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-98-30/1-A

Date: 28 February 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

MIROSLAV KVOČKA
MLAĐO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

JUDGEMENT

The Office of the Prosecutor:

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Mr. David Re
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Mr. Toma Fila for Mlađo Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Goran Rodić for Dragoljub Prcać

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I. INTRODUCTION

1. The Appeals Chamber of the 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 is seised of four appeals[1] from the written Judgement rendered by Trial Chamber I on 2 November 2001 in the case of *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać,* Case No IT-98-30/1-T ("Appeals" and "Trial Judgement", respectively). Milojica Kos submitted an appeal, which was subsequently withdrawn, leaving the appeals by the other four convicted Appellants ("Appellants").[2]

2. The events giving rise to these Appeals took place within three camps established at the Omarska and Trnopolje villages and at the Keraterm factory, in the area of Prijedor, in northwest Bosnia and Herzegovina. These camps were established shortly after the Serb takeover of the city of Prijedor on 30 April 1992; their overriding purpose was to hold individuals who were suspected of sympathizing with the opposition to the takeover.[3] The Trial Chamber found that the Omarska camp functioned as a joint criminal enterprise: the atrocities committed therein consisted of a broad mixture of serious crimes committed intentionally in order to persecute and subjugate non-Serbs detained in the camp.[4]

3. Miroslav Kvočka ("Kvočka") was a professional police officer attached to the Omarska police station department at the time the Omarska camp was established.[5] The Trial Chamber found that Kvočka participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service and that he had some degree of authority over the guards.[6] Because of the authority and influence which he exerted over the guard service and the limited attempts he made to prevent crime and alleviate the suffering of detainees, as well as the significant role he played in maintaining the functioning of the camp despite his knowledge that it was a criminal endeavour, Kvočka was found to be a co-perpetrator of the joint criminal enterprise of the Omarska camp.[7] Under Article 7(1) of the Statute, he was found guilty of co-perpetrating persecutions (count 1) under Article 5 of the Statute as well as murder (count 5) and torture (count 9) under Article 3 of

[1] Kvočka Appeal Brief, filed 11 April 2002; Prcać Appeal Brief filed 12 April 2002; Radić Appeal Brief, filed 11 April 2002; Žigić Appeal Brief, filed 3 July 2002.
[2] Kos's Brief on Appeal From Trial Judgement dated 2 November 2001, filed 2 April 2002; Kos's Brief on Appeal Withdrawal, filed 14 May 2002.
[3] Trial Judgement, paras 2 and 15-21.
[4] *Ibid.*, paras 319 and 320.
[5] *Ibid.*, para. 332.
[6] *Ibid.*, para. 372.
[7] *Ibid.*, para. 414.

the Statute.[8] The remaining charges against him were dismissed.[9] The Trial Chamber held that he did not incur superior responsibility for failing to prevent or punish crimes committed by his subordinates, pursuant to Article 7(3) of the Statute.[10] The Trial Chamber sentenced him to a single sentence of seven years' imprisonment for the crimes for which he was convicted.[11] He was granted provisional release on 17 December 2003 pending delivery of this Judgement. [12]

4. Milojica Kos ("Kos") was a waiter by profession who was mobilized to serve as a reserve officer. The Trial Chamber found that he was a guard shift leader in the Omarska camp[13] from approximately 31 May to 6 August 1992.[14] Because of the substantial contribution he made to the maintenance and functioning of the camp, the Trial Chamber found that he knowingly and intentionally contributed to the furtherance of the joint criminal enterprise at the Omarska camp.[15] He was found individually responsible under Article 7(1) of the Statute and guilty as a co-perpetrator of persecutions (count 1) under Article 5 of the Statute as well as murder (count 5) and torture (count 9) under Article 3 of the Statute.[16] The Trial Chamber was not satisfied that sufficient proof was provided to demonstrate that he exercised the necessary degree of control over the guards who committed specific crimes within the Omarska camp.[17] As a result, he did not incur superior responsibility under Article 7(3) of the Statute. The remaining charges against him were dismissed.[18] The Trial Chamber sentenced him to a single sentence of six years' imprisonment for these crimes.[19] Following the withdrawal of his appeal, he filed a motion for early release, which was granted on 31 July 2002.[20]

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[8] *Ibid.*, paras 419 and 752.
[9] *Ibid.*, para. 753. The following counts were dismissed: Count 2, Inhumane Acts as a Crime against Humanity; Count 3, Outrages on Personal Dignity as a Violation of the Laws or Customs of War; Count 4, Murder as a Crime against Humanity; Count 8, Torture as a Crime against Humanity; Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.
[10] Trial Judgement, para. 412.
[11] *Ibid.*, para. 754.
[12] Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003. *See* also the Order Varying the Provisional Release of Miroslav Kvočka and for his Return to the Tribunal During the Appeal Hearing, 11 March 2004.
[13] Trial Judgement, para. 485.
[14] *Ibid.*, paras 475-476.
[15] *Ibid.*, paras 499-500.
[16] *Ibid.*, paras 504 and 758.
[17] *Ibid.*, para. 502.
[18] *Ibid.*, para. 759. The following counts were dismissed: Count 2, Inhumane Acts as a Crime against Humanity; Count 3, Outrages on Personal Dignity as a Violation of the Laws or Customs of War; Count 4, Murder as a Crime against Humanity; Count 8, Torture as a Crime against Humanity; Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.
[19] Trial Judgement, para. 760.
[20] Order of the President for the Early Release of Milojica Kos, 1 August 2002.

5. Dragoljub Prcać ("Prcać") was a retired policeman and a crime technician who was mobilized to serve in the Omarska police station on 29 April 1992.[21] The Trial Chamber found that he was an administrative aide to the commander of the Omarska camp for over three weeks[22] and that, as such, he was able to move unhindered through the camp.[23] As a result of his position, Prcać was found to have some influence over the guards.[24] The Trial Chamber found that he remained impassive when crimes were committed in his presence and that, although not responsible for the behaviour of guards or interrogators, he was still responsible for managing the movement of detainees within the camp.[25] The Trial Chamber concluded that his participation in the camp, with full knowledge of what went on, was significant and that his acts and omissions substantially contributed to assisting and facilitating the joint criminal enterprise of the camp.[26] Pursuant to Article 7(1) of the Statute, the Trial Chamber found him guilty of co-perpetrating persecution (count 1) under Article 5 of the Statute as well as murder (count 5) and torture (count 9) under Article 3 of the Statute.[27] The Trial Chamber found that he did not incur superior responsibility pursuant to Article 7(3) of the Statute.[28] The remaining counts against him were dismissed.[29] The Trial Chamber sentenced Dragoljub Prcać to a single sentence of five years' imprisonment for the crimes for which he was convicted.[30]

6. Mlađo Radić ("Radić") was a professional policeman attached to the Omarska police station. The Trial Chamber found that he took up his duties as guard shift leader in the Omarska camp on approximately 28 May 1992 and remained there until the end of August 1992.[31] As a guard shift leader, Radić was found to have been in a position of substantial authority over guards on his shift. He used his power selectively to prevent crimes, and ignored the vast majority of crimes committed on his shift.[32] The Trial Chamber noted that guards on his shift were particularly brutal and that Radić personally committed sexual violence against female detainees.[33] The Trial Chamber found that Radić played a substantial role in the functioning of Omarska camp and that he was a co-perpetrator to the joint criminal enterprise. He was found guilty under Article 7(1) of the

[21] Trial Judgement, para. 425.
[22] *Ibid.*, paras 468 and 469.
[23] *Ibid.*, para. 459.
[24] *Ibid.*, para. 461.
[25] *Ibid.*, paras 461-462.
[26] *Ibid.*, paras 460-463.
[27] *Ibid.*, paras 470 and 755.
[28] *Ibid.*, para. 467.
[29] *Ibid.*, para. 756. The following counts were dismissed: Count 2, Inhumane Acts as a Crime against Humanity; Count 3, Outrages on Personal Dignity as a Violation of the Laws or Customs of War; Count 4, Murder as a Crime against Humanity; Count 8, Torture as a Crime against Humanity; Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.
[30] Trial Judgement, para. 757.
[31] *Ibid.*, paras 512 and 517.
[32] *Ibid.*, para. 526.

Statute as a co-perpetrator of the following crimes committed as part of a joint criminal enterprise: persecutions (count 1) under Article 5 of the Statute and murder (count 5) and torture (counts 9 and 16) under Article 3 of the Statute.[34] The remaining charges against him were dismissed.[35] The Trial Chamber declined to find that he incurred superior responsibility for his involvement in Omarska camp pursuant to Article 7(3) of the Statute.[36] Mlađo Radić received a single sentence of twenty years' imprisonment for his involvement at Omarska.[37]

7. Zoran Žigić ("Žigić") was a civilian taxi-driver who was mobilized to serve as a reserve police officer. He worked for a short period of time in the Keraterm camp and delivered supplies,[38] and he was also allowed to enter the Omarska and Trnopolje camps.[39] With regard to the Omarska camp, the Trial Chamber found that Žigić regularly entered the camp specifically to abuse detainees. Žigić's significant participation in the crimes at the Omarska camp, coupled with his awareness of their persecutory nature and the eagerness and aggressiveness with which he participated therein, led the Trial Chamber to conclude that he was a co-perpetrator of the joint criminal enterprise of Omarska camp.[40] Žigić was the only accused in the present case charged with crimes committed at the Keraterm camp. The Trial Chamber found that he committed persecutions, torture and murder at the Keraterm camp and that these crimes were part of a widespread or systematic attack against non-Serbs detained there, constituting crimes against humanity.[41] The Trial Chamber also found that Žigić entered Trnopolje camp and abused detainees.[42]

8. Pursuant to Article 7(1) of the Statute, Žigić was found guilty of persecutions (count 1) for the crimes committed in the Omarska camp generally and in particular against Bećir Medunjanin, Asef Kapetanović, Witnesses AK, AJ, T, Abdulah Brkić and Emir Beganović, as well as for crimes committed by him in the Keraterm camp against Fajzo Mujkanović, Witness AE, Redžep Grabić, Jasmin Ramadonović, Witness V, Edin Ganić, Emsud Bahonjić, Drago Tokmadžić and Sead Jusufagić.[43]

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[33] *Ibid.*, para. 575.
[34] *Ibid.*, paras 578 and 761.
[35] *Ibid.*, paras 579 and 762. The following counts were dismissed: Count 2, Inhumane Acts as a Crime against Humanity; Count 3, Outrages on Personal Dignity as a Violation of the Laws or Customs of War; Count 4, Murder as a Crime against Humanity; Count 8, Torture as a Crime against Humanity; Count 10, Cruel Treatment as a Violation of the Laws or Customs of War; Count 14, Torture as a Crime against Humanity; Count 15, Rape as a Crime against Humanity; Count 17, Outrages upon Personal Dignity as a violation of the Laws or Customs of War.
[36] Trial Judgement, para. 570.
[37] *Ibid.*, para. 763.
[38] *Ibid.*, para. 4.
[39] *Ibid.*, paras 4, 614, 676 and 684.
[40] *Ibid.*, paras 610 and 688.
[41] *Ibid.*, para. 672.
[42] *Ibid.*, para. 676. *See* generally para. 682 for conclusion.
[43] *Ibid.*, para. 691 (a).

9. Žigić was found guilty of murder (count 7) with respect to crimes committed in the Omarska camp generally and against Bećir Medunjanin in particular. With regard to the Keraterm camp, he was found guilty of murder (count 7) with respect to Drago Tokmadžić, Emsud Bahonjić and Sead Jusufagić.[44] He was found guilty of torture (count 12) with respect to crimes committed in the Omarska camp generally and against Abdulah Brkić, Witnesses T, AK, AJ, Asef Kapetanović in particular, and with respect to crimes committed in the Keraterm camp against Fajzo Mujkanović, Witness AE, Redžep Grabić and Jasmin Ramadonović.[45] He was found guilty of cruel treatment (count 13) with respect to crimes committed against Emir Beganović in the Omarska camp and Hasan Karabasić in the Trnopolje camp.[46] The remaining charges against him were dismissed.[47] The Trial Chamber sentenced Zoran Žigić to a single sentence of twenty-five years' imprisonment.[48]

10. All Appellants have appealed both their convictions and the sentences received. Notices of appeal were filed in November 2001. This long appeal has been characterized in part by the filing between August 2002 and June 2003 of a number of motions to admit additional evidence on appeal pursuant to Rule 115 of the Rules by three out of the four Appellants.[49] The "Decision on Appellants' Motions to Admit Additional Evidence Pursuant to Rule 115" was rendered by the Appeals Chamber on 16 February 2004. The Appeals Chamber found that three items of additional evidence as well as three items of rebuttal material[50] were admissible pursuant to Rule 115 of the Rules. Four witnesses were heard in the evidentiary portion of the hearing on appeal on 23 March 2004, as well as between 19 and 21 July 2004.

11. All four Appellants share common grounds of appeal concerning, *inter alia*, the doctrine of joint criminal enterprise and the manner in which it was pleaded, in addition to other grounds of appeal specific to them. The Appeals Chamber heard the Appeals from 23 to 26 March 2004. Additional hearings on appeal took place between 19 and 21 July 2004.

12. Having considered the written and oral submissions of the Appellants and the Prosecution, the Appeals Chamber hereby renders its Judgement.

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[44] *Ibid.*, para. 691 (b).
[45] *Ibid.*, para. 691 (c).
[46] *Ibid.*, para. 691 (d).
[47] *Ibid.*, paras 692, 693 and 765.
[48] *Ibid.*, para. 766.
[49] *See* Annex A: Procedural Background, paras 240-246.
[50] *See* Decision on Prosecution's Motion to Adduce Rebuttal Material, issued 12 March 2004.

II. GENERAL GROUNDS OF APPEAL

A. Standard of Review

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

14. On appeal, the Parties must limit their arguments to legal errors, which invalidate the decision of the Trial Chamber and to factual errors, which occasion a miscarriage of justice within the scope of Article 25 of the Statute. These criteria have been frequently referred to and are well established by the Appeals Chamber of both the ICTY[51] and the ICTR.[52]

15. The Appeals Chamber recalls at the outset that it maintains a discretion under Article 25 of the Statute to determine which of the parties' submissions warrant a reasoned written response. The Appellant has the obligation to set out his grounds of appeal clearly, and to provide the Appeals Chamber with specific references to the alleged errors of the Trial Judgement and to the parts of the record he is using to support his case.[53] The Appeals Chamber cannot be expected to distil the Appellant's legal arguments from vaguely pleaded suggestions of legal error mentioned in passing that are connected with factual arguments. If an argument is clearly without foundation, the Appeals Chamber is not required to provide a detailed written explanation of its position with regard to that argument. Therefore, the Appeals Chamber may decide not to consider arguments which are not directly pleaded as grounds of appeal or to reject, without detailed reasoning, arguments that are obviously ill-founded.[54]

1. Legal Errors

16. Any party alleging an error of law must, at least, identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or

[51] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, paras 34-40; *Čelebići* Appeal Judgement, paras 434-435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras 35-48; *Vasiljević* Appeal Judgement, paras 4-12.
[52] *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177 and 320; *Musema* Appeal Judgement, para. 15.
[53] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4(b); *see* also *Vasiljević* Appeal Judgement, para. 12.

revised may therefore be rejected on that ground.[55] However, 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.[56]

17. Where the Appeals Chamber finds that there is an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[57]

2. Factual Errors

18. The standard of review in relation to alleged errors of fact applied by the Appeals Chamber is one of reasonableness. When considering alleged errors of fact as raised by the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[58] The Appeals Chamber will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a Trial Chamber, but only one which has caused 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 the crime."[59]

19. The Appeals Chamber bears in mind that in determining whether or not a Trial Chamber's finding was reasonable, it "will not lightly disturb findings of fact by a Trial Chamber."[60] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić et al.*, wherein it was stated that:

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[54] *Kunarac et al.* Appeal Judgement, para. 98; *Krnojelac* Appeal Judgement, para. 16; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, paras 21-23.
[55] *Krnojelac* Appeal Judgement, para. 10.
[56] *Vasiljević* Appeal Judgement, para. 6. *See* also *Kambanda* Appeal Judgement, para. 98: "[I]n the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced: *jura novit curia"*.
[57] *Blaskić* Appeal Judgement, para. 15; *Kordić and Čerkez* Appeal Judgement, para. 17.
[58] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Čelebići* Appeal Judgement, para. 435; *Blaskić* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 18.
[59] *Furundžija* Appeal Judgement, para. 39, quoting Black's Law Dictionary (7th Edition, St. Paul, Minn 1999). *See* also *Kunarac et al.* Appeal Judgement, para. 37 referring to *Kupreškić et al.* Appeal Judgement, para. 30.
[60] *Furundžija* Appeal Judgement, para. 37, referring to *Tadić* Appeal Judgement, para. 64. *See* also *Aleksovski* Appeal Judgement, para. 63; *Krnojelac* Appeal Judgement, para. 11; *Musema* Appeal Judgement, para. 18.

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[61]

20. The Appeals Chamber considers that there are no reasons to depart from the standard set out above. That standard will be applied where appropriate in the present Judgement.

B. Alleged insufficiency of reasoning in the Trial Chamber's Judgement

21. Several of the Appellants contend that the Trial Chamber failed to give sufficient reasons for their conviction. According to the Appellant Žigić, the Trial Judgement was not well reasoned and its quality was far below the standard of the Tribunal, since the reasoning in the opinion was too short.[62] He submits that the Trial Chamber failed to assess all of the evidence presented and alleges that the Trial Chamber ignored more than 75 percent of the evidence.[63] In his view, the Trial Chamber, while ignoring the major part of the evidence, selected only evidence in favour of conviction.[64] Žigić claims that the Trial Chamber considered only undisputed issues in its Judgement, whereas the questions and objections raised by him were not addressed.[65] Furthermore, Žigić argues that, in some cases, the Trial Chamber did not discuss all the elements of crimes.[66] The Appellant Radić refers to the case of *Georgiadis v. Greece* in the European Court of Human Rights[67] to demonstrate that a court of law must "give much more specific reason" when its finding is of "decisive importance for appellant's rights" and when the findings include "assessment of factual issues".[68] Similar arguments are raised by Kvočka.[69]

22. The Prosecution responds that the duty to provide a reasoned opinion in writing does not require the Trial Chamber to articulate in its judgement every step of its reasoning in reaching particular findings, or to refer to the testimony of every relevant witness, or to every piece of evidence on the trial record.[70] It adds that the Trial Chamber is not obliged to give a detailed answer to every argument.[71] The Prosecution submits that, in the absence of some indication that the Trial Chamber did not weigh all the evidence that was presented to it, the Trial Chamber's reasoned

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[61] *Kupreškić et al.* Appeal Judgement, para. 30; *see* also *Blaskić* Appeal Judgement, paras 17-18; *Kordić and Čerkez* Appeal Judgement, para. 19, footnote 11.
[62] Žigić Appeal Brief, paras 6, 10-12.
[63] Žigić Appeal Brief, paras 16-20 and 24.
[64] Žigić Appeal Brief, paras 31, 43-45.
[65] Žigić Appeal Brief, paras 39, 40.
[66] Žigić Appeal Brief, paras 41-42.
[67] *Georgiadis v. Greece*, 29 May 1997, Eur. Ct. H. R., Report 1997-III.
[68] Radić Appeal Brief, para. 77.
[69] *See,* e. g., Kvočka Appeal Brief, para. 123.
[70] Prosecution Respondent's Brief, para. 2.18.

opinion will not be defective as a result of a failure to refer to a witness, even one whose evidence contradicts the findings of the Trial Chamber.[72] In the Prosecution's view, the Trial Chamber is only required to make findings of those facts which are essential to a determination of guilt on a particular point, and is not required to make findings in relation to other facts which are not essential, even if they were expressly alleged in the indictment.[73]

23. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98*ter*(C) of the Rules.[74] However, this requirement relates to the Trial Chamber's Judgement; the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[75] It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective. Considering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail.[76] If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings. It is therefore not possible to draw any inferences about the quality of a judgement from the length of particular parts of a judgement in relation to other judgements or parts of the same judgement.

24. The Appeals Chamber notes that, in certain cases, the requirements to be met by the Trial Chamber are higher. As an example of a complex issue, the Appeals Chamber considered the appraisal of witness testimony with regard to the identity of the accused:

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[71] *Ibid.*, para. 2.17.
[72] *Ibid.*, para. 2.18.
[73] *Ibid.*, para. 2.19.
[74] *Furundžija* Appeal Judgement, para. 69; *Kunarac et al.* Appeal Judgement, para. 41.
[75] *Čelebići* Appeal Judgement, para. 498; *Kupreškić et al.* Appeal Judgement, para. 39; *Kordić and Čerkez* Appeal Judgement, para. 382. *See* also above, para. 23.
[76] *Čelebići* Appeal Judgement, paras 481, 498; *Kupreškić et al.* Appeal Judgement, para. 32.

> While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion". In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence. [77]

But even in those cases, the Trial Chamber is only expected to identify the *relevant* factors, and to address the *significant* negative factors. If the Defence adduced the evidence of several other witnesses, who were unable to make any meaningful contribution to the facts of the case, even if the conviction of the accused rested on the testimony of only one witness, the Trial Chamber is not required to state that it found the evidence of each Defence witness irrelevant. On the contrary, it is to be presumed that the Trial Chamber took notice of this evidence and duly disregarded it because of its irrelevance. In general, as the *Furundžija* Appeals Chamber stated:

> The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that "the extent to which this duty ... applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case".[78]

25. The Appeals Chamber therefore emphasizes that it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[79] General observations on the length of the Judgement, or of particular parts of the Judgement, or of the discussion of certain parts of the evidence, do not qualify, except in particularly complex cases, as the basis of a valid ground of appeal.[80]

C. Issues related to the Indictment

1. Notice

26. Each of the Appellants contends that the Trial Chamber erred in law in convicting him of crimes not properly pleaded in the Indictment for which he therefore lacked notice. This section will outline the law governing challenges to the failure of an indictment to provide notice and then will consider the merits of the argument, raised by Appellants Radić and Zigić, that the Indictment failed to plead joint criminal enterprise as a mode of responsibility. Finally, the Appeals Chamber will discuss the Trial Chamber's approach to the Schedules attached to the Indictment. Other

[77] *Kupreškić et al.* Appeal Judgement, para. 39.
[78] *Furundžija* Appeal Judgement, para. 69 (footnotes omitted).
[79] *Cf. Kordić and Čerkez* Appeal Judgement, para. 21.
[80] *Cf.* Decision on Prosecution Motion Requesting Order to Zoran Žigić to File Grounds of Appeal, 14 June 2002, para. 10.

challenges to the adequacy of the Indictment will be discussed in the sections dealing with the individual grounds of appeal.

2. The law applicable to indictments

27. In accordance with Article 21(4)(a) of the Statute, an accused has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". It is well established in the case law of the International Tribunal that Articles 18(4) and 21(2), (4)(a), and (4)(b) of the Statute require the Prosecution to plead in the indictment all material facts underpinning the charges in the indictment, but not the evidence by which the material facts are to be proven.[81]

28. If the Defence is not properly notified of the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial.[82] Thus, an indictment is defective if it fails to plead required material facts.[83] An indictment which merely lists the charges against the accused without pleading the material facts does not constitute adequate notice because it lacks "enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence".[84] Whether or not a fact is considered material depends on the nature of the Prosecution's case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice. For example, if the Prosecution alleges that an accused personally committed the criminal acts in question, the indictment should include details which explain this allegation, such as the identity of the victim, the time and place of the events, and the means by which the offence was committed.[85] If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[86] Therefore, in order for an accused charged with joint criminal enterprise to fully understand which

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[81] *Kupreškić et al.* Appeal Judgement, para. 88.
[82] *Niyitigeka* Appeal Judgement, para. 194.
[83] *Kupreškić et al.* Appeal Judgement, para. 114.
[84] *Ibid.*, para. 88.
[85] *Galić* Decision on Leave to Appeal, para. 15.
[86] *See*, *e.g.*, *Prosecutor v. Stanišić*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, Decision on Duško Knežević's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13.

acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged.[87]

29. If an indictment merely quotes the provisions of Article 7(1) without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous.[88] When the Prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging.

