Appellant filed a motion for extension of time, asking for a 14-day extension to submit the Appellant's Brief.[361] The Prosecution filed its response noting that in the event of the Appellant being granted an extension, the Prosecution would request an extension to file its Respondent's Brief.[362] On 3 June 2003, the Pre-Appeal Judge ordered the Appellant to file his Appellant's Brief not later than 24 June 2003 and the Prosecution to file its Respondent's Brief not later than 18 August 2003.[363]

188. On 24 June 2003, the Appellant filed the "Defence Appellant's Brief Against Judgement of November 29, 2002" and an "(Additional) Defence Appeal Brief".

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[357] Notice of Appeal Against the Trial Judgement of 29 November 2002 (First Notice of Appeal). In its First Notice of Appeal the Defence also requested to exceed the 75 days provided for in Rule 111 of the Rules for filing the Appellant's Brief since the translation of the Judgement into a language the Appellant understands, *i.e.* BCS, was not yet available, it was suggested that the 75 days would start when the translation was available.

[358] Prosecution Motion Concerning Defects in the Defence Notice of Appeal and Response to Defence Motion for Extension of Time, 3 January 2003. The Defence responded to the Prosecution motion on 21 January 2003. Defence Reply to the Prosecution Motion Concerning Defects in the Defence Notice of Appeal and Defence Reply to the Prosecution Motion Concerning Defence Motion for Extension of Time Limited, 21 January 2003.

[359] Decision on Prosecution Motion Concerning Defects in the Defence Notice of Appeal and on Defence Motion for Extension of Time, 29 January 2003.

[360] Notice of Appeal against Judgement of November 29, 2002 (Defence Notice of Appeal).

[361] Defence Motion for the Extension of Time, 29 May 2003.

[362] Prosecution Response to Defence Motion for Extension of Time, 30 May 2003, submitting that the reasons filed by the Defence for the extension of time are not a "good cause" within the meaning of Rule 127(A) of the Rules.

[363] Decision on Defence and Prosecution Motions for Extension of Time, 3 June 2003. The Pre-Appeal Judge found that the circumstances raised both by the Defence and the Prosecution motions constitute good cause within the meaning of Rule 127

189. On 18 July 2003 the Prosecution filed, confidentially, its "Prosecution Respondent's Brief."[364]

190. On 2 September 2003, the Appellant filed, confidentially, his Reply[365] and an Additional Reply[366] to the Prosecution Response.

191. On 6 November 2003, noting the Prosecution Response and the Appellant Reply were filed confidentially, the Pre-Appeal Judge ordered the parties to file redacted public versions of the documents.[367] The Prosecution filed the public version of its Response on 7 November 2003 and the Appellant filed the public version of his Reply on the 17 November 2003.

C. Grounds of Appeal

192. The Appellant has advanced the following eight grounds of appeal against the Trial Chamber's Judgment:

193. The first ground of appeal concerns the Drina River incident. The Appellant submits that the Trial Chamber erred in fact when it concluded that although it was not satisfied that the Appellant actually killed one or more of the victims, it was nevertheless convinced that the only reasonable inference available on the evidence was that the Appellant intended, by his actions, that the seven Muslim men be killed, regardless of whether he carried out any of the murders himself.[368] The Appellant raises three arguments in support of this ground of appeal: i) that he was not armed on the day of the facts; ii) that he was not aware of the homicidal intent of Milan Lukić and his men before they took the seven Muslim men by force to the bank of the Drina River, where he attempted unsuccessfully to dissuade them from carrying out the act; and iii) that he remained at a distance from the armed men when the shooting was taking place. The Prosecution replied that the Appellant in no way demonstrated that the Trial Chamber committed errors occasioning a miscarriage of justice with regard to the Appellant's criminal responsibility for the Drina River incident.[369] The Prosecution also submitted that, with regard to the first ground, the Appellant in no way satisfied the review criteria on appeal and merely alleged errors in the Trial Chamber's assessment of the evidence presented at trial, without attempting to

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of the Rules. He also considered that it is in the interest of justice to allow the Defence the adequate time to adjust for the changes they have made in the composition of their team, p. 3.

[364] Prosecution Respondent's Brief, filed confidentially on 18 August 2003.

[365] Defence Respondent's Brief Against Prosecution Respondent's Brief of 18 August 2003, filed confidentially on 2 September 2003.

[366] (Additional) Defence Brief in Reply, 2 September 2003.

[367] Order to File Redacted Public Versions, 6 November 2003.

[368] Defence Appeal Brief, paras 1 and 90.