30. Where the scale of the crimes or the fallibility of witness recollection prevents the Prosecution from providing all the necessary material facts, less information may be acceptable. However, even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured. The Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused as the trial progresses.[89]

31. An indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified. Other defects in an indictment may arise at a later stage of the proceedings if the evidence at trial turns out to be different from that expected. In such circumstances, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[90]

32. When considering a motion to amend an indictment, the Trial Chamber must consider whether the Prosecution has provided the accused with clear and timely notice of the allegations

[87] *Krnojelac* Appeal Judgement, para. 138.
[88] *See*, *e.g., Aleksovski* Appeal Judgement, footnote 319; *Čelebići* Appeal Judgement, para. 350; *Krnojelac* Appeal Judgement, paras 138-144.
[89] *Kupreškić et al*. Appeal Judgement, para. 92.
[90] *Ibid.*

such that the Defence has had a fair opportunity to conduct investigations and to prepare its response notwithstanding the defective indictment.[91]

33. In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused has nevertheless been accorded a fair trial. In some instances, where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness, a conviction may be entered. Where the failure to give sufficient notice of the legal and factual reasons for the charges against him has violated the right to a fair trial, no conviction may result.

34. When challenges to an indictment are raised on appeal, the indictment can no longer be amended and so the Appeals Chamber must determine whether the error of trying the accused on a defective indictment "invalidat[ed] the decision."[92] In making this determination, the Appeals Chamber does not exclude the possibility that, in some instances, the prejudicial effect of a defective indictment can be "remedied" if the Prosecution has provided the accused with clear, timely and consistent information detailing the factual basis underpinning the charges against him or her, which compensates for the failure of the indictment to give proper notice of the charges.[93]

35. When an accused raises the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to demonstrate that the accused's ability to prepare a defence was not materially impaired.[94] When an appellant raises a defect in the indictment for the first time on appeal, then the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[95]

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[91] *Niyetegeka* Appeal Judgement, para. 196; *Prosecutor v. Karemera et. al*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 28: "The final consideration in determining the effect of the Amended Indictment on the fairness of the proceedings is the risk of prejudice to the Accused. The Trial Chamber concluded that proceeding to trial on the Amended Indictment without giving the Accused additional time to prepare their defence to the Amended Indictment would cause prejudice to the Accused. This problem, however, can be addressed by adjourning the trial to permit the Accused to investigate the additional allegations. The Trial Chamber also retains the option of proceeding with the presentation of the Prosecution case without delay; in such circumstances, however, there would be particular need to consider the exercise of the power to adjourn the proceedings in order to permit the Accused to carry out investigations and the power to recall witnesses for cross-examination after the Accused's investigations are complete."
[92] Statute, Art. 25(1)(a).
[93] *Kupreškić et al*. Appeal Judgement, para. 114.
[94] *Niyitigeka* Appeal Judgement, paras 198-199.
[95] *Ibid.* para. 200.

3. Failure to plead joint criminal enterprise in the Indictment

36. Radić argues that the failure to plead joint criminal enterprise responsibility in the Indictment constitutes a violation of his right to notice of the charge against him pursuant to Article 21(4) of the Statute. Radić argues that by convicting him for an unpleaded mode of responsibility – joint criminal enterprise – the Trial Chamber effectively amended the Indictment at trial in violation of the procedures set out in Rule 50 of the Rules.[96] He maintains that the form of criminal responsibility is an essential element of the Prosecution's case and argues that he should not have to refer to ICTY case law such as the *Tadić* Appeal Judgement in order to understand the charges presented against him in the Indictment. Moreover, even if the reference to Article 7(1) were sufficient to put him on notice that he might be prosecuted based on joint criminal enterprise responsibility, this did not provide him with sufficient notice of the type of joint criminal enterprise responsibility which would form the basis for the Prosecution's case. Finally, he asserts that the Prosecution's responsibility to inform the accused of the charges against him must be discharged in the Indictment and cannot be satisfied through later filings or statements.[97]

37. Žigić also argues that the Prosecution failed to plead criminal responsibility based on a joint criminal enterprise in the Indictment, and that he was not properly informed of the allegations against him.[98] In particular, Žigić notes that the Prosecution did not inform him of the specific crimes to which the joint criminal enterprise was related.[99]

38. Kvočka raises a similar argument in his Reply Brief. He argues that the Prosecution did not charge him in the Indictment with acting in accordance with a common plan to persecute detainees in Omarska camp.[100] In addition, he points out that the Prosecution failed to give the identities of the other members of this common design.[101]

39. Appellant Prcać made a related comment in his oral submissions at the appeals hearing, arguing that the Trial Chamber used joint criminal enterprise to save "the indictment from being completely dismissed".[102]

40. The Prosecution responds that the reference in the Indictment to individual criminal responsibility under Article 7(1) was sufficient to put the Appellants on notice that they were being

[96] Radić Appeal Brief, para. 17.
[97] Radić Reply Brief, paras 17-28; *see* also AT. 176-177 (23 March 2004).
[98] Žigić Appeal Brief, para. 405; Zigić Reply Brief, para. 13.1.
[99] Žigić Reply Brief, para. 13.2.
[100] Kvočka Reply Brief, para. 98.
[101] Kvočka Reply Brief, para. 99.
[102] AT. 522 (26 March 2004).

prosecuted for participating in a joint criminal enterprise since the jurisprudence of the International Tribunal has interpreted joint criminal enterprise as a form of individual criminal responsibility under Article 7(1).[103] Moreover, the intention to prosecute for joint criminal enterprise responsibility was made explicit in both the Prosecution's updated pre-trial brief and its opening statement.[104] The Prosecution emphasizes that its opening statement made it clear to all of the Appellants that they would be prosecuted on a theory of common purpose based on the three categories outlined in *Tadić*, and that none of the Appellants objected at that stage that the theory of common purpose or joint criminal enterprise had not been properly pleaded in the Indictment.[105] The Prosecution further notes that none of the Appellants raised this issue at the Rule 98*bis* hearing, and that none of them stated at trial that their ability to conduct cross-examination had been impaired as a result of the failure of the Indictment to allege the existence of a joint criminal enterprise.[106] The Prosecution argues that even if the notice was deficient, the Appellants have failed to identify any prejudice flowing from it.[107]

41. The Appeals Chamber notes that joint criminal enterprise was not pleaded in the initial indictments against the Appellants or any of the subsequent amendments to the Indictment.[108] The final version of the Amended Indictment, dated 26 October 2000, specifically indicates that the Accused were individually responsible for the crimes charged in the Indictment pursuant to Article 7(1) of the Statute, which "is intended to incorporate any and all forms of individual criminal responsibility as set forth in Article 7(1)."[109] The Appeals Chamber reaffirms that the Prosecution should only plead those modes of responsibility which it intends to rely on. Although the Indictment relies on all modes of individual criminal responsibility found in Article 7(1) of the Statute, the Prosecution has failed to plead the material facts necessary to support each of these modes. For example, despite pleading ordering as a mode of responsibility, the Indictment does not include any material facts which allege that any Accused ordered the commission of any particular crime on any occasion. Thus, the Appeals Chamber finds that in pleading modes of responsibility

[103] Prosecution Respondent's Brief, paras 4.7-4.8, referring to *Tadić* Appeal Judgement, para. 190.
[104] Prosecution Respondent's Brief, para. 4.9, referring to *Prosecutor v. Blaškić,* Case No. IT-95-14-T, Decision on the Defence Motion to Dismiss the Indictment Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Charges), 4 April 1997, para. 11; *Prosecutor v. Krnojelac,* Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 February 2000, paras 14-18.
[105] Prosecution Respondent's Brief, para. 4.9.
[106] *Ibid.*
[107] *Ibid.*, paras 4.10-4.20.
[108] *See* Case No. IT-95-4-I (or PT) Indictment, 10 February 1995; Case No. IT-95-8-PT, Indictment, 21 July 1995; Case No. IT-98-30-I, Amended Indictment, 12 June 1998; Amended Indictment, 31 May 1999; Amended Indictment, 29 August 2000.
[109] Indictment, 26 October 2000, para. 16.

for which no corresponding material facts are pleaded, the Indictment is vague and is therefore defective.

42. The Appeals Chamber also considers that the Indictment is defective because it fails to make any specific mention of joint criminal enterprise, although the Prosecution's case relied on this mode of responsibility. As explained above, joint criminal enterprise responsibility must be specifically pleaded. Although joint criminal enterprise is a means of "committing", it is insufficient for an indictment to merely make broad reference to Article 7(1) of the Statute. Such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility. Moreover, in the Indictment the Prosecution has failed to plead the category of joint criminal enterprise or the material facts of the joint criminal enterprise, such as the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[110]

43. The Appeals Chamber notes, however, that a careful review of the trial record reveals that the Prosecution gave timely, clear, and consistent information to the Appellants, which detailed the factual basis of the charges against them and thereby compensated for the Indictment's failure to give proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility.

44. The Appeals Chamber also notes that the Prosecution's Pre-Trial Brief of 9 April 1999 reproduces Article 7(1) of the Statute and mentions the common purpose doctrine in broad terms but does not specify that the Prosecution intends to rely on this mode of responsibility.[111]

45. In the Prosecution's Submission of Updated Version of Pre-Trial Brief, filed 14 February 2000, the Prosecution addresses common purpose responsibility in some detail. The brief specifically pleads the requisite elements of joint criminal enterprise, setting out the alleged common purpose, the plurality of participants, and the nature of the participation of each Accused in the common enterprise.[112] According to the Prosecution, the common purpose of the Accused was to "rid the Prijedor area of Muslims and Croats as part of an effort to create a unified Serbian State."[113] This brief also delineates the three categories of collective criminality, citing

[110] *See*, *e.g.*, *Prosecutor v. Stanišić*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, Decision on Duško Knežević's Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave To Amend the Consolidated Indictment, 4 March 2002, para. 13.
[111] Prosecutor's Pre-Trial Brief, 9 April 1999, paras 209-210.
[112] Prosecution Pre-trial Brief, paras 208-240.
[113] Prosecution Pre-trial Brief, para. 236.

corresponding case law, and indicates into which category each of the Accused falls.[114] The Prosecution only names Kvočka as being responsible under the first category of joint criminal enterprise, but alleges that Kvočka, Radić and Kos were part of a systemic joint criminal enterprise.[115] According to the Prosecution, Kvočka, Radić, and Kos were also responsible under the extended form of joint criminal enterprise for the foreseeable consequences of the acts of others who were, such as Žigić, permitted to enter the camp.[116] It is unclear from this brief whether Žigić is alleged to have joined the common purpose of the joint criminal enterprise. The Prosecution states clearly that the other three accused are alleged to be responsible for the acts of Žigić and "others like him" because they permitted them to enter the camp.[117] However, the Prosecutor also states that "[e]ach of the accused actively participated in this common design, and in doing so, each bears responsibility for crimes against humanity and violations of the laws of war", suggesting, without clearly stating, that Žigić also shared the common purpose.[118]

46. The Appeals Chamber further considers that the Prosecution's concentration on joint criminal enterprise is emphasized again in the opening statement of 28 February 2000. Prosecution Counsel referred to paragraph 191 of the *Tadić* Appeal Judgement and argued that the common design that united the accused was the creation of a Serbian state within the former Yugoslavia, and that they worked to achieve this goal by participating in the persecution of Muslims and Croats.[119] Prosecution Counsel submitted that although Kvočka did not physically commit any crimes, his presence and his failure to restrain the guards encouraged the abuse of detainees. Therefore, in the Prosecution Counsel's view, Kvočka voluntarily participated in the "common criminal design" and was responsible under the "first category of liability under this theory of common purpose".[120] With regard to the acts committed by outsiders, who, like Žigić, entered the Omarska camp to maltreat detainees, Counsel alleged that the accused did nothing to prevent such incursions. Thus, Counsel argued, the accused became responsible for the foreseeable consequences of these incursions under "the third category of common purpose liability."[121]

47. After the Prosecution's opening statement, the Trial Chamber heard the testimonies of Kvočka[122] and Radić.[123] Before any prosecution witnesses were called, Prcać was arrested and the

[114] Prosecution Pre-trial Brief, paras 208-240.
[115] Prosecution Pre-trial Brief, paras 220-229.
[116] Prosecution Pre-trial Brief, paras 230-234.
[117] Prosecution Pre-trial Brief, para. 234.
[118] Prosecution Pre-trial Brief, para. 236.
[119] T. 646-647.
[120] T. 649.
[121] T. 657.
[122] T. 676-1010.
[123] T. 1020-1070.

trial was adjourned on 6 March 2000. When the hearing reopened, on 2 May 2000, the Prosecution made a further opening statement addressing Prcać's participation in a joint criminal enterprise with the other co-accused. Prosecution counsel argued that Prcać's conduct, like that of the other accused, was a manifestation of collective criminality: [124]

> While he may not have physically committed or perhaps not been physically present when each of the specific criminal acts alleged in the indictment or the attached schedules were committed, those criminal acts could not have been committed as they were without his assistance, approval, and acquiescence.[125]

He pointed out that it was the Prosecution's position that Prcać was responsible for the crimes charged under "any one or all" of the theories of joint criminal enterprise.[126]

48. On 13 October 2000, during the Prosecution's case, the Trial Chamber ruled on the Prosecution's request to file an amended indictment. During the oral argument on this issue, Prosecution counsel reiterated its focus on joint criminal enterprise, arguing that "[a]t the same time, we wanted to reinforce the fact that the Prosecution's theory is that each of these accused individually are responsible for the totality of the acts by virtue of their participation in this common enterprise."[127] The Trial Chamber authorized the Prosecution to file an amended indictment, considering in its decision "that the Prosecution repeatedly made arguments that the accused 'joined' a 'criminal enterprise' and could be responsible for crimes occurring after June 1992 pursuant to a theory of 'common purpose'".[128]

49. In the Decision on Defence Motions for Acquittal, issued on 15 December 2000 at the close of the Prosecution's case, the Trial Chamber considered the Defence arguments and granted a judgement of partial acquittal to accused Kos, Kvočka, Radić, and Prcać for alleged offences in Keraterm and Trnopolje.[129] The Trial Chamber found that no reasonable trier of fact could have convicted the accused of those crimes, dismissing the possibility that "even a common purpose theory of responsibility would extend so far".[130] In considering the Defence's argument that the Prosecution had failed to adduce sufficient evidence, the Trial Chamber expressly considered whether a conviction could be entered for a joint criminal enterprise mode of responsibility.[131] The

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[124] T. 1116-1117.
[125] T. 1118.
[126] T. 1120.
[127] T. 6591.
[128] Decision on Prosecution Request for Leave to File a Consolidated Indictment and to Correct Confidential Schedules, 13 October 2000, p. 5 (footnotes omitted).
[129] Decision on Defence Motions for Acquittal, para. 33.
[130] *Ibid.,* para. 32.
[131] *Ibid.,* para. 40.

Trial Chamber rejected the motion for acquittal in relation to the events on Petrovdan (a Serbian holiday), explaining that:

> Under the common purpose theory of liability put forward by the Prosecution, which the Chamber may or may not ultimately accept, it is not necessary for the Prosecution to prove the direct participation of each accused in every criminal act. This theory of liability is based on the participation of the accused in a system created to further a criminal design that he shares, and there is sufficient evidence to support its use in this case.[132]

Žigić was put on specific notice that "the Chamber agrees with the Prosecutor that abundant evidence of the presence of the accused Žigić in the camps provides a basis upon which he could be found guilty of participation in the murders of Jasmin Izejiri and 'Špija' Mešić and the victims of Petrovdan".[133] Accordingly, the Trial Chamber held that:

> [S]ufficient evidence has been presented, in the terms of Rule 98 *bis*, of the criminal conduct of the accused Radić and Žigić to allow the necessary discriminatory intent for Article 5 to be inferred on the basis of participation in a common design. The Chamber need go no further at this stage in indicating what its ultimate choice among legal theories of culpability will be.[134]

50. The Appeals Chamber finds that the Prosecution gave clear and consistent notice, starting before the commencement of the trial and continuing throughout the Prosecution's case, that it intended to rely on joint criminal enterprise. If any of the Appellants was surprised by Prosecution or Trial Chamber references to joint criminal enterprise responsibility, none of the Appellants brought a timely objection to the attention of the Trial Chamber.

51. The issue of adequacy of notice of joint criminal enterprise was raised in Kvočka's final trial brief[135] and in Prcać's closing argument[136] and was considered by the Trial Chamber in the Judgement. The Trial Chamber emphasized "that the charges in the Amended Indictment that the accused 'instigated, committed or otherwise aided and abetted' crimes may include responsibility for participating in a joint criminal enterprise designed to accomplish such crimes."[137] The Trial Chamber held that it was "within its discretion to characterize the form of participation of the accused, if any, according to the theory of responsibility it deems most appropriate, within the limits of the Amended Indictment and insofar as the evidence permits."[138]

52. The Appellants' trial submissions further demonstrate that they were on notice of the Prosecution's reliance on joint criminal enterprise during the trial proceedings. For example, in the

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[132] *Ibid.,* para. 41.
[133] *Ibid.,* para. 53.
[134] *Ibid.,* para. 35 (footnote omitted).
[135] Confidential Closing Statement of the Accused Mr. Kvočka, 29 June 2001, paras 55-76.
[136] Prcać Closing Statement, T. 12686-12688.
[137] Trial Judgement, para. 247.
[138] *Ibid.*, para. 248 (footnote omitted).

Motion for Judgement of Acquittal filed by Appellant Žigić on 6 November 2000 at the close of the Prosecution's case, Žigić argued that the Prosecution had failed to prove either that he committed the crimes, or that "he had the 'Common purpose' with those who, allegedly, committed those crimes. On the contrary, he operated completely independently, with other motives for which those having the 'Common purpose' were conducting the legal criminal proceedings against him."[139]

53. The Appellants' understanding of the nature of the Prosecution's case can also be observed in their final trial briefs and closing arguments in which they advance legal and factual arguments relating to joint criminal enterprise.[140] Appellant Radić is the only accused who did not specifically argue the issue of joint criminal enterprise in his final brief, but his counsel expressly addressed the issue in the closing argument:

> To thank you for your patience and to add about common purpose. I didn't discuss this because I don't see what I could add to what I have written and what Mr. O'Sullivan has said. Even when talking about a common purpose, we have to bear in mind who we are talking about. A village policeman belonging to a police station department in Omarska. What common purpose can he have except to put his children through school? It is difficult to push a common policeman into a common purpose. Let us not forget that the Muslims were the first to form their organisation and the SDS was the last. And if someone did have a purpose, they will come here and we have them here or, rather, you have them here almost all of them in your hands or at least indictments for all of them.[141]

54. Upon careful review of the trial record, the Appeals Chamber finds that the Prosecution gave timely, clear and consistent information to the Appellants, which detailed the factual basis of the charges against them and compensated for the Indictment's failure to give proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility. This ground of appeal is therefore dismissed.

4. The Schedules and the factual findings of the Trial Chamber

55. The Appellants Radić and Kvočka contend that the Trial Chamber erred by failing to make factual findings in respect of each incident listed in the Schedules attached to the Indictment.[142] Radić submits *inter alia* that the Trial Chamber violated his right to a fair and impartial trial as a result of this error.[143] He argues that the Schedules form an integral part of the Indictment[144] and

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[139] Motion for Judgement of Acquittal-Defense for the Accused Zoran Žigić, 6 November 2000, para. 6.
[140] Final Trial Brief Submissions by the Defence of the Accused Dragoljub Prcać, 2 July 2001, paras 425-494; Confidential Final Trial Brief-Defence for the Accused Zoran Žigić, 29 June 2001, paras 243-264; Confidential Closing Statement of the Accused Mr. Kvočka, 29 June 2001, paras 55-76; Žigić Defence Closing Statement, T. 12602; Kvočka Defence Closing Statement, T. 12521-12525; Prcać Closing Statement, T. 12643, 12661, 12686-12688. *See* also Confidential Final Written Submissions of Milojica Kos, 29 June 2001, pp. 72-75; Kos Defence Closing Statement, T. 12550-12551.
[141] Radić Closing Statement, T. 12591.
[142] Kvočka Appeal Brief, paras 101 and 122-123; Radić Appeal Brief, paras 26-31.
[143] *See* Radić Appeal Brief, paras 26-31, as well as Radić Reply Brief, paras 5-16.

points to the fact that they contain detailed information about the alleged crimes as provided for in articles 18 and 21 of the Statute.[145] The Trial Chamber made factual findings "in a general and summary manner"[146] and therefore failed to establish a connection between the Schedules and the factual determinations made in the Trial Chamber's Judgement.[147] Radić concludes that the Trial Chamber violated the "spirit of the Rules of Procedure and Evidence" by pronouncing him guilty of certain crimes under counts of the Indictment without establishing the facts relating to these counts.[148] In Kvočka's view, the Trial Chamber should have established the necessary elements of the crimes for each individual case listed in the Schedules, as the Trial Chamber did in the *Čelebići* case.[149]

56. In response, the Prosecution submits that the Trial Chamber's approach to the evidence and its reasoning in relation to the crimes alleged in the Indictment reveal no error.[150] According to the Prosecution, a review of the Trial Chamber's analysis shows that the "Trial Chamber in fact considered and made factual findings on the vast majority of crimes particularised in the Indictment and Schedules."[151] Factual findings as to the crimes committed in the Omarska camp can be found throughout the Trial Judgement and more particularly in part II (paragraphs 45-108) and part IV (paragraphs 329-610) of the Trial Judgement.[152] The Prosecution also claims that the findings in relation to the various crimes are well founded on the evidence[153] and that the Trial Chamber's approach was appropriate in a case in which the accused was found guilty as a participant in a joint criminal enterprise encompassing a very large number of serious crimes committed over a lengthy period of time by various participants.[154] With regard to Kvočka's arguments, the Prosecution points to the fact that the Trial Chamber made comprehensive findings as to killings[155] and torture in the camp, considering all of the legal elements.[156]

57. In order to assess the submissions of the parties under these grounds of appeal, the Appeals Chamber will first look at the pre-trial and trial decisions taken by the Trial Chamber in relation to the Schedules to determine their object and purpose and whether they were properly treated by the Trial Chamber. Secondly, the Appeals Chamber will study the approach taken by the Trial Chamber

[144] Radić Appeal Brief, para. 28 and Radić Reply Brief, para. 7.
[145] Radić Appeal Brief, paras 27and 29; Radić Reply Brief, paras 9 and 11.
[146] Radić Appeal Brief, para. 26.
[147] Radić Reply Brief, para. 7.
[148] Radić Appeal Brief, para. 31.
[149] Kvočka Appeal Brief, para. 122, referring to the *Čelebići* Trial Judgement.
[150] Prosecution Respondent's Brief, para. 6.3. *See* generally paras 6.2-6.11 of the Prosecution Respondent's Brief.
[151] *Ibid.*, para. 6.4.
[152] *Ibid.*, paras 6.5-6.6.
[153] *Ibid.*, para. 6.7.
[154] *Ibid.*, para. 6.3.
[155] *Ibid.*, para. 5.81.

in the Trial Judgement and determine whether the Trial Chamber made the relevant factual findings in light of the Schedules and the incidents contained therein.

(a) The object and purpose of the Schedules

58. The first Indictment was confirmed by Judge Lal Chand Vohrah on 9 November 1998 and did not include any annexes. Counts were phrased in a general manner; counts 1 to 3, for example, read:

> Between about 26 May 1992 and about 30 August 1992, **Mladen RADIĆ,** while serving as a shift commander at the Omarska camp, participated in the daily murder, torture, sexual assault, beating, humiliation, psychological abuse, and/or confinement in inhumane conditions, of Bosnian Muslim, Bosnian Croat and other non-Serb detainees at the Omarska camp, including: the rape and sexual assault of several of the female detainees, among them witnesses A and F; the murder and torture of unnamed detainees on Petrovdan (a Serbian holiday); and, the plunder of valuables from detainees.[157]

59. Following various Defence motions alleging defects in the form of the first Indictment, the Trial Chamber issued the "Decision on Defence Preliminary Motions on the Form of the Indictment" on 12 April 1999. The Trial Chamber noted:

> [A]s a general rule, the degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions…The massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes – at any rate, the degree of specificity may not be as high as that called for in domestic jurisdictions.[158]

60. The Trial Chamber went on to find that "it is reasonable to require the Prosecution, depending on the particular circumstances of each case, to provide more specific information, if available, as to the place, the time, the identity of the victims and the means by which the crime was perpetrated".[159] The Prosecution was therefore directed, "if it is in a position to do so",[160] to identify the names of the victims of the crimes alleged, the method of commission of the crime or the manner in which it was committed, and to provide information that would allow for the identification of the other participants in the crimes alleged against the Accused.[161] The Trial Chamber also noted: "Merely to allege, as is done throughout the Amended Indictment, that the accused participated in certain crimes without identifying the specific acts alleged to have been

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[156] v, para. 5.140.
[157] First Amended Indictment dated 12 June 1998 confirmed on 8 November 1998, para. 27.
[158] Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17.
[159] *Ibid.*, para. 18.
[160] *Ibid.*, para. 23.
[161] *Ibid.*, paras 22-24. In response to an objection by Radić, the Trial Chamber directed the Prosecution, in respect of those parts of the first Indictment where the term "including" is used to signify some of the victims of a crime, to list, to the extent possible, additional names of victims; *see* para. 26.

committed by the accused does not meet the requirement of a 'concise statement of facts'"[162]. The Trial Chamber therefore directed the Prosecution to provide more information as to the specific acts of the accused that would establish their criminal responsibility under Article 7(1) and 7(3) of the Statute.[163]

61. Pursuant to the above-mentioned decision dated 12 April 1999, the Prosecution submitted on 31 May 1999 a second Amended Indictment together with four confidential annexes ("Schedules").[164] The latter identified the names of victims in the crimes alleged against Kvočka, Kos, Radić and Žigić and provided the names of other participants in the crimes alleged as well as information regarding the manner in which the crimes alleged were committed.[165] Schedule A contains the particulars for the charges against Kvočka, Schedule B pertains to the charges against the Accused Milojica Kos, Schedule C to Radić and Schedule D to Žigić. The particulars in each of the Schedules were arranged according to the counts of the Indictment. Further Defence objections to the second Amended Indictment were rejected by the Trial Chamber in its "Decision on Defence Objections to the Amended Indictment" dated 8 November 1999. The Trial Chamber rejected the claims of the Defence that the second Amended Indictment was still too general and that "new crimes" were included in the Schedules.[166] The Trial Chamber found that the level of detail contained in the second Amended Indictment provided the accused with sufficient material to enable them to prepare their defence and that the Amended Indictment complied with the Trial Chamber's Decision of 12 April 1999.[167] A fifth Schedule – Schedule E – containing the particulars for the charges against Prcać was added to the Indictment after the Trial Chamber granted the Prosecution's request to join the trial of Prcać to that of Kvočka, Kos, Radić and Zigic.[168]

62. The Appeals Chamber notes that the inclusion of the Schedules was a direct consequence of the directions given by the Trial Chamber in its decision dated 12 April 1999. Those directions stemmed from the necessity for an indictment to identify the specific acts alleged to have been

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[162] Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 32.
[163] *Ibid.*
[164] Confidential Schedules of Additional Particulars to the Submission of Amended Indictment pursuant to Trial Chamber Order of 12 April 1999.
[165] Submission of Amended Indictment pursuant to Trial Chamber Order of 12 April 1999, filed on 31 May 1999. The four annexed Schedules were marked confidential. A public version of these annexes was filed on 1 March 2001, Prosecution's Submission of New Public Schedules, following the Decision on Zoran Žigić's Motion for Rescinding Confidentiality of Schedules Attached to the Indictment, 22 February 2001.
[166] Decision on Defence Objections to the Amended Indictment, 8 November 1999, pp. 5-7.
[167] With respect to Radić, the Trial Chamber noted that Schedule C lists 84 names of victims in relation to count 1-3 (as opposed to 2 previously); 22 in relation to count 4-5 (as opposed to 3 previously); 15 in relation to count 8-10 (as opposed to 10 previously) and 5 in relation to count 14-17 (as opposed to 2 previously). *See* footnote 2 of the said decision.

committed by the accused, as well as from the necessity to provide information, to the extent possible, about the identity of the victims, the perpetrators and the manner in which the crimes were committed.

63. The Trial Chamber made further reference to the Schedules in its Decision on Defence Motions for Acquittal rendered on 15 December 2000. The Trial Chamber seems to have considered clearly that the Accused would be held responsible for certain crimes in the final judgement only if the events described in the Schedules to which the crimes refer could be established by the Prosecution beyond reasonable doubt. The Trial Chamber first recalled that the "Prosecution is required to present evidence not only that incidents or events occurred that constitute violations of the Statute, but also of the exact role each accused played in those incidents or events".[169] It then went on to emphasize "that the Defence will not be expected to call evidence concerning alleged victims about whom no evidence at all has been produced by the Prosecutor".[170] As a result, the Trial Chamber ordered that allegations in respect of nine individuals, whose names were contained in a confidential annex to that decision, be removed, as no evidence in their respect was produced by the Prosecution. The Trial Chamber entered a judgement of acquittal in favour of each accused in respect of those parts of the Indictment which concerned those nine individuals.[171]

64. The Prosecution chose to provide information as to the identity of the victims, the place and approximate date of the alleged offence in the Schedules and not to clutter the Indictment itself.[172] The precise issue before the Appeals Chamber is whether this information contained in the Schedules amounts to material facts that have to be pleaded in the indictment and established beyond reasonable doubt by the Prosecution.

65. It is well established that an indictment is required to plead the material facts upon which the Prosecution relies, but not the evidence by which those material facts are to be proved.[173] The Appeals Chamber has taken the view that whether or not a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally

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[168] *See* Decision on Prosecution Motion to Join Trials, 14 April 2000; Decision on Prosecution Request for Leave to File a Consolidated Indictment and to Correct Confidential Schedules, 13 October 2000.
[169] Decision on Defence Motions for Acquittal, para. 30.
[170] *Ibid.*, para. 38.
[171] *Ibid.*, paras 46 and 63.
[172] The Indictment reads for example that each accused is alleged to have "instigated, committed or otherwise aided and abetted the persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs … through his direct participation in crimes and through his approval, encouragement, acquiescence and assistance in the development and continuation of the conditions in the camp and the on-going commission of crimes as described in paragraph 25 *against the prisoners in the Omarska camp, including those set forth" in Schedule A through to E* for example under count 1 to 3 of the Indictment (emphasis added). Similarly, Radić is alleged to have "participated in the murder of prisoners at the Omarska camp *including those listed" in Schedule C* (emphasis added).
[173] *Furundžija* Appeal Judgement, para. 147; *Kupreškić et al.* Appeal Judgement, para. 88; *see* also above, para. 27.

responsible.[174] "As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him".[175] In the present case, the Trial Chamber was correct to direct the Prosecution to provide in the Indictment, to the extent possible, information about the identity of the victims, the perpetrators and the manner in which the crimes were committed. An indictment pleaded in very general terms would not have given adequate notice to the accused of the nature of the case they had to meet.[176] The Schedules completed the Indictment by giving further information which was sufficiently specific to give notice to the accused of the nature of the case they had to meet.

66. The Appellant Žigić argues that the use of the Schedules to plead crimes not charged in the Indictment is contrary to the approach of the *Čelebići* Trial Chamber, which was endorsed by the Appeals Chamber, that only those criminal acts specifically enumerated in the Indictment should be considered.[177] The reference to the *Čelebići* Appeal Judgement is misconceived. In that case, the Prosecution based its appeal on the submission that the Trial Chamber had not considered certain facts not set out in the Indictment. The Appeals Chamber found that:

> Given the generality with which those other incidents were alleged in the Indictment, the Indictment itself did not impose an obligation on the Trial Chamber to make findings on those incidents. It was incumbent upon the Prosecution, if it did in fact seek findings as to those matters, to identify them clearly to the Trial Chamber and to request it to make findings upon them.[178]

The Appeals Chamber did not state that such facts have to be incorporated in the body of the indictment. It clearly did not prevent the Prosecution from identifying them in the form of annexes or schedules to the indictment.

67. In a recent case, the Appeals Chamber held that "an indictment must necessarily, in the absence of a special order, consist of one document",[179] that "schedules to an indictment form an integral part of the indictment", and that they can contain essential material facts omitted from the

[174] *Galić* Decision on Leave to Appeal, para. 15, citing *Prosecutor v. Brdanin & Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 18, as well as *Kupreškić et al.* Appeal Judgement, paras 88-90; *see* also above, para. 28.
[175] *Galić* Decision on Leave to Appeal, para. 15.
[176] *Ibid.*, para. 16.
[177] Žigić Appeal Brief, para. 68.
[178] *Čelebići* Appeal Judgement, para. 765.
[179] *Galić* Decision on Leave to Appeal, para. 14.

body of the indictment.[180] In the case under appeal, the Appeals Chamber sees no reason to depart from this approach. The events contained in the Schedules amount to material facts that have to be proven before the accused can be held responsible for the crimes contained in the Indictment. The Trial Chamber in this case correctly reached this conclusion. In the above-mentioned Decision on Defence Motions for Acquittal, the Trial Chamber specifically acquitted the accused in respect of those parts of the Indictment which concern nine identified individuals appearing in the Schedules. The Trial Chamber therefore took the view that the accused could be found responsible for the crimes of persecution or murder, but not in respect of those nine victims, as the Prosecution had failed to produce any evidence relating to them during the Prosecution's case.

68. The Appeals Chamber will now examine the approach taken by the Trial Chamber in its Judgement in order to determine whether it departed from the proper approach taken during the pre-trial and trial phases of the proceedings.

(b) The approach taken by the Trial Chamber in the Trial Judgement

69. The Trial Chamber did not organize its factual findings in relation to each incident contained in the Schedules in a separate section of the Judgement. Instead, the Trial Chamber chose to have a general look at the running of the Omarska camp, making factual findings as to the general conditions of detention and treatment prevailing in the camp during the summer months of 1992.[181] The overall conclusions reached by the Chamber are contained in paragraphs 116 and 117 of the Trial Judgement:

> 116. The evidence is overwhelming that abusive treatment and inhumane conditions in the camps were standard operating procedure. Camp personnel and participants in the camp's operation rarely attempted to alleviate the suffering of detainees. Indeed, most often those who participated in and contributed to the camp's operation made extensive efforts to ensure that the detainees were tormented relentlessly. Many detainees perished as a result of the inhumane conditions, in addition to those who died as a result of the physical violence inflicted upon them.
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> 117. The Trial Chamber finds that the non-Serbs detained in these camps were subjected to a series of atrocities and that the inhumane conditions were imposed as a means of degrading and subjugating them. Extreme brutality was systematic in the camps and utilized as a tool to terrorize the Muslims, Croats, and other non-Serbs imprisoned therein.

70. The Trial Chamber then turned to the applicable law and legal findings before looking at the criminal responsibility of each accused in turn. This approach is different from that adopted by the *Krnojelac* Trial Chamber, which, seised of a similarly structured indictment, first made factual findings in relation to each incident listed in the schedules annexed to the indictment before looking

[180] *Ibid.*, para. 16, citing *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 54.
[181] Trial Judgement, paras 45-118.

at the responsibility of the accused.[182] Similarly, in the *Galić* Trial Judgement, the Trial Chamber established whether the shelling or sniping incidents recounted in the schedules annexed to the Indictment were established beyond reasonable doubt before looking at the criminal responsibility of the accused himself.[183] In the case under review, factual findings are scattered in various places throughout the Trial Judgement. The Prosecution is correct in asserting that some factual findings in relation to the various incidents listed in the Schedules were made by the Trial Chamber mainly in part II and part IV of the Trial Judgement. This led the Trial Chamber to conclude first, in paragraph 202, that:

> The Trial Chamber finds that *all of the acts enumerated under count 1 of the Amended Indictment were committed in Omarska camp*; the acts or omissions were committed both systematically and randomly by those acting according to their given roles within the camp structure and those responding spontaneously and opportunistically to the condonation of violence this structure afforded, with an intent to discriminate against and ultimately subjugate the non-Serbs detained in the camp (emphasis added).

and then in paragraph 323 of the Trial Judgement:

> The Trial Chamber has already found the following:
>
> (a) that the prerequisites necessary to sustain a charge under Articles 3 and 5 of the Statute have been satisfied;
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> (b) *that each of the crimes alleged in the Amended Indictment*, in particular murder, torture, outrages upon personal dignity, inhumane acts, cruel treatment, and persecution *were committed in Omarska camp* (emphasis added).

71. With respect to these conclusions, it is necessary to determine whether the Trial Chamber found that every incident listed in the Schedules had therefore been proven beyond reasonable doubt by the Prosecution and that the Accused were therefore guilty in respect to each incident listed therein. The approach of the Trial Chamber in certain parts of the Trial Judgement shows that it refrained explicitly from finding Radić or Žigić guilty of some crimes in respect of certain incidents because the victims were not mentioned either among the counts of the Indictment or in the Schedules. Instead, the Trial Chamber used the evidence of these victims as corroborating evidence of a consistent pattern of conduct pursuant to Rule 93 of the Rules.[184]

72. The Appeals Chamber notes that the Trial Chamber made factual findings in relation to some of the incidents detailed in the Schedules, and assured itself that instances of each crime contained in the Indictment had been committed, but it did not opt for a victim-by-victim or crime-by-crime analysis. The question is whether the Trial Chamber erred in doing so, and whether it

[182] *See* for example paragraphs 189-307 of the *Krnojelac* Trial Judgement, which cover the factual findings relating to cruel treatment, inhumane acts, and torture.
[183] *Galić* Trial Judgement, paras 206-581.

failed to establish the facts underlying each count of the Indictment, thereby violating the principle of a fair trial and invalidating the entire Trial Judgement.

73. The Appeals Chamber considers that a systematic approach, consisting of making factual findings in relation to each incident contained in the Schedules and underlying the crimes contained in the Indictment, would have been the appropriate approach. An accused is entitled to know whether he has been found guilty of a crime in respect of the alleged incidents under the principle of a fair trial.[185]

74. However, the Appeals Chamber finds that the generic approach adopted by the Trial Chamber does not render the Judgement invalid. A conviction on any given count may be reached as long as there are findings as to one incident contained therein. The Appeals Chamber has been able to find a great number of factual findings in part II and part IV of the Trial Judgement, underpinning the crimes for which the Appellants have been found guilty by the Trial Chamber. The language of the Indictment itself does not require that each and every incident be established beyond reasonable doubt before the accused can be found guilty under a certain count. Counts 8 to 10 of the Indictment read for example: "Miroslav Kvočka, Dragoljub Prcać, Milojica Kos and Mlado Radić participated in the torture and beating of Bosnian Muslim, Bosnian Croat and other non-Serb prisoners in the Omarska camp*, including those prisoners listed in Schedules A – E*".[186] The Trial Chamber established beyond reasonable doubt that some instances of persecutions, murder, torture and cruel treatment had been committed against prisoners of the Omarska camp, including some victims listed in the Schedules. Factual findings can be found throughout part II and part IV of the Trial Judgement.

75. The Appeals Chamber concludes that, even if the Trial Chamber made an error by failing to list the incidents established beyond reasonable doubt underlying each of the crimes for which the Appellants were found guilty, this error does not invalidate the Trial Judgement, as long as the Trial Chamber did actually make factual findings of individual crimes underlying the convictions of the Appellants. The Appeals Chamber will therefore not overturn any conviction for this reason, for which there are factual findings, provided that these facts had been pleaded in the Indictment.

76. The approach chosen by the Trial Chamber as to its factual findings has been explicitly challenged by the Appellants Kvočka and Radić only. However, the Appeals Chamber finds it appropriate to review this issue in relation to all the Appellants, where necessary.

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[184] *See* for examples Trial Judgement, paras 547, 556, 641, 652, 663 and 664.
[185] *See* for example *Krnojelac* Trial Judgement, para. 320.
[186] Indictment, para. 38 (emphasis added).

D. Common legal questions concerning joint criminal enterprise

77. Each of the Appellants challenges the legal principles the Trial Chamber applied when it found that the Appellants participated in a joint criminal enterprise. The Appellants do not raise discrete errors of law. Instead, they interweave factual errors with their challenges to the legal standards applied. In its Response, the Prosecution has attempted to reorganise the submissions of the Appellants into more structured allegations of legal errors and has responded to them in a consolidated manner.

78. The Appeals Chamber recalls at the outset that it maintains discretion under Article 25 of the Statute to determine which of the parties' submissions warrant a reasoned written response.[187] The Appeals Chamber will begin by setting out the applicable law concerning joint criminal enterprise. Discrete legal issues relating to joint criminal enterprise will be dealt with in this section, so long as they are discernible in the Appellant's submissions. The application of the law to the facts will be considered in the sections that deal with the individual Appellants.

1. The definition of joint criminal enterprise

79. Although the Statute makes no explicit reference to "joint criminal enterprise" as a mode of responsibility, the Appeals Chamber has held that participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute.[188] Article 7(1), which sets out certain forms of individual criminal responsibility applicable to the crimes falling within the International Tribunal's jurisdiction, reads:

> 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.

80. The *Tadić* Appeal Judgement explains why participation in a joint criminal enterprise is a form of commission under Article 7(1):

> The above interpretation [that responsibility under Article 7(1) is not limited to those who physically commit the crimes] is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the

[187] *See* above, para 15.
[188] *See Tadić* Appeal Judgement, paras 188, 195-226; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction- Joint Criminal Enterprise, 21 May 2003, para. 20.

> offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question. [189]

81. A joint criminal enterprise requires a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute.

82. Three broad forms of joint criminal enterprise have been recognised by the International Tribunal's jurisprudence.[190] In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose.[191] The second form of joint criminal enterprise, the "systemic" form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps.[192] This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.[193]

83. The third, "extended" form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.[194] The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.[195]

84. The Appeals Chamber understands that the Trial Chamber considered the crimes in Omarska camp to have been committed primarily as part of a systemic type of joint criminal enterprise. As the Trial Chamber explained:

> Although the first two categories enunciated by *Tadić* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war "concentration camp" cases, best resonates with the facts of this case and is the one upon which the Trial Chamber will focus most of its attention. The Trial Chamber will examine and elaborate upon the

[189] *Tadić* Appeal Judgement, para. 191.
[190] *Ibid.*, paras 195-226.
[191] *Ibid.*, para. 196. *See* also, *Krnojelac* Appeal Judgement, para. 84 ("[A]part 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.")
[192] *Tadić* Appeal Judgement, paras 202-203; *Krnojelac* Appeal Judgement, para. 89.
[193] *Tadić* Appeal Judgement, paras 203, 220, 228.
[194] *Ibid.,* para. 204 ("Criminal 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.")
[195] *Tadić* Appeal Judgement, paras 228 and also 204, 220; *Vasiljević* Appeal Judgement, para. 99.

> standards to be applied in assessing criminal liability of participants in a detention facility which operates as a joint criminal enterprise.[196]

85. However, in other places in the Trial Judgement, the Trial Chamber also contemplates the possibility of an extended form of joint criminal enterprise:

> The Trial Chamber also wishes to emphasize that crimes committed in furtherance of the joint criminal enterprise that were natural or foreseeable consequences of the enterprise can be attributed to any who knowingly participated in a significant way in the enterprise.[197]

> Similarly, any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise.[198]

86. The Appeals Chamber notes, however, that the Trial Chamber did not hold any of the Appellants responsible for crimes beyond the common purpose of the joint criminal enterprise. Nonetheless, the Appeals Chamber wishes to affirm that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of joint criminal enterprise, which may involve a large number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.

2. What is the difference between co-perpetration and aiding and abetting?

87. The submissions of the Appellants raise questions concerning the proper distinction between co-perpetration and aiding and abetting.[199] The Prosecution responds that when an accused is criminally liable based on his participation in a joint criminal enterprise, and the requisite *mens rea* is established, he should be regarded as having "committed" that crime.[200]

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[196] Trial Judgement, para. 268 (footnote omitted).
[197] *Ibid.*, para. 326.
[198] *Ibid.*, para. 327.
[199] *See, e.g.* Kvočka Appeal Brief, para. 162; Radić Appeal Brief, paras 47-49.
[200] Prosecution Respondent's Brief, para. 3.18.

88. The Trial Chamber considered that a co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and actively furthers the enterprise. An aider or abettor, on the other hand, need not necessarily share the intent of the other participants; he need only be aware that his contribution assists or facilitates a crime committed by the other participants. The Trial Chamber held that the shared intent may be inferred from the knowledge of the criminal nature of the enterprise and the continued significant participation therein. It acknowledged that there may be difficulties in distinguishing between an aider or abettor and a co-perpetrator, in particular in the case of mid-level accused who did not physically commit crimes. When, however, an accused participated in a crime that advanced the goals of the criminal enterprise, the Trial Chamber considered him more likely to be held responsible as a co-perpetrator than as an aider or abettor.[201]

89. The Appeals Chamber notes that in the *Vasiljević* Appeal Judgement, the Appeals Chamber discussed the correct distinction between co-perpetration by means of a joint criminal enterprise and aiding and abetting:

> (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.[202]

90. Applying the *Vasiljević* definition, the Appeals Chamber considers that whether an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a joint criminal enterprise depends on the effect of the assistance and on the knowledge of the accused. The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons. Furthermore, the requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however,

[201] Trial Judgement, para. 284.
[202] *Vasiljević* Appeal Judgement para. 102; *see* also *Tadić* Appeal Judgement, para. 229; *Krnojelac* Appeal Judgement paras 31-33.

the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.

91. The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself.[203] Therefore, it would be inaccurate to refer to aiding and abetting a joint criminal enterprise. The aider and abettor assists the principal perpetrator or perpetrators in committing the crime.