[369] Prosecution Response Brief, para. 2.3.

demonstrate how its factual findings are unreasonable.[370] The Appellant replied that a reasonable trier would not have accepted the evidence relied on by the Trial Chamber.[371]

194. The second ground of appeal concerns the Appellant's relationship with the paramilitary group led by Milan Lukić. The Appellant analyses Chapter V of the Judgment concerning this relationship and points to five errors of fact pertaining to the Trial Chamber's findings in paragraphs 72, 75-77 and 80 of the Judgment: i) the period in which the group committed its crimes;[372] ii) his alleged role as an informant to the group;[373] iii) the failure to consider the details provided about the group by the Appellant as a sign of his co-operation with the Tribunal;[374] iv) the fact that he did not completely sever his relationship with Milan Lukić following the Drina River incident;[375] and v) the fact that he took part in searching witness VG-59's father house in Musići.[376] The Prosecution responded that the Appellant's submissions do not demonstrate that any appealable error of fact was made as he failed to show that no court could have reasonably made the findings that the Trial Chamber did and that the alleged errors occasioned a miscarriage of justice.[377]

195. In the third ground of appeal the Appellant challenges the Trial Chamber's finding regarding the General Requirements of Article 3 and Article 5 of the Statute.[378] The Appellant argues that the Trial Chamber erroneously found in paragraph 46 the following facts: i) the Appellant knew Milan Lukić well; ii) he also knew the other men who were associated with Milan Lukić; iii) he knew that Milan Lukić and his men committed serious crimes;[379] and iv) despite that knowledge, the Appellant was seen together with those men on several occasions during the period relevant to the Indictment. In addition, the Appellant argues that the Trial Chamber committed errors of fact by finding that v) the Appellant was standing guard while money and valuables disappeared during the search of Musići; vi) non-Serb citizens of Višegrad began disappearing in early April 1992; vii) a burned Muslim woman was denied medical treatment; viii) the acts of the Appellant were closely related to the armed conflict; and (ix) the acts of the Appellant were part of a widespread and systematic attack of which he was aware. The Prosecution submits that this ground of appeal should be dismissed as it does not reveal an error, but

[370] Prosecution Response Brief, para. 2.4.
[371] Defence Additional Appeal Brief, para. 3.
[372] Judgement, paras 92-93.
[373] *Ibid*, paras 94-101 and 118-126.
[374] *Ibid*, paras 102-105.
[375] *Ibid*, paras 106-111.
[376] *Ibid*, paras 112-117.
[377] Prosecution Response Brief, paras 3.2-3.3.
[378] Defence Appeal Brief, paras 127-175.
[379] Defence Reply, para. 4.14, the Appellant submitted that the Trial Chamber erred in finding that he had the "requisite knowledge of criminal activity of the Lukić group s [sic] criminal activity before 7 June 1992".

rather is asking the Appeals Chamber to substitute the Trial Chamber's finding with that of the Appellant.[380]

196. In the fourth ground of appeal, the Appellant submits that the Trial Chamber erred both in law and fact by concluding that he intented to kill the seven Muslim men and therefore, that he is guilty of murder. The alleged error of fact concerned the Appellant's intent to kill. The errors of law concerned: i) whether the Appellant's convictions are cumulative; ii) whether there was an agreement among the Appellant, Milan Lukić and the two unknown men and; iii) whether participants in a joint criminal enterprise are "equally guilty."[381] The Prosecution submitted that, on the bases of the totality of the circumstances, it was reasonable for the Trial Chamber to conclude that the Appellant intended the seven Muslim men to be killed even if he did not actually carry out any of the killings.[382]

197. The fifth ground of appeal concerns the Appellant's conviction of persecution as a crime against humanity for the inhumane acts (Count 3) inflicted on the two survivors of the Drina River incident.[383] In support of this ground, the Appellant refers to his arguments submitted in relation to the fourth ground of appeal. The Appellant asserts that the Trial Chamber erred by finding: i) that there was an understanding amounting to an agreement among Milan Lukić, the Appellant and two other men to kill the seven Muslim men, and ii) that the Appellant personally participated in this joint criminal enterprise with the intent to cause VG-14 and VG-32 "serious mental or physical suffering."[384] The Prosecution relied on its response in relation to the other grounds of appeal.[385]

198. In the sixth ground of appeal, the Appellant submits that the Trial Chamber erred in finding him guilty of persecution as a crime against humanity for the murder of five Muslim men and the inhumane acts inflicted (Count 3) on two other Muslim men in relation to the Drina River incident. The main argument presented by the Appellant is that he did not act with the requisite discriminatory intent for the crime of persecution. In his submissions, the Appellant raised a number of arguments which are already included in the other grounds of appeal. The Appellant first submits that the Trial Chamber erred in finding that he acted as an informant to the Milan Lukić group.[386] Second, the Appellant believes that there is no evidence for finding beyond reasonable doubt that he intended to kill the seven Muslim men.[387] Third, the Appellant argues that there was no agreement between him and the other participants to persecute the Muslim population. The mere presence of the Appellant on the banks of the Drina River