92. The Appeals Chamber notes that the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.[204]

3. What level of contribution is required to show participation in a joint criminal enterprise?

93. Each of the Appellants raises questions concerning the level of contribution required to be a participant in a joint criminal enterprise.[205]

94. The Prosecution responds that the determination of what types of conduct amount to a significant contribution is, as stated in the Trial Judgement, to be based on the facts.[206] It further states that "any participation which enables the system to run more smoothly or without disruption would constitute a case of significant contribution".[207]

95. The Trial Chamber held that:

> [P]ersons who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal endeavor, and their acts or omissions significantly assist or facilitate the commission of crimes.[208]

It stressed that not everyone working in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise:

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[203] *Prosecutor v. Milutinović et al.*, Case No.: IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, para. 20.
[204] *Vasiljević* Appeal Judgement, para. 102; *Krnojelac* Appeal Judgement, para. 75 ("[T]he acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor since a participant in a joint criminal enterprise shares the intent of the principal offender whereas an aider and abettor need only be aware of that intent.")
[205] *See e.g.* Radić Appeal Brief, para. 62; Radić Reply Brief, paras 32-37; Prcać Appeal Brief, paras 147-149, 348; Kvočka Appeal Brief, paras 163-164, Žigić Appeal Brief, paras 406-408.
[206] Prosecution Respondent's Brief, para. 3.24.
[207] *Ibid.*, para. 3.9.
[208] Trial Judgement, para. 308.

> The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e. g. a participation that enables the system to run more smoothly or without disruption. Physical or direct commission of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution.[209]

The Trial Chamber went on to consider that the significance of the contribution to the joint criminal enterprise is to be determined on a case by case basis, taking into account a variety of factors, among them the position of the accused, the amount of time spent participating with knowledge of the criminal nature of the system, the level and efficiency of the participation, and any efforts to prevent crimes. The Trial Chamber attributed particular importance to any evidence of a shared intent or agreement with the criminal system, and the physical perpetration of crimes.[210]

96. The Appeals Chamber has explained the *actus reus* of the participant in a joint criminal enterprise as follows:

> First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. 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. 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.[211]

97. The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise.[212] In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.

98. The Appeals Chamber agrees that the Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed.[213] Thus, the argument that an accused did not participate in the joint criminal enterprise because he was easily replaceable must be rejected.[214]

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[209] *Ibid.*, para. 309.
[210] *Ibid.*, para. 311.
[211] *Vasiljević* Appeal Judgement, para. 100 (footnotes omitted).
[212] *See e. g.* below, para. 599 (the case of "opportunistic visitors" who enter the camp to commit crimes).
[213] *Tadić* Appeal Judgement paras 191, 199.
[214] Prcać Appeal Brief, para. 356 ("the accused did not have any special knowledge, skills or talents and, in the nature of things, he was easily replaceable."); Radić Appeal Brief, para. 62 ("The Defence can only conclude that the system would have functioned in the same way even without the presence of the accused Radić"); Radić Reply Brief, para. 34

99. Appellant Kvočka appears to argue that a co-perpetrator in a joint criminal enterprise must physically commit part of the *actus reus* of a crime in order to be criminally liable.[215] The Appeals Chamber disagrees. A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met. As the *Tadić* Appeals Chamber explained, "[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question."[216] This is particularly evident with respect to the systemic form of joint criminal enterprise at issue in the present case.

4. Can participation in a joint criminal enterprise be inferred from the accused's position in a camp?

100. The Appellants argue that a significant contribution cannot be inferred from their position in the camp and that their low positions of employment in the camps precluded responsibility for crimes committed there.[217] The Prosecution responds that a position of authority, while not a legal requirement for joint criminal enterprise responsibility, is still a factor in the determination of responsibility.[218]

101. The Appeals Chamber affirms that the *de facto* or *de jure* position of employment within the camp is only one of the contextual factors to be considered by the Trial Chamber in determining whether an accused participated in the common purpose. A position of authority, however, may be relevant evidence for establishing the accused's awareness of the system, his participation in

("Anyone could have replaced him since his presence is irrelevant for the events that took place in Omarska. Hence he could have been replaced at any time by anyone without any repercussions on the running of the camp").

[215] Kvočka Appeal Brief, para. 162 ("[T]he action has to be part of co-perpetration of some offense and also give its contribution to co-perpetration in the great extent").

[216] *Tadić* Appeal Judgement para. 191; *see* also para. 192: "Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility".

[217] Kvočka Appeal Brief, paras 163 ("Kvočka did not have any important position in the camp. He had no authority and influence over guards"), 164; Prcać Appeal Brief, paras 348, 352; Radić Appeal Brief, para. 57 (" The Trial Chamber erroneously objectifies existence of joint criminal enterprise and it mistakenly takes (*sic*) that if Omarska is a joint criminal enterprise it automatically means that the shift leader of the guard must be the co-perpetrator in the joint criminal enterprise, without finding it necessary to establish individual circumstance of possible involvement of the accused"), 61-62; Radić Reply Brief, para. 36 ("[T]he authority is the key factor with which to determine the contribution to the joint criminal enterprise").

[218] Prosecution Respondent's Brief, paras 6.96-6.125.

enforcing or perpetuating the common criminal purpose of the system, and, eventually, for evaluating his level of participation for sentencing purposes.[219]

102. In a related argument, Appellant Prcać has challenged the Trial Chamber's reliance on post-World War II jurisprudence, arguing that it is inapplicable because these cases required, *inter alia*, membership in the SS.[220] The Prosecutor points out that the Appellant's arguments are factually incorrect, because some of those convicted in the post-World War II cases were inmates of the camps.[221]

103. The Appeals Chamber notes that in assessing the level of contribution to a joint criminal enterprise which can be inferred from positions held in a camp, the Trial Chamber reviewed some of the post-World War II jurisprudence. Upon review, the Trial Chamber held that:

> The concentration camp cases seemingly establish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes committed therein. An intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp's functioning.[222]

The Appeals Chamber finds that the Trial Chamber did not err in its discussion of these early cases. As it is clear that there is no requirement of "membership" in a group, beyond playing a role in a camp, in order to incur joint criminal enterprise responsibility, Appellant Prcać's submission is rejected.

104. In another related argument, Appellant Radić submits that he should not be found guilty as a co-perpetrator since the Trial Chamber acquitted him of all charges based on superior responsibility.[223] The suggestion implicit in this argument is that a person lacking sufficient authority to be considered a superior would necessarily also lack sufficient authority to make a "significant contribution" to a systemic joint criminal enterprise. The Appeals Chamber notes that participation in a joint criminal enterprise pursuant to Article 7(1) of the Statute and superior responsibility pursuant to Article 7(3) of the Statute are distinct categories of individual criminal responsibility, each with specific legal requirements.[224] Joint criminal enterprise responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution.[225] Moreover, it is not appropriate to convict under both Article 7(1) and Article 7(3) of

[219] *Krnojelac* Appeal Judgement, para. 96.
[220] Prcać Appeal Brief, paras 364-372.
[221] Prosecution Respondent's Brief, para. 3.29.
[222] Trial Judgement, para. 278 (footnote omitted).
[223] Radić Reply Brief paras 52-53, 62-63.
[224] *Blaskić* Appeal Judgement, para. 91; *see* below, paras 144, 383.
[225] *See* above, para 97.

the Statute for the same crime. Where the legal requirements of both forms of responsibility are met, a conviction should be entered on the basis of Article 7(1) only, and the superior position should be taken into account as an aggravating factor in sentencing.[226] Thus, Appellant Radić's argument is dismissed.

5. Does participation in a joint criminal enterprise require a desire for the result?

105. Each of the Appellants suggests that he lacked the necessary intent to further the joint criminal enterprise, and that he was merely doing his job.[227] The Prosecution responds that the shared criminal intent to further the joint criminal enterprise "implies neither personal enthusiasm nor satisfaction, nor personal initiative in performing the relevant contribution to the common criminal design."[228] The Prosecution emphasizes that the motives of the accused are immaterial for the purposes of assessing that accused's intent and criminal responsibility.[229]

106. The Appeals Chamber agrees with the Prosecution and notes that it has repeatedly confirmed the distinction between intent and motive:

> The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the Tadic appeal judgement the Appeals Chamber stressed the irrelevance and 'inscrutability of motives in criminal law'.[230]

Shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise.[231] Therefore, the Appellants' argument in this regard is rejected.

107. To the extent that the submissions of the Appellants Prcać and Radić raise defences of superior orders or duress, these arguments will be considered in the sections dealing with their individual grounds of appeal.[232]

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[226] *See Blaskić* Appeal Judgement, para. 91, referring to *Čelebići* Appeal Judgement, para. 745.
[227] Kvočka Appeal Brief, para. 136 ("Kvočka's stay in the Omarska camp was not knowing, willingly and continuos (*sic*) under joint criminal enterprise theory"), para. 144 ("[H]e was psychologically unstable…his presence in the camp was within the scope of official task in the extraordinary circumstances"), paras 154-160; Radić Appeal Brief, paras 51, 52 ("...the accused Radić acts in accordance with the structure of his personality, and that he obeys orders and acts through no initiative of his own which might be characterized as discriminatory intent"), 53; Prcać Appeal Brief paras 176-182, 349, 372; Žigić Appeal Brief, para. 404 ("[T]his was done for entirely personal reasons, i.e. for the reasons pointing to existence of an ordinary crime. Maltreatment of a person, as is frequently the case under influence of alcohol, may happen without any reason at all or even out of sadism regardless of who the victim is").
[228] Prosecution Respondent's Brief, para. 3.36.
[229] *Ibid.*, para. 3.36-3.38.
[230] *Jelesić* Appeal Judgement, para. 49, referring to *Tadić* Appeal Judgement, para. 269; *see* also *Krnojelac* Appeal Judgement, para. 102.
[231] *Krnojelac* Appeal Judgement, para. 100.

6. Does a participant in a joint criminal enterprise need to share the discriminatory intent for persecutions?

108. Some of the arguments advanced by the Appellants suggest that the Trial Chamber erred in failing to accurately assess whether the Appellants shared the necessary mental element required for persecutions, and instead inferred the necessary discriminatory intent from the fact that the Appellants worked at the camp and thereby knowingly participated in the joint criminal enterprise.[233] In response, the Prosecution asserts that the required intent exists where an accused is aware of the nature of the intent of the other co-perpetrators and, guided by such knowledge, voluntarily contributes to that common design, meaning to make such a contribution.[234]

109. The Trial Chamber held that:

> Where the crime requires special intent, such as the crime of persecution charged in count 1 of the Amended Indictment, the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator. However, if he is an aider or abettor, he need only have knowledge of the perpetrator's shared intent. This shared knowledge too can be inferred from the circumstances. If the criminal enterprise entails random killing for financial profit, for instance, that would not necessarily demonstrate an intent to discriminate on "political, racial or religious grounds". If the criminal enterprise entails killing members of a particular ethnic group, and members of that ethnic group were of a differing religion, race, or political group than the co-perpetrators, that would demonstrate an intent to discriminate on political, racial, or religious grounds. Thus, a knowing and continued participation in this enterprise could evince an intent to persecute members of the targeted ethnic group.[235]

110. The Appeals Chamber affirms the Trial Chamber's conclusion that participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise.[236] If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime. Allegations of factual errors in relation to this issue are addressed in the sections of this Judgement dealing with the individual Appellants.

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[232] Prcać Appeal Brief, paras 35, 357; Radić Appeal Brief, paras 52, 303.
[233] Prcać Appeal Brief, paras 361-363; Radić Appeal Brief, paras 52, 56 ("…the trial chamber does not assess whether the accused shared the intent with those who committed crimes included in the act of persecution in general"); Kvočka Appeal Brief, para. 90 ("The Prosecution did not prove Kvočka's mens rea for persecution under political and religious affiliation"); Žigić Appeal Brief, para. 404 ("[T]his was done for entirely personal reasons, i.e. for the reasons pointing to existence of an ordinary crime. Maltreatment of a person, as is frequently the case under influence of alcohol, may happen without any reason at all or even out of sadism regardless of who the victim is").
[234] Prosecution Respondent's Brief, para. 3.36.
[235] Trial Judgement, para. 288.
[236] *Krnojelac* Appeal Judgement, para. 111.

7. Can an accused be held responsible for crimes of a joint criminal enterprise during absences from the camp?

111. Implicit in a number of the Appellants' arguments is the suggestion that they should not be held responsible for crimes committed when they were not present at the camp. Appellant Žigić describes this possibility as "an utterly unnatural construction".[237] Appellant Kvočka argues that a co-perpetrator is one "who participated in the crime with perpetration of act (although not act of the commission) which is most closely objectively connected with commission of crime, so that perpetration of the crime is one with acts of co-perpetrator" (sic).[238] In the view of the Prosecution, it would be artificial and impracticable to require precise knowledge of each and every crime committed in the course of a large-scale, ongoing joint criminal enterprise.[239]

112. The Appeals Chamber affirms that a co-perpetrator in a joint criminal enterprise need not physically commit any part of the *actus reus* of the crime involved.[240] Nor is the participant in a joint criminal enterprise required to be physically present when and where the crime is being committed.[241]

113. While it is legally possible for an accused to be held liable for crimes committed outside of his or her presence, the application of this possibility in a given case depends on the evidence. Thus, Žigić's argument that he cannot be liable for all the crimes committed at Omarska camp when he was only present at the camp for a total of two hours will be considered in the section of this Judgement relating to Žigić's individual grounds of appeal.[242]

114. The Prosecution has raised an additional jurisprudential question suggesting that the Trial Chamber should not have excluded criminal responsibility for crimes committed prior to an accused's arrival at the camp or after his departure from the camp.[243] The Appeals Chamber notes that the Trial Chamber's decision to limit the temporal responsibility of the accused, as mentioned in paragraph 349 of the Trial Judgement,[244] was explicitly based on an interlocutory finding relating only to Prcać.[245] In the Decision on Defence Motions for Acquittal, the Trial Chamber found that there was a "total lack of evidence of any involvement before [Prcać's] arrival [at the camp]".[246] It

[237] Žigić Appeal Brief, para. 401.
[238] Kvočka Reply Brief, para. 107.
[239] Prosecution Respondent's Brief, paras 3.32-3.33.
[240] *See e.g. Tadić* Appeal Judgement, para. 192.
[241] *Krnojelac* Appeal Judgement, para. 81.
[242] *See* below, paras 594-600.
[243] Prosecution Respondent's Brief, paras 3.40-3.50.
[244] *See* also para. 426 of the Trial Judgement with regard to Prcać's responsibility.
[245] Decision on Defence Motions on Acquittal, para. 61.
[246] *Ibid.*

can be inferred from the Trial Chamber's reliance on this decision in the Trial Judgement that the Prosecution also failed to prove beyond a reasonable doubt that the Appellants were involved in crimes committed prior to or after their departure from the camp. These rulings appear to be factual findings rather than a legal temporal limitation. The Appeals Chamber declines to consider the legal issue raised by the Prosecution in the circumstances of the present case, more particularly having regard to the fact that the Prosecution has not appealed.

8. Is the Prosecution required to prove the existence of an agreement?

115. Another legal issue raised in the Appellants' submissions is the question whether the Prosecution must prove an agreement between the accused and the other participants in the joint criminal enterprise.[247] In particular, Appellant Kvočka appears to suggest that he cannot be liable for participating in a joint criminal enterprise at Omarska camp when he was not involved in or responsible for its creation.[248]

116. The Prosecution responds that there is no necessity for a plan, design or purpose to have been previously arranged or formulated for a joint criminal enterprise to exist; the common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acted in unison to put a joint criminal enterprise into effect.[249] The Prosecution submits that once an accused wilfully joins and significantly contributes to a system of ill-treatment, the relevant "agreement" is either subsumed in, or replaced by, the acceptance of the system as a whole.[250]

117. The jurisprudence on this issue is clear. Joint criminal enterprise requires the existence of a common purpose which amounts to or involves the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.[251]

118. In the *Krnojelac* Appeal Judgement, the Appeals Chamber confirmed that the systemic form of joint criminal enterprise does not require proof of an agreement:

> 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

[247] Prcać Appeal Brief, paras 358-363; Radić Appeal Brief, paras 53-57; Radić Reply Brief, paras 30-32.
[248] Kvočka Appeal Brief, paras 138-144.
[249] Prosecution Respondent's Brief, paras 3.3 (ii), 3.20, 3.57.
[250] *Ibid.*, para. 3.57.
[251] *Tadić* Appeal Judgement, para. 227(ii). *See* also *Vasiljević* Appeal Judgement, para. 100.

> an agreement with the guards and soldiers – the principal perpetrators of the crimes committed under the system – to commit those crimes.[252]

119. Accordingly, the Appellants' arguments concerning the non-existence of an agreement must be dismissed.

[252] *Krnojelac* Appeal Judgement, para. 97.

III. SEPARATE GROUNDS OF APPEAL OF KVOČKA

120. In his Appeal Brief, Kvočka has identified eight grounds of appeal. The Appeals Chamber notes that Kvočka has withdrawn his first ground of appeal.[253] As the analysis of some of the remaining grounds depends on the resolution of some issues raised in other grounds, the Appeals Chamber has decided to address Kvočka's grounds of appeal in a different order from that which appears in the Kvočka Appeal Brief.

A. Kvočka's interview with the Prosecution (ground of appeal 2)

121. As his second ground of appeal, Kvočka contends that there were errors relating to his interview with the Prosecution. Kvočka raises two principal arguments in this regard: (i) he contends that the transcript of the interview he gave to the Prosecution shortly after his arrest should not have been admitted into evidence, and (ii) he also contests the Trial Chamber's reading of that interview, arguing that it does not support the proposition the Trial Chamber cited it for, namely, that there were shift leaders in the Omarska camp. This latter error, he argues, impacts upon the Trial Chamber's findings on joint criminal enterprise as regards his "role, significance and status", as well as the credibility to be attached to his testimony.[254]

1. Admission of the record of the interview into evidence

122. Kvočka voluntarily attended an interview conducted by Prosecution investigators on 24 June 1998. During the course of the interview, he spoke of facts regarding the establishment and organisation of the Omarska camp.[255] The Prosecution subsequently requested that the transcript of the interview be admitted into evidence and the Trial Chamber granted the request over the objections of Kvočka.[256] In doing so, the Trial Chamber considered its oral decision of 4 July 2000,[257] in which it held that the preliminary statements of witnesses should not in principle be admitted into evidence, to relate solely to witnesses' preliminary statements within the meaning of Rule 66 of the Rules.[258] The Trial Chamber cited the Decision of the President of the Tribunal in

[253] Kvočka's Brief in Reply, para. 13. *See* also Prosecution Respondent's Brief, para. 5.3.
[254] Kvočka Appeal Brief, para. 30.
[255] *Ibid.*, para. 11.
[256] Decision on the Admission of the Record of the Interview of the Accused Kvočka, 16 March 2001 ("Kvočka Admission Decision"). The interview was admitted as Exhibit P 3/203.
[257] Oral Decision, T. 3520-3522.
[258] Kvočka Admission Decision, p. 3.

Delalić[259] in support of its decision, noting that the President found that there was "a fundamental difference between being an accused, who might testify as a witness if he so chooses, and a witness".[260] Kvočka submits that the Trial Chamber erred in admitting the record of his interview into evidence.

123. The Appeals Chamber understands Kvočka to be raising three reasons to support his position. First, Kvočka contends that the Trial Chamber's reliance on the decision in *Delalić* was incorrect given that the essence of that decision related to whether a particular written document may be admitted into evidence without accompanying testimony.[261] He also argues that, contrary to the *Delalić* Decision, there should be no distinction between an accused who testifies as a witness and a witness summoned by the Prosecution or the Defence.[262] Second, he submits that the decision of the Trial Chamber in question is contrary to its oral decision of 4 July 2000.[263] Third, he reasons that the decision of the Trial Chamber violates the principle of orality of debates as well as the principle of equality.[264] He submits that there is a difference between the use that can be made of preliminary statements of an accused who subsequently testifies and the use that can be made of preliminary statements of an accused who does not testify.[265] Kvočka submits that it is only the latter that may be entered into evidence.[266] Kvočka argues that, since he testified, the Prosecution was able to cross-examine him with respect to all relevant facts including those that were the subject of his earlier interview.[267]

124. For its part, the Prosecution considers Kvočka's argument relating to the Trial Chamber's oral decision of 4 July 2000 to be misconceived. It argues that "there is a difference between the use that can be made of a statement of a *witness,* and the use that can be made of a statement of an *accused*",[268] and that the Trial Chamber's oral decision concerned "prior statements of *witnesses* generally, and not the prior statements of an *accused*".[269] The Prosecution submits that the jurisprudence of the Tribunal shows that "an accused's interview statements, if voluntarily made

[259] *Prosecutor v Mucić et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić, 11 November 1996 ("*Delalić* Decision").
[260] Kvočka Admission Decision, pp. 2-3.
[261] Kvočka Appeal Brief, paras 18-19.
[262] *Ibid.*, para. 17.
[263] *Ibid.*, para. 14.
[264] *Ibid.*; Kvočka Reply Brief, para. 19.
[265] Kvočka Appeal Brief, para. 18.
[266] Kvočka Reply Brief, para. 20.
[267] Kvočka Appeal Brief, para. 19; Kvočka Reply Brief, paras 17, 20.
[268] Prosecution Respondent's Brief, para. 5.10 (emphasis in original).
[269] *Ibid.*, para. 5.12 (emphasis in original).

and if in compliance with all requirements in Rule 42 are admissible as evidence and may be used against the accused, if probative".[270]

125. The Appeals Chamber does not consider the Trial Chamber to have erred in relying on the decision of the President of the Tribunal in *Delalić*. Although the subject matter of that decision differs from the subject matter of the decision in question, the relevant finding of the President is not limited to the facts of that particular case. The finding in question was that "[t]here is a fundamental difference between being an accused, who might testify as a witness if he so chooses, and a witness".[271] The President explained this distinction with the aid of two examples. First, there are provisions in the Rules relating to the testimony of witnesses that are inapplicable to an accused and incompatible with his rights. Second, the Rules contain separate definitions and separate substantive positions for an accused as opposed to witnesses. For these reasons, the President considered it clear that "an accused cannot be considered for all purposes as a witness."[272] The principle enunciated is thus not limited to the facts of the *Delalić* Decision and can be applied outside its confines. In its own decision, the Trial Chamber considered that neither the Statute nor the Rules nor the Tribunal's own practice "treat a witness in the same way as an accused testifying under oath" and that "an accused enjoys specific protection with regard to respect for the rights of the defence".[273] The Appeals Chamber can see no fault in this reasoning. Indeed, it confirms that an accused who chooses to testify as a witness is not to be treated *qua* witness but as an accused testifying *qua* witness.

126. In light of the foregoing, the Trial Chamber was clearly entitled to hold that its oral decision of 4 July 2000 related "only to witnesses' prior statements within the meaning of Rule 66 of the Rules"[274] and not to the prior statements of an accused testifying *qua* witness. The decision to admit the transcript of Kvočka's interview into evidence therefore in no way contradicts the Trial Chamber's earlier oral decision.

127. Given that a witness cannot be treated in the same way as an accused who testifies and the rules governing the testimony of witnesses cannot be mechanically extended to cover the testimony of accused persons who testify, Kvočka's third line of reasoning would require an exception to the rules governing the testimony of accused persons who testify. No such exception exists. Further, the Appeals Chamber notes that Kvočka's preliminary interview was admitted into evidence in addition

[270] *Ibid.*, para. 5.17.
[271] *Delalić* Decision, para. 35.
[272] *Ibid.*
[273] Kvočka Admission Decision, p. 3.
[274] *Ibid.*

to, not instead of, his subsequent testimony. Thus, contrary to Kvočka's argument, the principle of orality of debates has not been violated.

128. The Appeals Chamber observes that "a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable."[275] The Trial Chamber, in its decision, considered that Kvočka's interview was "conducted in accordance with Rules 63 and 42(A)(iii) of the Rules which set down certain measures protecting the rights of the accused" and noted that Kvočka was "clearly informed of his rights in the presence of his Counsel".[276] The Appeals Chamber takes note of the fact that Kvočka does not allege a procedural irregularity in relation to the interview itself. Indeed, he considers it to have been procedurally flawless.[277] In the absence of such a flaw, this argument cannot be upheld.

129. For these reasons, this sub-ground of appeal is dismissed.

2. The Trial Chamber's reading of the interview

130. Having found that the Trial Chamber did not err in allowing the transcript of the interview to be entered into evidence, the Appeals Chamber now turns to Kvočka's arguments relating to the Trial Chamber's reading of the interview. Kvočka contests the basis of the Trial Chamber's statement that he "initially acknowledged that there were shift leaders in the camp."[278] He contends that he made no such acknowledgement and that the language used in the interview does not support such a conclusion.[279] Initially, Kvočka also submitted that the Trial Chamber failed to appreciate the difference between the police shift and the guard shift of the camp.[280] However, considering this to be within the scope of his third ground of appeal, Kvočka subsequently restricted himself to his argument relating to the misinterpretation of the interview.[281] As such, the Appeals Chamber will also restrict its consideration of this sub-ground of appeal to this matter.

131. To the question whether there was "somebody below [him], or Mr. Meakić and above the other police guards, for instance, a shift leader", Kvočka states that his reply was: "I know the term. I think that Meakić determined three people to be as if in front of the shift."[282] However, paragraph 363 of the Trial Judgement indicates that Kvočka responded: "I know the term. I think that Meakić

[275] *Čelebići* Appeal Judgement, para. 533.
[276] Kvočka Admission Decision, p. 3.
[277] Appeal Hearings, 24 March 2004, AT. 263.
[278] Trial Judgement, para. 363.
[279] Kvočka Appeal Brief, paras 24-29.
[280] *Ibid.*, paras 26-27.
[281] Kvočka Reply Brief, para. 26.

appointed three people to be shift leader."[283] Kvočka denies that he ever said this and argues that there is no linguistic or logical reason to support such a conclusion.[284] He initially raised the possibility that the explanation for this discrepancy may lie in an inaccurate translation of his testimony,[285] but subsequently withdrew this line of reasoning.[286]

132. The Prosecution submits that Kvočka has failed to demonstrate an error on the part of the Trial Chamber. It argues that Kvočka's interview with the Prosecution "contains several references to shift leaders, and to the roles of these individuals as being senior to the guards at the camp".[287] The Prosecution further argues that Kvočka does not explain what is meant by the phrase "in front of shifts" and does not explain why it was not open to a reasonable trier of fact to reach the conclusion of the Trial Chamber.[288]

133. In his reply, Kvočka maintains that he did not mention the term "shift leader" at all given that no such position existed either in the extraordinary security system or in the Omarska Police Station Department.[289] Kvočka argues that the reason he knew what the job of a shift leader entailed was due to their duties being stated in the "Rules on Internal Organization of Republican Secretariat for Internal Affairs".[290]

134. Despite the withdrawal of Kvočka's translation error argument, he continues to use the phrase "in front of the shift" and not the phrase "shift leader" as used in the Trial Judgement. The Appeals Chamber notes that Kvočka does so without providing an explanation as to the meaning to be attributed to this phrase. Nevertheless, the Appeals Chamber need not speculate on the correct translation. Even assuming *arguendo* that Kvočka's interpretation is the correct one, the Appeals Chamber considers it within the discretion of a reasonable trier of fact to determine that "in front of the shift" can be read as "shift leader". This is especially so given the question to which the phrase proved to be the answer. According to Kvočka, the exchange proceeded, in relevant part, as follows:

> Q: … is there or was there somebody below you or Mr. Meakić and above the other police guards, for instance, a shift leader?

[282] Kvočka Appeal Brief, para. 24.
[283] Quoting exhibit P 3/203, p. 59.
[284] Kvočka Appeal Brief, para. 26.
[285] *Ibid.*, para. 30.
[286] Kvočka Reply Brief, paras 14-15.
[287] Prosecution Respondent's Brief, para. 5.20.
[288] *Ibid.*, para. 5.22.
[289] Kvočka Reply Brief, para. 23.
[290] *Ibid.*, para. 24.

A: I know the term. I think that Meakić determined three people to be as if in front of the shift.[291]

From this, a reasonable trier of fact could properly have inferred that Kvočka was treating the phrase "in front of the shift" synonymous with the phrase "shift leader". The inference drawn by the Trial Chamber was therefore a valid one.

135. In any event, the Appeals Chamber notes that the Trial Chamber did not find Kvočka to be a shift leader; rather, it held that he was the functional equivalent of the deputy commander of the guard service.[292] While Kvočka challenges this finding in his third ground of appeal, the Appeals Chamber observes at this stage that Kvočka's present argument would have no impact on the Trial Chamber's findings as to his role, significance or status in the joint criminal enterprise. Therefore, even assuming *arguendo* that Kvočka's assertions are correct, neither his conviction nor his sentence would be affected. Furthermore, any alleged error would not affect the credibility attached to Kvočka's testimony given that this was not challenged by the Trial Chamber. This ground of appeal is dismissed.

B. Kvočka's role and position in the Omarska camp (ground of appeal 3)

136. Kvočka submits that he was a police officer-patrolman and the Trial Chamber erred in finding that he had the *de facto* status of a deputy commander of the guard service.[293] The Appeals Chamber understands that he advances three main arguments to support this submission: (a) the Trial Chamber's findings were contradictory and unclear, (b) the Trial Chamber relied for its findings on unreliable evidence, and (c) the material fact that he was *de facto* deputy commander was not pleaded in the Indictment.

1. The Trial Chamber's findings

137. The Trial Chamber found that Kvočka held a *de facto* position of authority in the camp and that he participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service.[294] Prior to the establishment of the camp, Kvočka had been a patrol leader in the Omarska police station department. In this position, he had no formal authority over the other police officers, although there was a slight difference in authority between a sector leader and the other policemen.[295] Following an increase in the size of the Omarska police station department, Kvočka was elevated to a position of *de facto* deputy or assistant commander. The

[291] Kvočka Appeal Brief, para. 24.
[292] Trial Judgement, para. 372.
[293] Kvočka Appeal Brief, para. 70.
[294] Trial Judgement, para. 372.
[295] *Ibid.*, para. 336.

increase in size should have been accompanied by the assignment of deputy and assistant commanders, but there were none available. Therefore, as was common in the former Yugoslavia, Kvočka, as one of the senior policemen, took over *de facto* the function of a deputy commander.[296] When the Omarska camp was established, Željko Meakić, who was the commander of the Omarska police station department at that time, organized the service in the camp after the model of the Omarska police station department. In this way, Kvočka assumed the function of deputy commander in the camp.[297]

138. The Trial Chamber partially based its findings on the evidence given by Kvočka. He had denied that he had any authority in the camp, but had acknowledged that he had transmitted Željko Meakić's orders to the guards, and that he had replaced Željko Meakić in his absence. Additionally, the Trial Chamber relied on the testimony of several witnesses who stated that Kvočka had influence on and authority over the guards. The Trial Chamber concluded that Kvočka had significantly participated in the operation of the camp, wielding considerable influence.[298] However, the Trial Chamber found that the evidence did not sufficiently demonstrate a superior-subordinate relationship between Kvočka and the known perpetrators of crimes in the camp. The Trial Chamber, therefore, held that Kvočka did not incur superior responsibility under Article 7(3) of the Statute.[299]

2. Kvočka was not the deputy commander of the Omarska camp

(a) Kvočka's position in the camp

139. Kvočka contends that the Trial Chamber's findings are inconsistent and contradictory, because the Trial Chamber used expressions like commander/deputy commander of the camp or the guard service indiscriminately, making the Judgement difficult to understand.[300] Kvočka argues that only the head of the Banja Luka Security Service Centre was in charge of assigning duties in the whole Banja Luka Security Service Centre, including the police department in Omarska. He submits that he was assigned by the head of the Banja Luka Security Service Centre to the post of patrol sector leader in the Omarska police department, and therefore could not have had any other status.[301] In addition, he submits that the Trial Chamber's conclusion regarding his position in the camp is inconsistent with the Prosecution's argument that the police was a strict formal and

[296] *Ibid.*, para. 343.
[297] *Ibid.*, para. 344.
[298] *Ibid.*, para. 398.
[299] *Ibid.*, paras 411-412.
[300] Kvočka Reply Brief, para. 30.
[301] Kvočka Appeal Brief, para. 47.

hierarchical organisation with a precisely defined structure. He argues that this argument excluded the assumption that one might *de facto* perform certain duties without being appointed in accordance with the formal procedure.[302] Kvočka contends that the Trial Chamber reached its conclusion based on the assumption that there was an increase in size of the police station and the scope of its tasks. But this assumption was, in his view, contradicted by the evidence presented at trial.[303] Finally, Kvočka points out that the Trial Chamber acknowledged that the evidence did not sufficiently demonstrate a superior-subordinate relationship between him and known perpetrators of the crimes; nor was there credible evidence that he exercised effective control over subordinates who committed crimes. He argues that these findings are contradictory to the finding that he held a *de facto* position of authority, and that, since he did not have a superior status in comparison with other police officers, he could not have had a *de facto* position of deputy commander.[304]

140. The Prosecution responds that Kvočka was found to have participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service, and that his criminal liability did not depend on any formal position.[305] The Prosecution argues that the Trial Chamber found that Kvočka was responsible for the crimes on the basis of the significance of his contribution to the system of mistreatment. His criminal liability exists independently of any finding that he was liable as a superior under Article 7(3) of the Statute for crimes committed within the camp.[306] In the Prosecution's view, the Trial Chamber found that there was inconclusive evidence to demonstrate "effective control" over the guards because the guard service was disorganized and acted without accountability, and that it was not fully established which crimes were committed by which of Kvočka's subordinates during the time that he was working in the camp. The Prosecution submits that these findings were inconsequential to the Trial Chamber's conclusion that Kvočka exercised influence and authority in the camp.[307]

141. Kvočka in reply points out that the Trial Chamber's findings were inconsistent with the "Rules on the operational methods of the Public Security Service".[308] He argues that, according to these Rules, Simo Drljača, who was the head of the Prijedor Public Security Station, was the only person responsible for the "extraordinary security", and, as such, for the operation and the security

[302] *Ibid.*, para. 66.
[303] *Ibid.*, paras 46-47.
[304] *Ibid.*, para. 48.
[305] Prosecution Respondent's Brief, paras 5.30-5.31.
[306] *Ibid.*, para. 5.51.
[307] *Ibid.*
[308] Kvočka Reply Brief, para. 39. The Appeals Chamber understands that Kvočka refers to the "Rules on operational methods of the Public Security Service", published in the Official Gazette of the Socialist Republic of Bosnia and Herzegovina of 11 August 1977, submitted as part of Kvočka's Reply Brief.

of the Omarska camp. In this function, Simo Drljača was assisted by Dusan Janković, but neither by Željko Meakić, nor, consequently, by Kvočka as Željko Meakić's subordinate.[309]

142. The Appeals Chamber recalls that the Trial Chamber found Kvočka guilty notably because he occupied a *de facto* position of authority. The Trial Chamber took care to distinguish between the formal position of a deputy commander and the *de facto* position of authority and influence occupied by Kvočka.[310] When the Trial Chamber employed the term "deputy commander" in relation to Kvočka's position, it did so paraphrasing the Prosecution's submissions or evidence given by witnesses.[311] Summarizing its own findings, the Trial Chamber described Kvočka's position as the "*functional equivalent*" of a deputy commander.[312] Although Kvočka submitted that authority is linked to a formal position,[313] he acknowledged in the same Appeal Brief that authority may not be derived only from a formal position within a hierarchy, but also from professional experience and reputation.[314] Kvočka himself had explained in his interview with the Prosecution that it was quite common in the former Yugoslav police force to take over certain functions temporarily, without an official appointment.[315]

143. With regard to the organizational changes in the Omarska police station in April 1992, the Trial Chamber could rely on Kvočka's own statement in his interview with the Prosecution:

> I'll try to explain that. Okay, so after Meakić replaced Bujić, there was a programme or a plan of operation of the police station under war conditions. And again, the Omarska section, again became a police station. And a certain number of reserve policemen was included in its operation. There were civilians, so there were civilians who had military war assignments in the police. So […] when Želijko became the commander we can now say again of the police station in Omarska, the chief of the public security station in Prijedor was Simo Drljača.[316]

This statement is consistent with the uncontested finding of the Trial Chamber that a large number of reserve policemen were called into service at the Omarska police station department at that time.[317] Kvočka has failed to identify the evidence which, he asserts, is contrary to the Trial Chamber's finding that the structure of the police station changed in April 1992.

144. The Trial Chamber's finding that there was not sufficient evidence demonstrating a superior-subordinate relationship between Kvočka and known perpetrators of crimes is not inconsistent with its finding that Kvočka occupied a position of authority and influence in the camp.

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[309] Kvočka Reply Brief, paras 41-43.
[310] *See,* e. g., Trial Judgement, paras 342, 344.
[311] *See,* e. g., Trial Judgement, paras 362, 369.
[312] Trial Judgement, para. 372.
[313] Kvočka Appeal Brief, para. 48.
[314] *Ibid.*, para. 54.
[315] Exhibit P 3/203, p. 21.
[316] *Ibid.*, p. 4.

First, the Trial Chamber noted that it had heard evidence that the guard service was disorganized and acted without accountability. It is therefore doubtful if Kvočka exercised effective control over the guards. Second, in the view of the Trial Chamber, the Prosecution had not fully established which crimes were committed by which of Kvočka's subordinates. These circumstances excluded any finding that Kvočka incurred responsibility under Article 7(3) of the Statute. Not every position of authority and influence necessarily leads to superior responsibility under Article 7(3) of the Statute; a reasonable trier of fact could still come to the conclusion that Kvočka was responsible pursuant to Article 7(1) of the Statute for his participation in a joint criminal enterprise.

145. The Trial Chamber was not conducting research into the formal organization of the police force in the Prijedor area in 1992, but had to determine Kvočka's responsibility for the crimes committed in the Omarska camp. The basis of this responsibility is not Kvočka's formal position within the police force, but his factual participation in the operation of the camp. The Appeals Chamber, therefore, finds Kvočka's arguments relying on the formal organization of the police force to be misconceived.

(b) Kvočka was not Meakić's deputy

146. Kvočka challenges the Trial Chamber's finding that he was *de facto* or *de jure* the deputy commander of the Omarska police station department.[318] He submits that there was no evidence showing that he had any influence in the Omarska police station department or performed any task that was equivalent to the duty of a deputy commander in the department.[319] He points out that the tasks which he performed in the camp, such as transmitting orders, were just regular duties of a duty officer.[320] He submits that he did not replace Meakić in his absence, as many witnesses testified that Meakić was almost always in the camp.[321] Finally, he advances the argument that since he ate the same food as the detainees, he was not superior to other guards.[322]

147. The Prosecution replies that Kvočka did not dispute that, when Željko Meakić was absent, he was *de facto* in charge. When Meakić was present, the Trial Chamber found that Kvočka was the *de facto* deputy commander who passed on instructions from Meakić to the guards.[323] The Prosecution argues that the fact that Kvočka ate the same food as the detainees is irrelevant to his

[317] Trial Judgement, para. 337.
[318] Kvočka Appeal Brief, paras 55-56.
[319] *Ibid.*, para. 57.
[320] *Ibid.*, para. 58.
[321] *Ibid.*, para. 61.
[322] *Ibid.*, para. 64.
[323] Prosecution Respondent's Brief, para. 5.44.

position at the camp, as it was a matter of choice, since Kvočka admitted that officials at the camp were allowed to bring food from home.[324]

148. The Trial Chamber based its finding that Kvočka participated in the operation of the camp as the functional equivalent of a deputy commander on the fact that Kvočka transmitted Željko Meakić's orders to subordinates, and that he replaced Željko Meakić during his absence.[325] Kvočka admitted that he transmitted orders, and argued that this was part of his tasks as a duty officer. For the finding that Kvočka replaced Željko Meakić during his absence, the Trial Chamber could rely on Kvočka's own testimony:

> That's what he was trying to achieve when he was absent, that is, in his absence, that there should be one of us on duty on the shift who would have some kind of police experience and knowledge which he would use to prevent such things. And you heard from your own witnesses that Zeljko was there all the time, that he was, that he was – he would sleep there as well; however, that from time to time, he would absent himself from the camp. During those periods of time, he wanted me to be there and to establish a shift like that there, because he trusted me. He believed that I would inform him of everything, that I would also intervene in cases of trouble, if I see that.[326]

The arrangement, that Kvočka should be in the camp when Željko Meakić was absent, was modelled after a similar arrangement that existed for the Omarska police station department:

> I just have to say that with respect to the agreement between Željko, Ljuban and myself, and mentioning Ljuban, he was, there was another war station, police station, established in the village of Lamovita and then he went there. So according to this agreement, that one of us should always be present in the police station, I was there one night.[327]

This is not inconsistent with the testimony of Witness F and Witness J, on which Kvočka heavily relies. Although both witnesses stated that Meakić was "always" in the camp, they were not in a position to observe Meakić permanently. Their testimony does not exclude the possibility that Meakić left the camp "from time to time", as Kvočka recounted. Moreover, the Appeals Chamber notes that both witnesses agreed that Kvočka acted as the deputy commander of the camp, regardless of Meakić's presence.[328] Even if Željko Meakić spent a lot of time in the camp, Kvočka acknowledged that there were occasions when Meakić left the camp. A reasonable trier of fact could conclude from Kvočka's statements that he acted as Željko Meakić's deputy on these occasions. Željko Meakić obviously trusted Kvočka more than any other guard in the camp; he relied on Kvočka for information and was also confident that Kvočka would intervene in cases of trouble.

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[324] *Ibid.*, para. 5.45.
[325] Trial Judgement, para. 372.
[326] Miroslav Kvočka, T. 8150.
[327] Exhibit P3/203, p. 8.
[328] Witness F, T. 5355, 5360 and 5405; for a discussion of Witness J's testimony, *see* below paras 151-153.

3. The evidence did not support the Trial Chamber's findings

149. Kvočka submits that the evidence presented to the Trial Chamber neither proved beyond reasonable doubt that he acted as the functional equivalent of the deputy commander of the guard service, nor proved beyond reasonable doubt that he had some degree of authority over the guards. The Trial Chamber, he argues, therefore erred in finding that he occupied a position of authority and influence within the camp.[329]

150. The Trial Chamber based its finding on Kvočka's position in the camp on the evidence of a number of witnesses, namely, Mirsad Ališić, Sifeta Sušić, Azedin Oklopčić and Witnesses A, AJ and AI.[330] As supporting evidence, the Trial Chamber referred to the testimony of Nusret Sivać, Kerim Mesanović and WitnessJ, who had stated that they had seen Kvočka giving orders to guards on several occasions.[331]

(a) Witness J

151. Kvočka argues that Witness J arrived at Omarska on 13 or 14 June and was in the camp for only just five or six days before Kvočka left. Moreover, he submits that this witness had a "strong motive to file a false charge" against him because of a previous personal conflict. Kvočka asserts that she had had a relationship with his uncle, of which Kvočka strongly disapproved.[332] He further argues that Witness J abused the protective measures granted to her by the Trial Chamber, because she subsequently appeared several times in the media and gave accounts about her experiences in the Omarska camp.[333]

152. The Appeals Chamber considers that a reasonable trier of fact could rely on Witness J's testimony. She was familiar with the structure of the public security service and gave a detailed account of it.[334] She stated that the administration of the Omarska camp was similar to the structure she knew from the public security service.[335] In her view, Kvočka was the deputy commander of the Omarska camp. She gave several reasons supporting this conclusion: Kvočka was referred to as the deputy commander by detainees and guards; for example, she had heard guards saying "I have to ask the deputy, I'm going to see the deputy, I'm going to see Kvočka."[336] On other occasions, she heard Kvočka issuing orders to guards, and she observed that the guards treated Kvočka with

[329] Kvočka Appeal Brief, para. 49.
[330] Trial Judgement, para. 368.
[331] *Ibid.*, para. 370.
[332] Kvočka Appeal Brief, para. 50, p. 44.
[333] *Ibid.*, para. 50, p. 45.
[334] Witness J, T. 4760-4762.
[335] *Ibid.*, T. 4761-4762.

respect, like a superior. She saw Kvočka going round the camp, positioning the guards. She had never heard anyone refuse to act upon Kvočka's word. Kvočka shared an office with Željko Meakić, and when Željko Meakić was off duty, Kvočka would take his place.[337]

153. The Appeals Chamber finds that Kvočka did not advance relevant objections to Witness J's testimony. She admitted freely that she was not certain about the exact dates of her observations,[338] but such uncertainty is understandable when a witness gives evidence about events after several years. The alleged personal motive for a false accusation remains vague and is not supported by any evidence. Even if such a motive existed, the mere existence of a personal conflict between a witness and an accused does not render the witness' evidence *per se* unreliable. The fact that the witness, after testifying before the Trial Chamber, chose to appear in public, does not have an impact on the reliability of her testimony; Kvočka does not claim that she applied for protective measures under false pretences. The Appeals Chamber, therefore, finds that Kvočka's arguments with regard to Witness J are without merit.

(b) Witness Azedin Oklopčić

154. Kvočka submits that the testimony of Azedin Oklopčić, that Kvočka and Meakić had a particular status because they took 24-hour shifts, whereas other guards and shift leaders took 12-hour shifts, should not have been accepted. He argues that this statement was not confirmed by any other witness.[339] The Prosecution replies that although the witness was incorrect on this detail of Kvočka's and Meakić's shifts, the Trial Chamber relied on other sufficiently compelling evidence to find that Kvočka occupied a position of influence and authority.[340]

155. The Appeals Chamber acknowledges that Azedin Oklopčić stated that Željko Meakić and Kvočka took turns every 24 hours, as opposed to the shift leaders and the guards.[341] However, even if this statement is incorrect, this would not raise any doubts as to the reliability of Azedin Oklopčić's evidence. Kvočka had stated that he had no fixed schedule, and that his working times in the camp were irregular.[342] It was, therefore, easy for an observer to be mistaken about Kvočka's working schedule. Moreover, Azedin Oklopčić did not rely on this particular observation for his conclusion that Kvočka was the deputy commander of the camp. He stated that he believed that Kvočka was the deputy commander because the guards and shift leaders treated him respectfully.

[336] *Ibid.*, T. 4742.
[337] *Ibid.*
[338] *Ibid.*, T. 4743.
[339] Kvočka Appeal Brief, para. 49(e).
[340] Prosecution Respondent's Brief, para. 5.37.
[341] Azedin Oklopčić, T. 1757.
[342] Miroslav Kvočka, T. 8154.

He observed that the guard leaders would go to see him and Željko Meakić for consultations, and that he distributed food and cigarettes among the guards. Finally, Azedin Oklopčić remarked that the shift changeover would always take place in the presence of the commander or the deputy commander, and that he had seen Kvočka on several of these occasions.[343] The reasoning that Kvočka distributed food and cigarettes among the guards may not be conclusive, if assessed on its own. However, viewed in their entirety, Azedin Oklopčić's reasons for his assumption that Kvočka held the position of deputy commander are not unreasonable. The Appeals Chamber finds that the Trial Chamber could reasonably rely on the evidence given by Azedin Oklopčić to support its findings.