[380] Prosecution Response Brief, paras 4.2-4.3.
[381] Defence Appeal Brief, para. 55-59; Defence Additional Appeal Brief, paras 176-224.
[382] Prosecution Response, para. 5.10.
[383] Judgement, para. 307.
[384] Defence Appeal Brief, paras 222-224.
[385] Prosecution Response Brief, para. 6.3.
[386] Defence Appeal Brief, paras 226-230.
[387] Defence Additional Appeal Brief, para. 231.

is not sufficient to establish that there was such an agreement and therefore to find the Appellant responsible for the joint criminal enterprise of persecution.[388] Fourth, the Appellant submits that the Trial Chamber erred in finding that the Appellant was aware of previous illegal acts committed by the Lukić group.[389] The Prosecution submits that it was not established that the Trial Chamber's findings were unreasonable on the bases of the available evidence and in fact, that it was the only reasonable conclusion available to any reasonable trier of fact.[390]

199. In the seventh ground of appeal, the Appellant argues that the Trial Chamber erred in both law and fact when it applied the concept of joint criminal enterprise in this case. The Appellant submits four sub-grounds in relation to this issue. In the first sub-ground, the Appellant argued that the Trial Chamber committed an error of law by failing to indicate the criteria applied in order to establish the existence of a joint criminal enterprise in this case.[391] Second, he argues that the Trial Chamber erred in law when it concluded that the participants in a joint criminal enterprise are equally guilty.[392] Third, the Appellant argues that the Trial Chamber erred when accepting that the Appellant shared the intent of the other perpetrators of the joint enterprise. The Appellant challenges the Trial Chamber's findings with respect to the shared intent on the following grounds: i) an error of fact in the Trial Chamber's finding that an agreement existed;[393] ii) an error of fact in the Trial Chamber's finding that the Appellant provided assistance to the other perpetrators;[394] iii) the absence of a finding of any general or specific homicidal intent on the Appellant's part;[395] iv) the reliance on the Appellant's failure to prevent Milan Lukić from committing the crimes;[396] v) the absence of any proof that the Appellant carried a weapon;[397] and vi) the absence of any proof of the Appellant's actual participation in the shooting.[398] The Appellant's fourth sub-ground on the issue of joint criminal enterprise is that the requirements for proving liability as an aider and abettor were not considered and would not have been satisfied in the present case.[399] The Prosecution submits that the present case involved the first category of joint criminal enterprise liability established in the *Tadić* Appeal Judgement,[400] that no error has been demonstrated, and that this ground of appeal should be dismissed.

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[388] *Ibid*, paras 8-9; also Defence Additional Reply, paras. 8-10.
[389] *Ibid*, para. 18.
[390] Prosecution Response, para 7.8.
[391] Defence Additional Appeal Brief, paras 26-29.
[392] Defence Appeal Brief, para. 241.
[393] *Ibid*, para 236-238; Defence Additional Appeal Brief, paras 30-32.
[394] Defence Additional Appeal Brief, paras 32-38.
[395] *Ibid*, paras 39-42.
[396] *Ibid*, paras 43-45.
[397] *Ibid*, paras 46-51.
[398] *Ibid*, paras 52-53.
[399] Defence Appeal Brief, paras 239-240.
[400] Prosecution Response, para. 8.5.

200. Under the eighth ground of appeal, the Appellant submits that the Trial Chamber erred both in law and fact when it sentenced him to twenty years imprisonment. The Appellant argues that the sentence imposed on him is extremely high and that he was sentenced more than once for the same act, despite the Trial Chamber's statement to the contrary. The Appellant requests that the Appeals Chamber acquit him or grant him a new trial. In the alternative, the Appellant submits that the sentence should be reduced.[401] The Prosecution argues that the Appellant was not able to establish in any of the arguments submitted in this ground of appeal that the Trial Chamber made a discernible error in the exercise of its discretion and that this ground should therefore be dismissed.[402]

D. Assignment of Judges

201. On 8 January 2003, Judge Jorda, then President of the International Tribunal, in accordance with Article 12(3) of the Statute, assigned Judges Shahabuddeen, Güney, Gunawardana, Pocar and Meron, the bench of the Appeal Chamber in the present case.[403]