(c) Witness AJ

156. Kvočka argues that the Trial Chamber erred in accepting the testimony of Witness AJ that Kvočka was a deputy commander of the camp, because he approved the change of the witness's location. He submits that this conclusion is erroneous, because any guard had the authority to assign a detainee to a specific location, as shown by the testimony of Witness AN and Nusret Sivać.[344] The Prosecution responds that Witness AJ testified that he was informed by a guard that Kvočka was in a position to decide if he could be detained in another location, which was not inconsistent with Witness AN's evidence that guards could send detainees to various places of detention after interrogation.[345]

157. The relevant part of Witness AJ's testimony reads as follows:

> I got this from Miroslav Kvocka, because he [an unknown guard] said, "Interrogation and then to the pista." And I said, "Well, I'd like to go where I was before." And he said, "You have to ask Kvocka about that." Then it happened by chance that Kvocka happened to be there, and I asked him, and he gave me a piece of paper. He wrote -- what he wrote on it, I don't remember. But I gave this piece of paper to the man over there on guard. Who it was, I can't really remember now, but I gave him the piece of paper, and then I went to Mujo's rooms.[346]

From this statement it becomes clear that the guard, who had been asked by Witness AJ first, did not have the competence to allow Witness AJ to change his place, whereas Kvočka did. The witness called Kvočka explicitly a commander, even if he was unsure about the exact command structure in the camp.[347] The Appeals Chamber finds that a reasonable Trial Chamber could infer from this testimony that Kvočka had more authority than a simple guard.

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[343] Azedin Oklopčić, T. 1756-1757.
[344] Kvočka Appeal Brief, para. 49(c).
[345] Prosecution Respondent's Brief, para. 5.35.
[346] Witness AJ, T. 1610-1611.
[347] *Ibid.*, T. 1596.

(d) Witness AI

158. Kvočka argues that Witness AI's testimony is unreliable. He submits that Witness AI testified that, between 8:00 and 9:00 p.m. on 30 May 1992, Kvočka introduced himself as the person responsible for the detainees, and told the detainees that everything would be fine; they would be questioned and then returned home. Kvočka argues that this testimony is contrary to the evidence given by Branko and Milenko Rosić that he left the camp after a shooting incident, which occurred in the afternoon on 30 May, and did not come back on the same day.[348] He adds that, after the shocking experience of the shooting incident, he was mentally incapable of performing his duties and went on sick leave the next day.[349] He submits that the Trial Chamber also concluded that staff and detainees of the camp believed in the first ten to fifteen days that the detainees would be questioned and then returned home, and that therefore his address to the detainees did not show that he had a superior position.[350] The Prosecution responds that the evidence of witnesses Branko and Milenko Rosić was irrelevant to the credibility of Witness AI. It submits that the testimony of these two witnesses was not inconsistent with Witness AI's evidence since the exact time of the incident was unclear.[351] Kvočka replies that the testimony of Witness AI did not prove anything due to three reasons. First, the witness claimed that Kvočka was normally dressed when addressing the detainees between 8:00 and 9:00 p.m., although he had helped in the transportation of heavily injured people in the ambulance. Second, the witness did not give information about the event of the "washing of the pista" (to remove the bloodstains) on 30 May, which was an extraordinary situation. Third, witnesses Milenko and Branko Rosić confirmed that he left the camp after giving help in transporting the injured.[352]

159. The Appeals Chamber finds that the testimony of Witness AI is not inconsistent with the testimony of Branko and Milenko Rosić. None of the witnesses could give the exact time of his observations. Even if it is accepted that the shooting incident took place before Kvočka's address to the detainees, this would not raise doubts about the reliability of Witness AI's account. Branko Rosić mentioned that Kvočka left the camp after the shooting incident, but his testimony does not exclude the possibility that Kvočka returned later in the evening. Milenko Rosić himself left the camp after the incident and was therefore not in a position to testify about Kvočka's eventual return to the camp. Kvočka's intervention to stop the shooting was no doubt stressful for him. However, the witnesses agreed that Kvočka reacted adequately and courageously, and that he organized help

[348] Kvočka Appeal Brief, para. 49(f), pp. 35-36.
[349] *Ibid.*, para. 49(f), p. 30.
[350] *Ibid.*, para. 49(f), p. 36.
[351] Prosecution Respondent's Brief, para. 5.38.
[352] Kvočka Reply Brief, para. 49.

for the victims of this incident efficiently.[353] It is highly improbable that the consequences of this incident should have prevented Kvočka from addressing a few reassuring remarks to the detainees later in the evening. For Witness AI, it was clear from Kvočka's words that Kvočka held a position of authority in the camp.[354] The Trial Chamber could rely on this evidence to support its findings about Kvočka's position in the camp.

(e) Witness Nusret Sivać

160. Kvočka contends that the Trial Chamber misinterpreted Nusret Sivać's testimony when it stated that Kvočka had intervened on behalf of this witness. Kvočka submits that Nusret Sivać's testimony is not reliable for three reasons: (i) he could have seen Kvočka only once; (ii) his description of Kvočka's uniform was wrong; and (iii) he had stated that he had seen Kvočka and Prcać together in the camp, which was impossible.[355] In his Reply Brief, he added that the Trial Chamber erred in relying on Nusret Sivać's testimony, because the witness arrived in the camp on 24 June 1992, after Kvočka had already left the camp.[356] The Prosecution submits that the Trial Chamber was entitled, while interpreting Sivać's evidence, to conclude that Kvočka had influence over the guards as he intervened when they arrested the wrong person. The Prosecution argues that the allegation that the witness was lying when he said that Kvočka was seen with Prcać sometime in July must be rejected as Kvočka stated that he might have returned to the camp sometime in the second week of July.[357]

161. Nusret Sivać stated:

> While they were beating us, our faces were facing the wall, and I don't know how long it took. I remember the moment when I heard Kvocka's voice. He shouted all of a sudden, "Who brought Nusret Sivac to the camp?" At that moment, the guards stopped beating us and we turned around, and Kvocka came to Tomislav Stojakovic and Brane Bolta, who had taken us from Prijedor, and he told them, "Why have you brought Mr. Sivac here? We need his sister, Nusreta Sivac, who used to work as a judge in the court in Prijedor."
>
> Q. And after he said that, what happened?
>
> A. Then Tomo Stojakvic who had brought us there asked him, "What am I going to do with him?" He said, "Wait a second. I'm going to see Mico, the boss. I'll ask him what to do."[358]

The conclusion drawn by the Trial Chamber, that Kvočka interrupted the beating, sought specific instructions from the investigator Ranko Mijić and finally ordered that Nusret Sivać should be

[353] Branko Rosić, T. 7493; Milenko Rosić, T. 7514-7515.
[354] Witness AI, T. 2271-2272.
[355] Kvočka Appeal Brief, para. 50, pp. 38-43.
[356] Kvočka Reply Brief, para. 47.
[357] Prosecution Respondent's Brief, para. 5.39.

brought back to Prijedor, is justified. The alleged errors in Nusret Sivać's testimony are minor and do not affect the core of the testimony. Nusret Sivać was arrested twice, on 10 June and 23 June.[359] After the first arrest, he was released immediately because of Kvočka's intervention. Kvočka's argument, that the Trial Chamber should have disregarded Nusret Sivać's evidence because he was arrested on 24 June, is therefore misconceived. The Appeals Chamber finds that Kvočka does not explain why no reasonable trier of fact could have come to the Trial Chamber's finding.

(f) Witness Mirsad Ališić

162. Kvočka argues that Mirsad Ališić's credibility is in question as his testimony about the shooting incident, which happened on 30 May 1992, was contrary to the evidence given by Branko Rosić, Milenko Rosić, Miroslav Nišić, Ljuban Anđić and Kvočka himself.[360] Kvočka argues that Mirsad Ališić claimed that he had seen Kvočka addressing the detainees on 31 May, which is impossible, as Kvočka had left the camp after the incident of 30 May. In addition, Kvočka submits that Mirsad Ališić gave a false account about the murder of Mehmedalija Nasić. He points out that Ališić's testimony about the death of Nasić was inconsistent with the testimony of Jasmir Okić, Dragan Popović and himself.[361] He further submits that Ališić's testimony was unreliable because of contradictions in some details, such as the colour of Kvočka's uniform. Kvočka finally argues that Mirsad Ališić testified that Kvočka addressed the detainees on the "pista" stating that he was the commander of the camp, which was contrary to the finding that he was the deputy commander of the police station.[362]

163. The Prosecution responds that the testimony of Ališić was materially consistent with the Trial Chamber's findings that Kvočka was the *de facto* deputy commander in the camp when Meakić was not present.[363] It further submits that the Trial Chamber found that Kvočka was absent from the camp from 2-6 June, which is contrary to Kvočka's assertion that he was absent on 31 May, and that Kvočka's testimony showed that Meakić was not at the camp at the material time and that Kvočka had assumed the role of supervisor.[364]

164. The Appeals Chamber notes that Kvočka does not explain why he considers the testimony of Mirsad Ališić about the incident on 30 May to be unreliable. The witness recounted that, when he

[358] Nusret Sivać, T. 3973-3974.
[359] *Ibid.*, T. 3970 and 3975.
[360] Kvočka Appeal Brief, para. 49, p. 18.
[361] Kvočka Reply Brief, para. 50.
[362] Kvočka Appeal Brief, para. 49, p.18.
[363] Prosecution Respondent's Brief, para. 5.33.
[364] *Ibid.*; *see* also exhibit P3/203, pp. 16-17.

arrived in Omarska, a guard opened fire on six detainees. The Trial Chamber found that, on this occasion, Kvočka intervened and stopped the shooting. The Trial Chamber based this finding on Kvočka's own statement and the testimony of Branko Rosić, Milenko Rosić and Ljuban Andić.[365] This finding is not necessarily inconsistent with Mirsad Ališić's account. The main differences are that Mirsad Ališić omitted Kvočka's intervention, and that he identified the attacker as a guard named Pedrojević. Mirsad Ališić was not asked why the shooting stopped; neither was he confronted with the statement of Kvočka about this incident. No other witness identified the attacker.

165. Kvočka's argument that there are further inconsistencies in Mirsad Ališić's testimony, such as the colour of Kvočka's uniform or the existence of reflectors in the camp, is equally without merit. These details do not affect the core of Mirsad Ališić's testimony, nor does Kvočka demonstrate that they are actually incorrect.

166. The Trial Chamber accepted Mirsad Ališić's testimony about the murder of a detainee called Nasić.[366] Kvočka does not advance specific arguments supporting his argument that Mirsad Ališić gave false testimony about this fact. The Appeals Chamber finds that he seeks merely to substitute his own evaluation of the evidence for that of the Trial Chamber, without demonstrating that it was not open for a reasonable trier of fact to come to the conclusions of the Trial Chamber. The Appeals Chamber finds that it was open for a reasonable trier of fact to rely on the testimony of Mirsad Ališić about Kvočka addressing orders to the detainees. A reasonable trier of fact could also conclude from Mirsad Ališić's testimony that Kvočka was the camp commander and that Kvočka held a position of authority. Even if the witness used the term "camp commander" and not "deputy commander" or a similar term, it is not to be expected that this witness, not being an expert on the organizational structure of the police, was aware of the correct designation of Kvočka's position.

(g) Witness A

167. Kvočka argues that Witness A only assumed that Kvočka held a superior position in the camp. He submits that this witness was brought to the Omarska camp between 17 and 20 June 1992 and the Trial Chamber found that he was absent from the camp from 16 to 20 June and finished working there on 23 June. Since the witness was only in the camp together with Kvočka for about two to three days and saw him two or three times, Kvočka argues that this part of Witness A's testimony should be rejected. He further points out that the Trial Chamber found another part of the

[365] Trial Judgement, footnote 657.
[366] *Ibid.*, para. 379.

witness' testimony unreliable.[367] The Prosecution replies that the Trial Chamber declined to rely upon a part of Witness A's evidence because the details of the rape that she gave were confusing and could not be relied upon to establish guilt. The Trial Chamber, however, accepted her testimony that she saw Kvočka in the camp and that he appeared to hold a position of authority. The Prosecution points out that the evidence of Witness A corroborated that of other witnesses to a material extent, and that Witness A was in Omarska for some time from June to August 1992, when she saw Kvočka for two to three days walking around the camp, which is contrary to Kvočka's claim that Witness A was in the camp for a few days only.[368]

168. Witness A stated that she had seen Kvočka two or three times in the camp.[369] She saw him in the command room or walking about in other parts of the camp. She assumed that he was "some sort of superior", because the guards addressed him, and the female detainees were told by the guards to address any request to Kvočka or one of the other commanders.[370] The Trial Chamber noted that Witness A testified about her rape by Radić, and that the Trial Chamber had "no difficulty believing that this witness suffered a terrible and traumatizing ordeal. However, her testimony was so confused as to the details of the rape that it cannot be relied upon to establish guilt." [371] The Trial Chamber did not doubt the credibility of Witness A, but found her evidence insufficient as the factual basis for a conviction. This did not prevent the Trial Chamber from relying upon other parts of the witness' testimony, which it found sufficiently clear. Witness A did not merely assume that Kvočka held a position of authority in relation to the guards, but drew this conclusion from her observations of the guards' behaviour. The Appeals Chamber finds that a reasonable trier of fact could rely on this testimony as corroborating evidence.

(h) Witnesses Sifeta Sušić and Kerim Mešanović

169. Kvočka argues that Sifeta Sušić and Kerim Mešanović were brought to the camp only after he had left his position there, so they were unable to give evidence about his position in the camp.[372] With regard to Kerim Mešanović, Kvočka adds that this witness did not recognise him in a photo-set procedure.[373] The Prosecution responds that Kvočka did not dispute the salient aspects of Sifeta Sušić's testimony, such as the date of her arrest and transfer to the camp, and his assistance to her in obtaining medication. In addition, the Prosecution argues that the Trial Chamber held that

[367] Kvočka Appeal Brief, para. 49(b).
[368] Prosecution Respondent's Brief, para. 5.34
[369] Witness A, T. 5500.
[370] *Ibid.*, T. 5469.
[371] Trial Judgement, para. 557.
[372] Kvočka Appeal Brief, paras 49(d) and 50, pp.45-46.
[373] *Ibid.*, para. 50, pp.45-46.

Kvočka was at the camp from "about" 29 May to 23 June 1992, so the relevant conduct on 24 June as testified to by Sifeta Sušić and Kerim Mešanović should not be excluded.[374] In the Prosecution's view, Sifeta Sušić's credibility was not undermined by her understandable mistake about the specific date when she saw Kvočka.[375]

170. The Trial Chamber found that Kvočka held a position in the camp during the period from about 29 May to 23 June 1992.[376] The fact that Kvočka was also seen by several witnesses on 24 June in the camp was, in the view of the Trial Chamber, convincingly explained by the fact that he was obliged to return his brothers-in-law to the camp on this day, and that he visited them once more on a later occasion. The Trial Chamber, therefore, had no doubt that Kvočka's official duties in the camp ceased on 23 June, and that "the fact that witnesses saw Kvočka in the camp after 24 June 1992 is not sufficient evidence that his duties there continued".[377] In the light of this finding, no reasonable trier of fact could infer from observations made after 23 June anything about Kvočka's position in the camp before this date. Both Sifeta Sušić and Kerim Mešanović were arrested on 24 June, and it is unlikely that they erred about a date of such significance. The Appeals Chamber, therefore, finds that no reasonable trier of fact could rely on the testimony given by them to establish Kvočka's position in the camp.

(i) Defence evidence

171. Kvočka argues that, although the Prosecution had to prove its assertions, he had summoned several Defence witnesses to testify about the facts in question, namely, himself, Milutin Bujić, Dragan Popović, Nada Markovski, Witness DD/10 and others. Kvočka submits that all these witnesses agreed that he was a simple police officer and held no position of *de facto* authority in the camp.[378] The Prosecution responds that it is insufficient for Kvočka merely to express dissatisfaction that the Trial Chamber chose to accept evidence of Prosecution witnesses over that of Defence witnesses, as the Trial Chamber weighed the evidence carefully and gave reasons for rejecting or accepting the evidence before arriving at its conclusions.[379]

172. The Appeals Chamber notes that Kvočka gives references only for the testimony of Milutin Bujić, Dragan Popović and Nada Markovski, and accordingly limits itself to the examination of these pieces of evidence. Milutin Bujić, a retired policeman, was Kvočka's superior at the Omarska

[374] Prosecution Respondent's Brief, paras 5.36 and 5.41
[375] *Ibid.*, para. 5.36.
[376] Trial Judgement, para. 356.
[377] *Ibid.*, para. 355.
[378] Kvočka Appeal Brief, paras 67-68.
[379] Prosecution Respondent's Brief, para. 5.46.

police station, but had nothing to do with the Omarska camp.[380] He was therefore unable to provide any information about Kvočka's position in the camp. Nada Markovski was working as a typist in the camp and never left her office there. When asked who was deputizing for Željko Meakić in the camp, she answered: "I don't know. That – I didn't pay attention to things like that. My job was to do the typing."[381] Both witnesses' testimony is, therefore, immaterial to the Trial Chamber's findings.

173. Dragan Popović was a guard in Omarska. Although he said that he had not seen Kvočka very often because he belonged to a different shift, he stated explicitly that Kvočka only had the position of an ordinary guard and could not issue any orders to other guards.[382] In fact, Dragan Popović maintained that the only person who had any authority in the camp was Željko Meakić, and that there were not even shift leaders.[383] Any problem in the camp had to be communicated to Željko Meakić.[384] In the view of the Appeals Chamber, it seems improbable that during the absence of Željko Meakić nobody was there to coordinate the guards. In particular, that improbability is inconsistent with Kvočka's own testimony who acknowledged that Željko Meakić wanted him to be present during his absence so that Kvočka could keep Meakić informed and deal with any problems.

174. In summary, even disregarding the evidence of Sifeta Sušić and Kerim Mešanović, there was ample evidence before the Trial Chamber supporting the conclusion that Kvočka held at least a *de facto* position of authority in the camp. The only contrary evidence is the testimony of Dragan Popović, which carries no great evidentiary weight and is inconsistent with the rest of the evidence on the trial record. The Appeals Chamber finds that Kvočka has not demonstrated that no reasonable trier of fact could arrive at the conclusion that he held a *de facto* position of authority in the camp.

4. Kvočka was not charged as the *de facto* deputy commander

175. Kvočka submits that, since the Trial Chamber accepted his argument that Željko Meakić was the chief of security at the camp, it should have rejected the Prosecution's assertion that Meakić, Kvočka and Prcać were the commander and deputy commanders of the camp.[385] He argues that since the Indictment named him commander or deputy commander of the camp, the

[380] Milutin Bujić, T. 7838.
[381] Nada Markovski, T. 7776. Witness DD/10 had no knowledge of the organizational structure of the security forces: T. 10678.
[382] Dragan Popović, T. 7713.
[383] *Ibid.*, T. 7713, 7727.
[384] *Ibid.*, T. 7726.
[385] Kvočka Appeal Brief, paras 34, 41.

Prosecution had to prove beyond a reasonable doubt that he held such a position.[386] Instead the Trial Chamber found that Kvočka held a *de facto* position of authority and influence in the Omarska police station after Meakić was appointed commander of the station. Kvočka submits that he was not charged with having such a position in the Indictment.[387]

176. The Prosecution replies that Kvočka was on notice that, in relation to Article 7(1) of the Statute, the nature of his function and duties were in issue at trial and that his criminal liability would depend on the Trial Chamber's findings made in this respect. In the Prosecution's view, it was open to the Trial Chamber to find that Kvočka's functions and duties were different from those alleged in the Indictment and to determine his criminal liability accordingly.[388]

177. The Appeals Chamber notes that Kvočka was charged in the Indictment with liability under Article 7(1) of the Statute for the crimes committed in the Omarska camp. Kvočka's formal position in the police hierarchy as commander or deputy commander is immaterial to his responsibility pursuant to Article 7(1): a person does not need to hold a formal position in a hierarchy to incur liability under Article 7(1). The allegation that Kvočka was commander or deputy commander of the camp was not a material fact in relation to his liability under Article 7(1), so that his argument that a material fact in the Indictment had not been proved is without merit. It was for the same reason unnecessary for the Prosecution to plead the fact that Kvočka held a *de facto* position of authority and influence in the camp. The Appeals Chamber further recalls the finding of the *Kunarac* Appeal Judgement that minor discrepancies between the facts in the Trial Judgement and those in the Indictment do not imply that the events charged in the Indictment did not occur.[389]

C. Kvočka's responsibility under the joint criminal enterprise theory (ground of appeal 7)

178. The Trial Chamber was satisfied beyond reasonable doubt that, through his participation, Kvočka intentionally furthered the criminal system in place in Omarska camp and is therefore responsible for the crimes committed as part of the joint criminal enterprise.[390] The Trial Chamber thus found Kvočka guilty as a co-perpetrator of the following crimes as part of the joint criminal enterprise in Omarska camp pursuant to Article 7(1) of the Statute: persecution (count 1), murder (count 5) and torture (count 9). In this ground of appeal, Kvočka submits that the Trial Chamber erred in finding that the requisite *actus reus* and *mens rea* to establish his responsibility as co-

[386] Kvočka Reply Brief, para. 33.
[387] *Ibid.*, para. 36.
[388] Prosecution Respondent's Brief, para. 4.31, with reference to similar arguments submitted by Prcać.
[389] *Kunarac et al.* Appeal Judgement, para. 217. In that Judgement, the Appeals Chamber was referring to the exact date of a crime, but the underlying reasoning applies to the present case as well.
[390] Trial Judgement, paras 413-419.

perpetrator in a joint criminal enterprise had been satisfied. He requests the Appeals Chamber to set aside the Trial Chamber's finding on this point.

179. The Appeals Chamber finds that Kvočka's arguments in support of this ground need to be somewhat restructured in order to be more clearly assessed. To this end, the Appeals Chamber decided not to follow the order in which Kvočka presented his arguments in his Appeal Brief but rather favoured a methodical approach, first, to the issues relating to the *actus reus*, and then to those relating to the *mens rea*.

180. The Appeals Chamber proposes to rule at the outset on one of the arguments put forward by Kvočka in this ground of appeal. In his Brief in Reply, Kvočka submits that the present case does not involve concentration camps, and that consequently, his responsibility must fall under the first category of joint criminal enterprise.[391] He also argues that the Prosecution did not prove beyond reasonable doubt the existence of such an enterprise, nor the existence of a common plan shared by him and others.[392]

181. A close analysis of the Trial Judgement shows that the Trial Chamber contemplated Kvočka's responsibility under the second category of joint criminal enterprise:

> Although the first two categories enunciated by *Tadic* are quite similar, and all three are applicable to this case to some degree, the second category, which embraces the post war "concentration camp" cases, best resonates with the facts of this case and is the one upon which the Trial Chamber will focus most of its attention. The Trial Chamber will examine and elaborate upon the standards to be applied in assessing criminal liability of participants in a detention facility which operates as a joint criminal enterprise.[393]

182. The Appeals Chamber wishes to point out that, although commonly referred to as the "category known as concentration camps", the second category of joint criminal enterprise, known as systemic, covers all cases relating to an organised system with a common criminal purpose perpetrated against the detainees. This concept of criminal responsibility has been shaped by the case-law derived from concentration camp cases from the Second World War, but reference to the concentration camps is circumstantial and in no way limits the application of this mode of responsibility to those detention camps similar to concentration camps.[394]

183. The Trial Chamber found that Omarska camp was a joint criminal enterprise the purpose of which was to persecute and subjugate non-Serb detainees.[395] Kvočka did not succeed in

[391] Kvočka Reply Brief, para.93.
[392] *Ibid.*, para.101 and also paras 102-103.
[393] Trial Judgement, para. 268 (emphasis added, footnote omitted).
[394] *See* also *Krnojelac* Appeal Judgement, para. 89.
[395] Trial Judgement, para. 320

demonstrating how the Trial Chamber erred in reaching this conclusion. The Appeals Chamber upholds the Trial Chamber's findings in this regard.