202. On 28 January 2003, pursuant to Rules 65*ter* and 107 of the Rules, the President assigned Judge Shahabuddeen as Pre-Appeal Judge.[404]

203. On 18 June 2003, the President of the International Tribunal, Judge Meron, taking into consideration the changes in the composition of the Appeals Chamber assigned himself, Judges Jorda, Shahabuddeen, Güney and Weinberg de Roca to the bench in this case.[405]

204. On 26 September 2003, due to further changes in the composition of the Appeals Chamber, Judge Schomburg was assigned to this case to replace Judge Jorda.[406]

E. Rule 115 motion

205. On 24 June 2003, the Appellant submitted a "Defence Motion for Additional Evidence" ("Defence Motion") pursuant to Rule 115 of the Rules, requesting the admission as additional evidence of five documents, a videotape and a transcript.[407] The documents submitted concern the ownership of a

[401] Defence Appeal Brief, paras 302-303.
[402] Prosecution Response Brief, paras 9.1-9.20.
[403] Order of the President Assigning Judges to a Bench of the Appeals Chamber, filed on 9 January 2003, French being authoritative. On 24 January 2003, Judge Jorda signed an order assigning Judge Jorda to replace Judge Pocar on the Bench of the Appeals Chamber, filed on 31 January 2003, French being authoritative.
[404] Order Assigning a Pre-Appeal Judge, filed 5 February 2003, French being authoritative.
[405] Order Assigning a Judge to a Case Before the Appeals Chamber, filed on 18 June 2003.
[406] Order Replacing a Judge in a Case Before the Appeals Chamber, filed 26 September 2003.
[407] D-51 Buying and selling contract from 10 September 1985; D-52 Object location from 23 March 1988, D-53 General agreement of the electricity supply enterprise from 29 April 1988; D-54 Decision act of Višegrad Municipality for agricultural agreement from 18 May 1998; D-55 Decision act of Višegrad Municipality for building permit from 9 September 1988; D-56 Video tape of Stojan Kosorić of the house in Sase, 2 March 2003; D-57 Transcript of Stojan Kosorić tape.

house in the municipality of Višegrad and relate to the Trial Chamber's finding that the Appellant acted as an informant to the Milan Lukić group.

206. Following the order of the Pre-Appeal Judge,[408] the Appellant filed an Addendum to the Defence Motion on 11 July 2003. On 17 July 2003, the Prosecution submitted its response arguing that the Defence Motion should be dismissed and that the proposed additional evidence should not be admitted.[409]

207. The Appeals Chamber issued its decision on 21 October 2003, finding that the documents proposed as additional evidence were available at trial and the Appellant did not establish that the exclusion of the additional evidence would lead to a miscarriage of justice.[410] The Appeal Chamber found that the additional evidence was inadmissible and dismissed the Appellant's motion.

F. Oral arguments

208. Oral arguments were heard on 18 November 2003.[411]

[408] On 4 July, the Senior Legal Officer informed the Appellant that the Defence Motion was lacking necessary details and therefore the Appellant would be granted leave to file an addendum to the motion, Letter from John Hocking dated 4 July 2003 and response from Defence Counsel Mr Vladimir Domazet dated 7 July 2003. Scheduling Order signed on 8 July 2003 by the Pre-Appeal Judge granted leave to the Defence to file an addendum to the Additional Evidence Motion, no later than 11 July 2003 and the Prosecution to file its response no later than 18 July 2003. The Defence were allowed to file its reply to the Prosecution response if it so wishes not later than 22 July 2003.
[409] Prosecution Response to Defence Motion for Additional Evidence, 17 July 2003. The Appellant replied on 22 July 2003 and reargued that the proposed additional evidence could have been a decisive factor at trial and that it is in the interest of justice to admit the evidence as additional evidence, Defence Response to Prosecution Motion Dated 17 July 2003.
[410] Decision on Application of Additional Evidence, 21 October 2003.
[411] Scheduling Order, 22 October 2003.