1. Kvočka's work in the Omarska camp did not meet the standard for that of a co-perpetrator

184. The Trial Chamber found that Kvočka had actively contributed to the everyday functioning and maintenance of the camp and, through his participation, enabled the camp to continue unabated its insidious policies and practices,[396] and is thus criminally responsible for the crimes committed as part of the joint criminal enterprise. More specifically, Kvočka was found guilty as a co-perpetrator in the joint criminal enterprise in Omarska camp "[d]ue to the high position Kvočka held in the camp, the authority and influence he had over the guard service in the camp, and his very limited attempts to prevent crimes or alleviate the suffering of detainees, as well as the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavour."[397]

185. Kvočka claims that he did not participate in carrying out the joint criminal enterprise and, at any rate, that his participation in the functioning of Omarska camp was not sufficiently significant to convict him as a co-perpetrator.

(a) The objective element of a joint criminal enterprise

186. Kvočka submits that, in order to establish participation as a co-perpetrator in a joint criminal enterprise, the objective and subjective elements must be established.[398] He submits that the objective element is the co-perpetrator's "action", and that, according to the Tribunal's jurisprudence, his contribution to the criminal enterprise must be "direct and significant."[399] The Prosecution recalls that the Trial Chamber did consider this argument in its Judgement.[400] In reply, Kvočka repeats that co-perpetration requires proof of the existence of acts of commission as the objective element.[401]

187. The Trial Chamber held in paragraph 309 of the Trial Judgement that to find an individual who works in a detention camp where conditions are abusive liable as a participant in a joint criminal enterprise, "the participation in the enterprise must be significant". The level of contribution required to amount to participation in a joint criminal enterprise has already been

[396] *Ibid.*, paras 407-408, 413(d).
[397] *Ibid.*, para 414.
[398] Kvočka Appeal Brief, para. 162.
[399] *Ibid.*, para. 163.
[400] Prosecution Respondent's Brief, para. 5.183.
[401] Kvočka Reply Brief, para. 106.

addressed by the Appeals Chamber in the section addressing the legal questions related to joint criminal enterprise common to the four Appellants.[402] The Appeals Chamber has stated that the accused's participation in carrying out the joint criminal enterprise is likely to engage his criminal responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant nature of his contribution: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.[403] Contrary to the holding of the Trial Chamber, the Tribunal's case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated.[404] *A fortiori*, contrary to Kvočka's submissions, such participation need not be "direct or significant". Kvočka's arguments are thus rejected on this point.

188. The Appeals Chamber recalls however that the significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*.[405] The extent of the material participation is also a decisive factor when assessing the responsibility of an individual for aiding and abetting the crimes committed by the plurality of persons involved in the joint criminal enterprise. As stated in the Tribunal's case-law, the aider and abettor must make a substantial contribution to the crime in order to be held responsible.[406]

(b) Kvočka's contribution

189. Kvočka argues that he did not have any important position in the camp, having no authority or influence over other guards but intervening as a mere police officer.[407] He submits that the Trial Chamber erred in finding that he exercised authority in Omarska when Željko Meakić was not in the camp.[408] He underlines that the Trial Chamber did not address the fact that no one replaced him during his leave and after he was finally dismissed.[409] Kvočka concludes that he was an insignificant link in the camp system.[410]

190. The Prosecution responds that a position of authority *per se* is not a legal requirement for liability as a participant in a joint criminal enterprise, but one of the relevant factors to be

[402] *See* above, paras 93-99.
[403] *See* above, paras 96-97.
[404] *See* above, para. 97.
[405] *Ibid.*
[406] *See* above, paras 89-90.
[407] Kvočka Appeal Brief, para.163.
[408] *Ibid.*, paras 163-164.
[409] *Ibid.*
[410] Kvočka Appeal Brief, para. 164.

considered in the process of determining the liability of an accused as a co-perpetrator.[411] It points to the Trial Chamber's conclusion that mid- or low-level perpetrators could be held responsible as co-perpetrators of, or aiders and abettors to, a joint criminal enterprise, provided they made a substantial contribution to the enterprise's functioning or endeavours.[412] It adds that the Trial Chamber held that Kvočka's contribution to the functioning of the camp was significant, and that his willingness to continue holding a position of authority and influence demonstrated that he was not a passive or reluctant participant.[413] In its view, Kvočka's significant contribution encompassed active and positive acts, as well as omissions and negative conduct.[414] It also argues that, according to the *Tadić* Appeal Judgement, it is sufficient to find him liable as a co-perpetrator if the participant "perform[s] acts that in some way are directed to the furthering of the common plan or purpose".[415] It contends that the legal standard applied in the Trial Judgement is consistent with these principles.[416]

191. Kvočka submits in reply that his duties were strictly limited to providing security in the camp according to the plan established by Simo Drljača.[417] He argues that the Prosecution did not prove beyond reasonable doubt the allegation that his daily tasks at the camp amounted to a contribution to the commission of crimes.[418]

192. With regard to Kvočka's allegations concerning his position in the Omarska camp, the Appeals Chamber recalls that it has already concluded that a reasonable trier of fact could consider that Kvočka held a *de facto* position of authority and influence in the camp.[419] As set out previously, the Appeals Chamber considers also that Kvočka acted as Željko Meakić's deputy in his absence.[420] Although a *de jure* or *de facto* position of authority is not a material condition required by law under the theory of joint criminal enterprise,[421] the Appeals Chamber stresses that it is a relevant factor in determining the scope of the accused's participation in the common purpose.

193. The Appeals Chamber wishes to emphasize that whether the criminal purpose could have been achieved without the participation of the accused has little relevance if it has been established

[411] Prosecution Respondent's Brief, para. 3.24.
[412] *Ibid.*
[413] Prosecution Respondent's Brief, para. 5.184.
[414] *Ibid.*, para. 5.185.
[415] *Tadić* Appeal Judgement, para. 229; Prosecution Respondent's Brief, para. 3.23.
[416] Prosecution Respondent's Brief, para.3.23, quoting Trial Judgement, para. 309.
[417] Kvočka Reply Brief, para. 108.
[418] *Ibid.*, para. 109.
[419] *See* above, para. 174.
[420] *See* above, para. 148.
[421] *See* above, para. 101.

that, to a certain extent, he participated in implementing and upholding the system.[422] The argument that Kvočka's contribution should be considered less significant because it was unnecessary to replace him when he was absent and after he had left is thus without merit.

194. The Appeals Chamber will now consider whether it was reasonable for the Trial Chamber to conclude that Kvočka's participation in the functioning of the camp had furthered the criminal purpose, so as to entail his criminal responsibility as a co-perpetrator in the joint criminal enterprise.

195. The Appeals Chamber observes that the Trial Chamber found that Kvočka had served in the camp from about 29 May 1992 to 23 June 1992 and that he was absent from 2 to 6 June 1992 and from 16 to 19 June 1992;[423] that he held a high-ranking position in the camp and had some degree of authority over the guards;[424] that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely;[425] that he carried out his tasks diligently, participating actively in the running of the camp;[426] that through his own participation, in the eyes of the other participants, he endorsed what was happening in the camp.[427] Kvočka did not show how the Trial Chamber's findings were unreasonable.

196. It is clear that, through his work in the camp, Kvočka contributed to the daily operation and maintenance of the camp and, in doing so, allowed the system of ill-treatment to perpetuate itself. The Appeals Chamber holds that the Trial Chamber did not make an error of fact when it found that Kvočka allowed the perpetuation of the system of ill-treatment, thereby furthering the common criminal purpose. Consequently, the Appeals Chamber rejects this sub-ground of appeal.

2. Kvočka's stay in the Omarska camp was not knowing, willing, or continuous

197. The Trial Chamber found that Kvočka participated knowingly, willingly and continuously in the criminal events at Omarska camp,[428] in short that he was aware of the common system of ill-treatment and that he had the intent to discriminate against and persecute the non-Serb detainees.[429] Kvočka contends on the contrary that when he was working in Omarska camp he was not aware of the common criminal purpose nor did he intend to further the system of ill-treatment. In support of this sub-ground of appeal Kvočka submits that two errors were allegedly committed by the Trial

[422] *See* above, paras 96-98.
[423] Trial Judgement, para. 356.
[424] *Ibid.*, para. 372.
[425] *Ibid.*, paras 395-396.
[426] *Ibid.*, para. 404.
[427] *Ibid.*, para. 405.
[428] *Ibid.*, para. 404.
[429] *Ibid.*, para. 413 (e).

Chamber: (i) the finding that he was aware of the common criminal purpose of the Omarska camp, and (ii) the finding that he had the requisite intent to further the joint criminal enterprise.

(a) Kvočka's awareness of the criminal purpose of the camp

198. On several occasions, the Appeals Chamber stated that the systemic form of joint criminal enterprise requires that the accused had personal knowledge of the criminal nature of the system.[430] Kvočka does not question that requirement[431] but submits that the Trial Chamber erred in finding that he had personal knowledge of the common criminal purpose implemented in Omarska camp.

199. Kvočka submits that, because of his actual position in the system and his short stay in the camp with two considerable interruptions, he was not aware of the final goal of the camp. He concedes that the conditions of detention were bad but submits that he deeply believed that this was due to the very extraordinary circumstances and that he had no knowledge of the prohibited purpose of the camp.[432] He submits that he was absent from the camp in the period from 16 to 19 June 1992 and that, at this time, he did not know what was going on in the camp.[433]

200. The Prosecution responds that Kvočka's knowledge of the nature of the joint criminal enterprise was considered at length by the Trial Chamber in the Trial Judgement and its findings have not been shown to be unreasonable.[434]

201. When discussing the applicable criteria in determining the accused's awareness of the criminal nature of the system, the Trial Chamber emphazised that:

> Knowledge of the joint criminal enterprise can be inferred from such indicia as the position held by the accused, the amount of time spent in the camp, the function he performs, his movement throughout the camp, and any contact he has with detainees, staff personnel, or outsiders visiting the camp. Knowledge of the abuses could also be gained through ordinary senses.[435]

202. Hence, the Trial Chamber observed that Kvočka held a *de facto* position of authority in the camp,[436] a finding upheld by the Appeals Chamber.[437] It then established that, by his own admission, Kvočka was informed of the harshness of the living conditions of the non-Serb detainees and the serious crimes regularly committed against them[438] and that, in spite of this, he continued to

[430] *Tadić* Appeal Judgement, para. 203; *Krnojelac* Appeal Judgement, paras 32 and 89.
[431] Kvočka Reply Brief, para. 106.
[432] Kvočka Appeal Brief, paras 156-157.
[433] *Ibid.*, para. 149.
[434] Prosecution Respondent's Brief, para. 5.179.
[435] Trial Judgement, para. 324.
[436] *Ibid.*, para. 372.
[437] *See* above, para. 174.
[438] Trial Judgement, para. 385.

work in the camp for approximately seventeen days, "where he performed the tasks required of him skilfully, efficiently, and without complaint".[439] The Trial Chamber concluded from this that Kvočka was aware of the context of persecution and ethnic violence prevalent in the camp and the persecutory nature of the crimes committed against the non-Serbs detained in the camp.[440]

203. The Appeals Chamber considers that, even though Kvočka may have participated in the joint criminal enterprise, without being aware at the outset of its criminal nature, the facts of the case prove that he could not have failed to become aware of it later on. The harsh detention conditions, the continuous nature of the beatings of the non-Serb detainees and the widespread nature of the system of ill-treatment could not go unnoticed by someone working in the camp for more than a few hours, and in particular by someone in a position of authority such as that held by Kvočka. Kvočka's submission that he was not aware of the criminal nature of the system in place at the camp is bound to fail.

204. The Appeals Chamber is not convinced by Kvočka's arguments that the Omarska camp was initially intended to be used as an interrogation centre for a short duration following the armed conflicts in Kozarac from 24 to 26 May 1992 and in Prijedor on 30 May 1992,[441] that his own role in the camp was limited to that of a duty officer,[442] and that he was psychologically unstable and absent from the camp from 2 to 6 June 1992 and failed to perform his duties after having witnessed an incident in which a person opened fire against a group of detainees on 30 May 1992.[443] Kvočka does not establish how these circumstances would render the Trial Chamber's finding with regard to his knowledge of the criminal purpose of the camp unreasonable. The same applies to Kvočka's argument that the physical abuse of detainees during interrogation, about which he heard, was common practice in socialist countries and that their authors were his superiors.[444]

205. Since Kvočka has in no way demonstrated how the Trial Chamber's finding that he was fully aware of the system of ill-treatment in Omarska camp which aimed at persecuting and subjugating the non-Serb detainees was unreasonable, the Appeals Chamber rejects this sub-ground of appeal.

206. The Appeals Chamber will now examine the second sub-ground of appeal relating to Kvočka's intent.

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[439] *Ibid.*, para. 397.
[440] *Ibid.*, paras 408 and 413(e).
[441] Kvočka Appeal Brief, para. 138.
[442] *Ibid.*, para. 142.
[443] *Ibid.*, para. 144.
[444] *Ibid.*, para. 145.

(b) Kvočka's intent to participate in the joint criminal enterprise

207. The Appeals Chamber notes that Kvočka has not clearly identified the alleged errors relating to this ground of appeal. The Appeals Chamber could have dismissed the ground on this basis alone but has nevertheless decided, in the interests of justice, to consider the merits of these arguments when, on its own, it was able to identify with certainty the alleged error.

(i) Absence of agreement with the perpetrators of the crimes

208. Kvočka submits that the subjective element for co-perpetration requires that a person who participates in an offence must be aware of other participants' actions, in other words, that his act is connected with other persons' actions. He submits that this subjective connection emerges in two or more persons' agreement regarding joint criminal enterprise, which may appear before undertaking the action, immediately before approaching the action, or even after the commencement of the action.[445] Kvočka maintains that the proof of an agreement, even implicit, is necessary[446] and submits that the Prosecution did not prove beyond reasonable doubt his agreement with other members of the criminal enterprise.[447] This issue is not addressed in the response of the Prosecution.

209. The Appeals Chamber recalls that the common purpose need not be previously arranged or formulated; it may materialise extemporaneously.[448] In order to circumscribe the responsibility of an accused for participation in a second category of joint criminal enterprise as a co-perpetrator, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.[449] Once it has been established that the accused had knowledge of the system of discriminatory ill-treatment, it is a question of determining his involvement in that system, without it being necessary to establish that he had entered into an agreement with the principal perpetrators of the crimes committed under the system to commit those crimes.[450] The Appeals Chamber considers that the Trial Chamber did not err in law by not requiring evidence of a formal agreement between the co-perpetrators in order to participate in the joint criminal enterprise.

[445] Kvočka Reply Brief, para. 95.
[446] *Ibid.*, para. 95, referring to *Krnojelac* Trial Judgement.
[447] Kvočka Reply Brief, para. 103.
[448] *Tadić* Appeal Judgement, para. 227(ii); s*ee* also *Vasiljević* Appeal Judgement, para. 100; and above, para. 117.
[449] *Krnojelac* Appeal Judgement, para. 96.
[450] *Ibid.*, para. 97.

(ii) Kvočka's behaviour in the camp

210. Kvočka submits that he warned the members of the security service who committed violations.[451] He also helped detainees, not limiting this help to his acquaintances and friends, by bringing them food, clothes, packages and hygienic supplies.[452] He asserts that he also protected detainees when he could, shielding them from an attack by a local criminal named Đorđin, and preventing some intoxicated military and paramilitary members from entering the camp. Kvočka adds that the detainees trusted him.[453]

211. The Prosecution responds that this assertion was considered in detail by the Trial Chamber, but that, after having carefully weighed the evidence and his culpable omissions to act, the Trial Chamber concluded that he could have done far more to mitigate the terrible conditions in the camp.[454] The Prosecution submits that the Trial Chamber considered the effect of giving such assistance and found that, if the Appellant actively attempted to alleviate detainees' suffering, he might be more likely to be liable as an aider and abettor, but this circumstance did not relieve his criminal liability in a joint criminal enterprise.[455] The Prosecution argues that these circumstances do not absolve Kvočka of liability, as it was within the Trial Chamber's discretion to conclude that these acts could not constitute significant mitigation.[456]

212. The Appeals Chamber understands that Kvočka submits that his intervention to improve conditions for detainees or to prevent the commission of certain crimes is not consistent with the Trial Chamber's finding that he shared the intent to persecute the non-Serb detainees. The Appeals Chamber notes that the Trial Chamber carefully considered the facts raised here by Kvočka[457] before concluding that he "could have done far more to mitigate the terrible conditions in the camp".[458] Standing by itself, this wording might give the impression that the Trial Chamber gave more consideration to what Kvočka failed to do rather than what he actually did. Taken in context, however, the Appeals Chamber believes that the wording does not affect the reasonable nature of the Trial Chamber's finding that Kvočka should be considered a co-perpetrator in the joint criminal enterprise in the Omarska camp. In light of the measures Kvočka could have taken in view of his position of authority and the influence he had over the guards, the Trial Chamber considered that

[451] Kvočka Appeal Brief, para. 146.
[452] *Ibid.*, para. 147.
[453] *Ibid.*, para. 148.
[454] Prosecution Respondent's Brief, para. 5.173.
[455] *Ibid.*, para. 5.174.
[456] *Ibid.*, para. 5.175.
[457] Trial Judgement, paras 370, 386-397.
[458] *Ibid.*, para. 395.

the positive measures which he took in Omarska camp were not sufficiently numerous or significant to diminish the extent of his participation in the joint criminal enterprise.

213. The Appeals Chamber recalls that the level of an individual's contribution to the joint criminal enterprise is a relevant factor in determining whether he has the requisite *mens rea* of a co-perpetrator. The Appeals Chamber stresses that, although the Trial Judgement does not include a section on the establishment of the *mens rea*, it should not be inferred that the Trial Chamber did not rely on the aforementioned factors when determining Kvočka's *mens rea*. Settled case-law provides that an accused's conduct is a relevant factor in establishing the intentional element of an offence. In this instance, the Trial Chamber balanced Kvočka's infrequent intervention to improve the situation of certain detainees, family members or others,[459] and to prevent crimes from being committed[460] with the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavour.[461] The Appeals Chamber finds that Kvočka does not demonstrate how his infrequent intervention to assist the detainees is *per se* inconsistent with the Trial Chamber's finding that he shared the intent to further the common criminal purpose.

(iii) Kvočka's willingness to work in the camp

214. Kvočka challenges the Trial Chamber's finding that he worked in the Omarska camp willingly.[462] He submits that the evidence on which the Trial Chamber relied did not permit such a finding. Indeed, Kvočka argues that the Trial Chamber erred in interpreting the testimony of Witness DD/10[463] and submits that the fact that some reserve unit members lacked discipline in leaving the camp cannot not serve as a standard for the Trial Chamber to conclude that he could leave if he was dissatisfied, and that he was there because it was his assignment.[464]

215. According to the Prosecution, the Trial Chamber relied on the evidence of Witness DD/10 to show that the witness left voluntarily and nevertheless did not lose the employment.[465] It argues that Kvočka's claim is without substance, as he was the *de facto* deputy commander of the camp who did not have to report to anyone when he arrived at the camp for work, and was clearly in a more influential position than Witness DD/10.

[459] *Ibid.*, paras 370(a) and (b), 378, 383, 387, 395.
[460] *Ibid.*, para. 396.
[461] *Ibid.*, para. 414.
[462] Kvočka Appeal Brief, para. 154.
[463] *Ibid.*, paras 157-158.
[464] *Ibid.*, para.159.
[465] Prosecution Respondent's Brief, para. 5.180.

216. The Appeals Chamber agrees with the Trial Chamber's finding that the fact that he did not refuse to participate in a joint enterprise because such refusal would prejudice his career, or that he feared that he would be imprisoned or punished, is not an excuse or a defence to liability for participating in war crimes or crimes against humanity.[466] Nevertheless, these are circumstances which may be taken into consideration when determining the *mens rea*.

217. The Appeals Chamber notes that the Trial Chamber considered Kvočka's allegation that he worked in Omarska camp against his will because he was forced to carry out his professional duties as a police officer.[467] The Trial Chamber pointed out in this regard that "despite being reportedly distressed by the crimes committed in the camp, Kvočka remained on the job until removed by his superiors",[468] and concluded that Kvočka participated not only knowingly but willingly in the events in Omarska camp.[469]

218. The first question before the Appeals Chamber is whether the Trial Chamber erred when reaching the above conclusion, relying *inter alia* on the fact that, "significantly, Witness DD/10 testified that he left Omarska camp around 25 July 1992, at his own initiative and even after confronting Simo Drljača about the conditions in the camp, he did not lose his employment".[470]

219. After reading Witness DD/10's testimony, the Appeals Chamber considers that the Trial Chamber did not err in concluding that this witness left the camp voluntarily without the witness' employment being terminated. The Appeals Chamber acknowledges that Witness DD/10's circumstances were different from those of Kvočka. The Appeals Chamber notes in particular in this respect Witness DD/10's statement that, having left the job, "I was extremely lucky not to lose my head."[471] Witness DD/10 also testified that this fortunate outcome could be attributed both to personal circumstances and to the fact that Witness DD/10 was not an employee of Željko Meakić with a direct link to the State Security Centre.[472] This evidence might indicate either that Kvočka chose his employment freely or that he did so under duress. The Appeals Chamber considers that it was up to the Trial Chamber to interpret the evidence either way if the material sufficed for that purpose.

220. The Appeals Chamber considers that the same applies to Kvočka's second argument, regarding the fact that the organisation in the camp was so lax that guards failed to show up for

[466] Trial Judgement, para. 403.
[467] *Ibid.*, paras 399-404.
[468] *Ibid.*, para. 400.
[469] *Ibid.*, para. 404.
[470] *Ibid.*, para. 401.
[471] Witness DD/10, T. 10700 (private session; emphasis added).
[472] *Ibid.*

work without serious, or probably any, repercussions.[473] The Appeals Chamber acknowledges that, due to Kvočka's position of authority and influence, he was in a different situation from that of the other guards. However, in the view of the Appeals Chamber, the material still sufficed to support the interpretation of the Trial Chamber as reasonable.

221. In addition, the Appeals Chamber notes that, to conclude that Kvočka worked willingly in the camp, the Trial Chamber relied on ample evidence such as (i) his own declaration that, had he been given the choice, he would have continued working in the camp until its closure;[474] (ii) the fact that when he was relieved of his duties at Omarska in June because, by his account, he was not regarded as sufficiently anti-Muslim, he was simply re-assigned to another police station at Tukovi;[475] (iii) the fact that there was no evidence before it that indicated that Serbs working in the camp who assisted or tried to improve the situation of the non-Serb detainees were punished;[476] (iv) the fact that Kvocka did not allege duress, nor plead it as a mitigating factor.[477] The Appeals Chamber finds that a reasonable trier of fact could have reached the conclusion that Kvočka worked willingly in the Omarska camp.