X. ANNEX B: GLOSSARY OF TERMS

Akayesu Appeals Judgement	*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001
Akayesu Trial Judgement	*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998
Aleksovski Appeals Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000
Aleksovski Trial Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999
AT	Transcript of appeal hearing in *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A. All transcript pages referred to in this judgement are taken from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Banović Sentencing Judgement	*Prosecutor v. Predrag Banović,* Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003
BCS	Bosnian Croatian Serbian languages
Blaškić Trial Judgement	*Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, 3 March 2000
Bosnia and Herzegovina	Republic of Bosnia and Herzegovina
Čelebići Appeals Judgement	*Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-A, Judgement, 20 February 2001
Čelebići Trial Judgement	*Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-T, Judgement, 16 November 1998
Defence Appeal Brief	Defence Appellant's Brief Against Judgement of November 29, 2002, filed by counsel for Mitar Vasiljević on 24 June 2003
Defence Additional Appeal Brief	(Additional) Defence Appeal Brief, filed by counsel for Mitar Vasiljević on 24 June 2003
Defence Reply	Defence Respondent's Brief Against Prosecution Respondents Brief of 18 August 2003, filed confidentially by Counsel for Mitar Vasiljević on 2 September 2003. Public redacted version filed on 17 November 2003
Defence Additional Reply	(Additional) Defence Brief in Reply, filed by counsel for Mitar Vasiljević on 2 September 2003.

Delić Rule 115 Decision	*Prosecutor v. Hazim Delić*, Case No.: IT-96-21-R-R119, Decision on motion for Review, 25 April 2002
Drina River incident	The shooting of seven Muslim civilians on the bank of the Drina River on 7 June 1992, in which five of the Muslim men were killed
Erdemović Appeals Judgement	*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 October 1997
Erdemović First Sentencing Judgement	*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996
Erdemović Second Sentencing Judgement	*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgement, 5 March 1998
Furundžija Appeals Judgement	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000
Furundžija Trial Judgement	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
Indictment	*Prosecutor v. Mital Vasiljević*, Case No. IT-98-32-PT, Amended Indictment, 12 July 2001
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Jelisić Appeals Judgement	*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, Judgement, 5 July 2001
Jelisić Trial Judgement	*Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgement, Judgement, 14 December 1999
Jelisić Rule 115 Decision	*Prosecutor v. Goran Jelisić*, Case No.: IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000
JNA	Yugoslav People's Army
Judgement	*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002

Kayishema/Ruzindana Trial Judgement	*Prosecutor v. Clément Kayishema & Obed Ruzindana*, Case No. ICTR-95-T, Judgement, 21 May 1999
Krnojelac Appeals Judgement	*Prosecutor v Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003
Krnojelac Trial Judgement	*Prosecutor v Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002
Krstić Rule 115 Decision	*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003
Krstić Trial Judgement	*Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001
Kunarac Appeals Judgement	*Prosecutor v. Dragoljub Kunarac et al*, Case No. IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002
Kunarac Trial Judgement	*Prosecutor v. Dragoljub Kunarac et al*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001
Kupreškić Appeals Judgement	*Prosecutor v. Zoran Kupreškić et al*., Case No. IT-95-16-A, Judgement, 23 October 2001
Kupreškić Rule 115 Decision	*Prosecutor v Zoran Kupreškić et al*, Case No.: IT-95-16-A, Decision on the Motions of Appellants Kupreškić et al to Admit Additional Evidence, 26 February 2001
Kupreškić Trial Judgement	*Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000
Kvočka Trial Judgement	*Prosecutor v. Miroslav Kvočka et al*., Case No. IT-98-30/1-T, Judgement, 2 November 2001
Musema Trial Judgement	*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement, 27 January 2000
Ojdanić Decision	*Prosecutor v. Milutinović et al*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No.: IT-99-37-AR72, 21 May 2003
Plavšić Sentencing Judgement	*Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003
Prosecution	The Office of the Prosecutor
Prosecution Response Brief	Prosecution Respondent's Brief, filed confidentially on 18 August 2003. Public redacted version filed on 7 November 2003
Rules	Rules of Procedure and Evidence of the Tribunal

Ruggiu Trial Judgement	*Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentencing, 1 June 2000
Serushago Appeals Judgement	*Omar Serushago v. the Prosecutor*, Case No. ICTR-98-39-A, Appeal against Sentencing: Reasons for Judgement, 6 April 2000
Serushago Sentencing	*Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999
SFRY	Socialist Federal Republic of Yugoslavia
Simić Sentencing Judgement	*Prosecutor v. Milan Simić*, Case No. IT-95-9/2, Sentencing Judgement, 17 October 2002
Simić Trial Judgement	*Prosecutor v. Blagoje Simić et al*, Case No. IT-95-9-T, Judgement, 17 October 2003
Statute	Statute of the Tribunal
T	Transcript of trial hearing in *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T. All transcript pages referred to in this judgement are taken from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Tadić Appeal Judgement	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999
Tadić Jurisdiction Decision	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadić Rule 115 Decision	*Prosecutor v. Tadić,* Case No. IT-94-1-A, Decision on Appellant's Motion for Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998
Tadić Sentencing Appeal	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A & IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000
Tadić Trial Judgement	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997
TO	Territorial Defence
Todorović Sentencing Judgement	*Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001