(iv) Kvočka's relations with colleagues

222. Kvočka submits that during his stay at Omarska, his relations with his superior and colleagues were not good because he was suspected of collaborating with Muslims.[478] He points out that Witnesses Zdravko Samardžija and Lazar Basrak testified that he was suspected of collaborating with Muslims.[479] Another witness, Jadranka Mikić, stated that there were words spread around Omarska that Kvočka was collaborating with Muslims. In its response, the Prosecution argues that these submissions are irrelevant to the argument that Kvočka's participation was neither willing nor knowing.[480]

223. The Appeals Chamber understands that Kvočka submits that the Trial Chamber failed to take into account the alleged circumstances in assessing the *mens rea*. Kvočka argues that the attitude of the camp personnel towards him was inconsistent with the Trial Chamber's finding regarding his intent to further the joint criminal enterprise. On this point, the Appeals Chamber notes that the Trial Chamber did not discuss the issue of the attitude of Kvočka's colleagues and

[473] Trial Judgement, para. 400, quoting Branko Starkević, T. 9266, 9289-9291.
[474] Trial Judgement, para. 399, referring to Kvočka's testimony, T. 8405.
[475] Trial Judgement, para. 402.
[476] *Ibid.; see* also footnote 679.
[477] *Ibid.*, para. 403.
[478] Kvočka Appeal Brief, para. 152.
[479] *Ibid.*
[480] Prosecution Respondent's Brief, para. 5.177.

superiors towards him but merely set out in a footnote that Kvočka alleged that he was a black sheep within the circle of Serb personnel in the camp,[481] without referring to any of the testimony cited by Kvočka in this regard. As a result, the Appeals Chamber considers that the Trial Chamber did not rely on this circumstance when assessing Kvočka's *mens rea*.

224. However, the Appeals Chamber concurs with the Prosecution's submission that Kvočka's argument in this regard is unrelated to the issue of his voluntary participation in the joint criminal enterprise. The fact that Kvočka was thought to be a traitor by some of his superiors and colleagues could tend to show that Kvočka lacked enthusiasm in executing his duties in the camp, but such lack of enthusiasm, though relevant to motives, would not affect his intent to further the joint criminal enterprise.

(v) Kvočka's dismissal from the camp

225. Kvočka submits that he was absent from the camp from 16 to 19 June 1992, and was then dismissed by his superior Janković on 23 June in a very humiliating way.[482] He points out that the Trial Chamber accepted documents from the Prijedor Police Station stating that some particular positions in Omarska could not be occupied by workers who had not confirmed their Serbian nationality or did not understand clearly that the only representative of the Serbian people was the Serbian Democratic Party.[483] He submits that, according to this finding, the reasons for his dismissal from Omarska were that he was a member of the moderate Reformist Party of Ante Marković, he and his sister were both married to Bosnian Muslims and he was not a member of SDS.[484] Kvočka submits that the reason that he was not dismissed from Omarska until 23 June 1992 was that on 1 July 1992 the head of the Security Services Centre, Stojan Župljanin issued an order not to dismiss or remove employees from their posts if they had no knowledge of the Crisis Staff Decision.[485]

[481] Trial Judgement, footnote 680.
[482] Kvočka Appeal Brief, para. 149.
[483] The documents Kvočka is referring to is Defence exhibit D-1/39. This exhibit consists of a circular signed by Stojan Župljanin, Chief of Banja Luka Security Services Centre. Even if the circular seems to have been signed on 1 July 1992, the date of 6 July 1992 appears on top of the document. This circular brings a decision of 22 June 1992 taken by the *Crisis Staff of the Autonomous Region of Krajina* to the attention of *Public Security Stations*' chiefs. The decision in question implies that non Serb nationals and Serbs showing no allegiance to the Serbian Democratic Party shall be excluded from important positions relevant to the "Economy" as of 26 June 1992. Since it lists amongst entities concerned both the *Ministry of Interior* and the *Army of the Serbian Republic of Bosnia and Herzegovina* and is attached to a circular according to which public security positions are also concerned, it seems that it would have been applicable to Omarska camp guards.
[484] Kvočka Appeal Brief, para. 151.
[485] *Ibid.*, para. 153. The Appeals Chamber understands that Kvočka refers as the Crisis Staff Decision the Decision taken by the *Crisis Staff of the Autonomous Region of Krajina* on 22 June 1992.

226. The Prosecution submits that the Trial Chamber considered but dismissed this assertion as the Appellant's suggestion that he was dismissed for his political affiliation was inconsistent with his position that he was dismissed because he assisted the Muslims at the camp.[486] The fact that Kvočka was dismissed from his position in the camp is irrelevant to his defence that he was unable to resign from his job or leave the camp, as the Trial Chamber found that he would not have been punished if he had resigned or left the camp.[487]

227. When considering Kvočka's allegations that he was relieved of his duties at the camp on political grounds, the Trial Chamber stated that there was no evidence indicating that the Serbs in the camp who assisted the non-Serb detainees or attempted to improve their situation were punished.[488] Nor did the Trial Chamber adjudicate on the reasons for Kvočka's reassignment. The Appeals Chamber understands Kvočka's argument that his forced dismissal was politically motivated to imply that the Trial Chamber erred in failing to take this circumstance into account when determining his *mens rea*.

228. The Appeals Chamber notes that Kvočka was dismissed on 23 June 1992, that is the day after the decision mentioned by Kvočka[489] was adopted and almost a week before the circular signed by Stojan Župljanin was distributed. Even assuming that the decision applied to positions such as that held by Kvočka, it seems unlikely that it could have been implemented so quickly when the circular of the head of the Security Services Centre in Banja Luka had not even been issued.

229. Accordingly, the Appeals Chamber is not satisfied that Kvočka's dismissal from the camp was politically motivated and need not consider whether the Trial Chamber erred in failing to take this circumstance into account.

(vi) Kvočka's personal situation

230. Kvočka submits he never had the requisite discriminatory intent, arguing that he is married to a Bosnian Muslim and had close association with non-Serbs even during the war.[490] He argues

[486] Prosecution Respondent's Brief, para. 5.176
[487] *Ibid.*, para. 5.178.
[488] Trial Judgement, para. 402.
[489] *See* above, footnote 485.
[490] Kvočka Appeal Brief, para. 92 : "In spite of enormous odious towards mixed marriage during the war and the biggest national tensions, Mr. Kvočka supported multiethnic marriage and accepted to be a marriage witness (…). In the period of hard economical conditions, he used to provide a job for his new best man, Mr. Hasan Oklopčić (Bosnian Muslim). (…) A young man, Bosnian Muslim, used to sleep for two years in the same room with Kvočka's son (…)." (footnotes omitted).

that he was a member of the moderate Reformist Party of Ante Marković and that he never showed any intolerance towards other nationals.[491]

231. The Prosecution argues that his association with the Muslim community did not detract from the finding that he shared the discriminatory intent of those who physically perpetrated the crimes, that his acts of benevolence cannot obliterate his criminal liability and that it was open to the Trial Chamber to conclude that such acts could not constitute significant mitigation.[492]

232. Kvočka replies that his association with the Muslim community, his political affiliation and his duty as a professional policeman are facts that disprove the existence of a discriminatory intent.[493]

233. The Appeals Chamber understands that Kvočka contends that the Trial Chamber erred in omitting to consider these circumstances when assessing his *mens rea* and argues that his personal situation was not consistent with the Trial Chamber's finding that he intended to further the joint criminal enterprise. It would be wrong to consider that the Trial Chamber disregarded the information provided by Kvočka with regard to his so-called "personal situation". The Appeals Chamber notes that, in a sub-section dealing with Kvočka's personal background, the Trial Chamber reviewed this evidence and concluded that many witnesses depicted a tolerant and politically moderate man who was close to the Muslim community, into which he had married.[494] However, in the Appeals Chamber's view, such findings do not preclude a reasonable trier of fact from concluding, in light of all the evidence provided, that the accused intended to further a joint criminal enterprise whose purpose was to persecute the non-Serbs.

(vii) Conclusion on Kvočka's intent to participate in the joint criminal enterprise

234. Kvočka argues that although he worked in the Omarska camp, he had no will to participate in the joint criminal enterprise, as he only performed his duties in accordance with the police requirements.[495] He concludes that his stay in the Omarska camp was not "willing or continuous from the aspect of the joint criminal enterprise theory".[496] He further submits that the Prosecution did not prove his intention to support the joint criminal enterprise.[497]

[491] Kvočka Appeal Brief, paras 92-93.
[492] Prosecution Respondent's Brief, para. 5.60.
[493] Kvočka Reply Brief, paras 74-75.
[494] Trial Judgement, paras 331-332.
[495] Kvočka Appeal Brief, para. 154.
[496] *Ibid.*, para. 160.
[497] *Ibid.*

235. The Prosecution argues that the shared criminal intent to act as a co-perpetrator in a joint criminal enterprise does not imply personal enthusiasm or satisfaction, or personal initiative in making the relevant contribution to the common criminal purposes. It submits that the intent exists where an accused is aware of the nature of the intent of the other co-perpetrators and voluntarily contributes to that common purpose, that the motives of the accused are irrelevant to liability and the fact that an accused may internally not approve of the common purpose and wish that the crimes were not being committed is immaterial to his criminal liability.[498]

236. In reply, Kvočka points out that the *Krnojelac* Trial Judgement held that the Prosecution must demonstrate that each accused and the principal offender had a common state of mind for the crime.[499] He concludes that the Prosecution did not prove beyond reasonable doubt his intention to participate in the criminal enterprise or his wilful contribution to the execution of the common plan or purpose.[500]

237. To find an accused liable as a co-perpetrator in a systemic joint criminal enterprise, it is necessary to establish that the accused intended to further the criminal purpose of the system,[501] as was correctly stated by the Trial Chamber.[502] The Appeals Chamber recalls that 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.[503] It is settled that the benefit of the doubt must always go to the accused.

238. The Trial Chamber found that Kvočka was a co-perpetrator in the joint criminal enterprise in Omarska camp in the following terms:

> Due to the high position Kvocka held in the camp, the authority and influence he had over the guard service in the camp, and his very limited attempts to prevent crimes or alleviate the suffering of detainees, as well as the considerable role he played in maintaining the functioning of the camp despite knowledge that it was a criminal endeavour, the Trial Chamber finds Kvocka a co-perpetrator of the joint criminal enterprise of Omarska camp.[504]

239. The Trial Chamber explicitly stated that Kvočka shared the intent to discriminate against the non-Serb detainees in the camp:

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[498] Prosecution Respondent's Brief, para. 3.36. *See* also para. 3.38, referring to *Tadić* Appeal Judgement, para. 269.
[499] Kvočka Reply Brief, para. 97.
[500] *Ibid.*, paras 100-103.
[501] *Tadić* Appeal Judgement, para. 203; *Krnojelac* Appeal Judgement, paras 32 and 89.
[502] Trial Judgement, paras 273 and 284.
[503] *Vasiljević* Appeal Judgement, para. 120.
[504] Trial Judgement, para. 414.

> Kvocka was aware of the persecutory nature of the crimes committed against non-Serbs detained in the camp and, based upon his knowing and substantial participation in the system of persecution pervading Omarska camp, Kvocka had the intent to discriminate against the non-Serbs detained in the camp.[505]

240. The Appeals Chamber is convinced that, in the circumstances of this case, the intent to discriminate against the non-Serb detainees and the intent to further the joint criminal enterprise constitute a single form of intent. Since the joint criminal enterprise at Omarska camp identified by the Trial Chamber was the implementation of a system of discriminatory ill-treatment of non-Serb detainees, the two types of intent are in fact one. The Trial Chamber's finding regarding Kvočka's discriminatory intent encompasses the intent to further the joint criminal enterprise. The Appeals Chamber considers therefore that the Trial Chamber inferred from the facts that Kvočka intended to further the joint criminal enterprise and that the inference so drawn accords with the applicable requirements.

241. It remains now for the Appeals Chamber to determine whether a reasonable trier of fact could have inferred this intent from the facts of the case.

242. The Appeals Chamber reiterates firstly that the intent to further the common criminal purpose does not imply any enthusiasm, personal satisfaction or personal initiative in furthering the joint purpose on the part of the co-perpetrator.[506] The Appeals Chamber considers therefore that Kvočka's submission that he was simply carrying out his duties in accordance with the police requirements is without merit. Incidentally, it does not appear that maintaining a camp which seeks to subjugate and persecute detainees based on their ethnicity, nationality or political persuasion and in which living conditions are intolerable and the most serious beatings are regularly meted out can possibly be considered as performing "duties in accordance with the police requirements".[507]

243. The Appeals Chamber agrees with the Trial Chamber's argument that, given the absence of direct evidence, intent may be inferred from the circumstances, for example, from the accused's authority in the camp or the hierarchical system.[508] The Trial Chamber also rightly stated that an intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation in the functioning of the camp.[509] The threshold from which an accused may be found to possess intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration depends in the final analysis mainly on the circumstances of the case.

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[505] *Ibid.*, para. 413(e).
[506] *See Krnojelac* Appeal Judgement, para. 100; *see* also above, para. 106.
[507] Kvočka Appeal Brief, para.154.

244. The Trial Chamber found the following:

1) that living conditions in Omarska camp were harsh and that discriminatory beatings were regularly meted out to the non-Serb detainees;[510]

2) that Kvočka worked willingly in Omarska camp for approximately 17 days and left his position only when dismissed by his superiors;[511]

3) that he was amply informed of the harsh living conditions and abusive treatment endured by the non-Serbs detainees;[512]

4) that he participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service and that he had some degree of authority over the guards; [513]

5) that he was in a position to prevent crimes or alleviate suffering but that he did so only on a few occasions;[514]

6) that Kvočka was aware of the common criminal purpose which prevailed in the camp;[515]

7) that his participation substantially allowed the system and its insidious acts to continue.[516]

245. The Appeals Chamber holds that a trier of fact could reasonably have inferred from these facts that Kvočka shared the intent to further the common criminal purpose. The concentration or detention camp cases have demonstrated repeatedly that such an inference may be drawn when those factors are present.[517] Accordingly, the Appeals Chamber finds that the Trial Chamber did not commit any error in concluding from the evidence that Kvočka possessed the intent to further the joint criminal enterprise of the Omarska camp.

3. Conclusion on Kvočka's responsibility

246. In light of the above considerations, the Appeals Chamber upholds the Trial Chamber's findings that Kvočka contributed to the furtherance of the system of maltreatment of the Omarska camp, with knowledge of the common criminal purpose and intent to further the joint criminal enterprise. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in finding Kvočka guilty as a co-perpetrator of crimes committed as part of the joint criminal enterprise.

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[508] Trial Judgement, para. 272, referring to *Tadić* Appeal Judgement, para. 220.
[509] *Ibid.*, para. 278, referring to *Dachau Concentration Camp,* pp. 15-16.
[510] *Ibid.*, paras 116-117.
[511] *Ibid.*, paras 356, 399-400.
[512] *Ibid.*, paras 374-385, 413(a).
[513] *Ibid.*, paras 358-372.
[514] *Ibid.*, paras 386-396.
[515] *Ibid.*, paras 408 and 413(e).
[516] *Ibid.*, paras 407-408, 413(d).
[517] *See, e.g., Krnojelac* Appeal Judgement, para. 111.

D. Kvočka's criminal liability for the crime of murder (ground of appeal 5)

247. Kvočka submits that the Trial Chamber erred in finding him guilty of the crime of murder as charged in Count 5, which is prohibited by Common Article 3(1)(a) of the Geneva Conventions and punishable under Articles 3, 7(1) and 7(3) of the ICTY Statute. He asks the Appeals Chamber to overturn the conviction on Count 5. [518]

1. Temporal limitation of Kvočka's criminal responsibility

248. First, Kvočka submits that his criminal responsibility is limited exclusively to the period during which he was actually working in the camp and that he could not be held responsible for the crimes committed when he was absent from the camp on official leave. He submits that the Trial Chamber found that he held a position of authority in the camp from 29 May to 23 June 1992 and that the Trial Chamber accepted that he was absent on sick leave from 2 to 6 June and from 16 to 19 June 1992.[519]

249. The Prosecution disagrees, arguing that there was no indication that the Trial Chamber required proof of physical presence at the camp in order to infer criminal liability so as to restrict his responsibility exclusively to the time period of the 17 days he was present in the camp.[520]

250. The Appeals Chamber notes that Kvočka does not claim that the Trial Chamber committed a specific error as regards the temporal limitation of his responsibility, but submits his own interpretation of the Trial Chamber's findings on this point. It is on the basis of this interpretation that he concludes that the Trial Chamber committed errors. The Appeals Chamber therefore considers that it is important to understand the exact liability incurred by Kvočka according to the Trial Judgement before ruling on the merits of the grounds of appeal submitted by Kvočka.

251. The Appeals Chamber first recalls that the presence of the participant in the joint criminal enterprise, either as co-perpetrator or aider and abettor, at the time the crime is committed by the principal offender is not required for liability to be incurred.[521] The Trial Chamber concurred with this as it is stressed in its Decision of 13 October 2000 that "while the Defence for the accused Kvočka is right in stating that the Prosecution itself mentioned that the accused ceased to be Commander or Deputy Commander in the Omarska camp sometime in June 1992, it does not follow necessarily that the accused could not be liable for any of the crimes committed after the

[518] Kvočka Appeal Brief, para. 107.
[519] *Ibid.*, para. 99; Kvočka's Brief in Reply, paras 11-12.
[520] Prosecution Respondent's Brief, para. 5.78.
[521] *Krnojelac* Appeal Judgement, para. 81. *See* above, para. 112.

date his official functions in the camp ceased".[522] While it is legally possible to hold an accused liable for crimes committed outside of his or her presence, the application of this possibility in a given case depends on the evidence.

252. In this case, the Appeals Chamber concurs with Kvočka that the Trial Chamber decided not to hold him responsible for the crimes committed before his arrival in the camp.[523] It also considered that he could not be held responsible for the crimes committed after he left the camp.[524] The Appeals Chamber recalls having considered earlier that this conclusion is more akin to a factual finding than to a legal limitation.[525]

253. Having thus limited Kvočka's responsibility in time, the Trial Chamber carried out an in-depth review of the evidence before it to determine the period during which Kvočka was employed in Omarska camp and concluded that "Kvočka held a position in the camp during the period from about 29 May to 23 June 1992, and that he was absent from the camp on official leave from 2 to 6 June 1992 and from 16 to 19 June 1992. Kvočka thus spent approximately 17 days in Omarska camp".[526]

254. Kvočka does not show that the Trial Chamber intended to limit his responsibility to those days when he was effectively working in the camp. Although the meticulous count of the number of days during which Kvočka physically held his position in the camp[527] and the statement in paragraph 413(b) of the Trial Judgement that "Kvočka continued working in the camp for approximately 17 days"[528] – that is the total number of days during which he was employed in the camp minus the days of his official leave – could *prima facie* support Kvočka's assertion, other evidence contradicts it altogether. First, the Appeals Chamber points out that the Trial Chamber did not indicate that Kvočka's physical presence in the camp at the time the crimes were committed was necessary for him to be held criminally responsible, while it explicitly excludes Kvočka's responsibility for the crimes committed before he arrived at the camp and after he left. The Appeals Chamber also believes that the meticulous count of 17 days and frequent references thereto were seen by the Trial Chamber as relevant indications of the extent of Kvočka's participation in the running of the camp, his awareness of the system of ill-treatment and the willingness of his

[522] Decision on Prosecution Request for Leave to File a Consolidated Indictment and to Correct Confidential Schedules, 13 October 2000, p. 4.
[523] Trial Judgement, para. 349, referring to Decision on Defence Motions on Acquittal of 15 December 2000, para. 61.
[524] Trial Judgement, para. 349.
[525] *See* above, para. 114.
[526] Trial Judgement, para. 356.
[527] *See ibid.*, para. 356.

participation. The Appeals Chamber does not believe that it can draw other conclusions from the Trial Chamber's persistent reference to the 17 days. Finally, the Appeals Chamber notes that, when the Trial Chamber ruled on the crimes alleged against Kvočka it used the expression "during the time that he was employed in the camp", deliberately avoiding the term "worked":

> The Trial Chamber has found the following in regards to Kvočka:
>
> […]
>
> (b) that he continued working in the camp for approximately 17 days;
>
> c) that the crimes alleged against Kvočka in the Amended Indictment were committed in Omarska during the time that he was employed in the camp;[529]

255. The Appeals Chamber considers that the Trial Chamber did not limit Kvočka's responsibility to those days when he effectively worked in the camp but held him responsible for crimes committed in the camp from about 29 May to 23 June 1992, *i.e.* during the time that he was employed in the camp. Kvočka's claims of errors of law based on this erroneous interpretation of the Trial Chamber's findings are therefore dismissed.

2. Requirements for establishing the charge of murder

256. The Appeals Chamber will now examine Kvočka's grounds of appeal based on the errors of law and fact allegedly committed by the Trial Chamber in connection with the crime of murder.

257. Kvočka submits that in order to establish the charge of murder, the Prosecution is required to prove, first, the death of the victim; secondly, that the death was a result of an act of the accused or his subordinate; and thirdly, that the accused or his subordinate had a motivation and intent to kill the victim or to cause grievous bodily harm with reasonable knowledge that the attack was likely to result in death.[530] He submits that the Trial Chamber should first establish the existence of the crime of murder, and then evaluate his responsibility for each individual murder.[531] Kvočka argues that the Trial Chamber did not give any evaluation of evidence relating to the charge of murders of prisoners in Omarska between 24 May and 30 August 1992,[532] and, therefore, the Trial Chamber failed to establish the existence of Kvočka's acts or omissions in relation to each victim's

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[528] Information repeated in paragraph 397 of the Trial Judgement. The Trial Chamber alternates the following terms: "during the time he was working in the camp" (para. 412), "during the period when Kvocka worked in the camp" (footnote 686) and "during the time that Kvocka was working in the camp" (para. 416).
[529] Trial Judgement, para. 413 (emphasis added).
[530] Kvočka Appeal Brief, para. 101.
[531] *Ibid.*
[532] *Ibid.*, paras 102-106.

death. As a result, he submits that the Appeals Chamber should reverse the convictions under Count 5 of the Indictment.[533]

258. The Prosecution argues that the Trial Chamber fully considered the evidence before arriving at its conclusion that murders occurred at Omarska.[534] In its Decision on Defence Motions for Acquittal, the Trial Chamber correctly applied the standard of proof relating to the sufficiency of evidence and held that, in the absence of evidence to support each and every element of the crime, the accused would be entitled to an acquittal, and consequently the Trial Chamber acquitted Kvočka of several murders.[535] The Prosecution then argues that, to prove beyond reasonable doubt that a person was murdered, it is not necessarily required that the dead body of the victim be recovered, but that it may be reasonably inferred from the evidence that the victim was dead as a result of what happened at the camp.[536] Further, the Prosecution submits that the fact that Kvočka may not have been liable in respect of all the killings that occurred at Omarska is immaterial both to the legal basis for his culpability and his sentence, and that therefore this ground of appeal must fail.[537]

259. The Trial Chamber referred to the case-law of the ICTY and ICTR and adopted the following definition of the crime of murder:

> The ICTY and the ICTR have consistently defined the crime of murder as requiring that the death of the victim result from an act or omission of the accused committed with the intent to kill, or with the intent to cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[538]

The Appeals Chamber cannot but agree with the Trial Chamber's definition, but wishes to clarify the following.

260. In the *Krnojelac* case, the Trial Chamber rightly stated that proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered.[539] The fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber. All that is required to be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead as a result of acts or

[533] *Ibid.*, para. 107.
[534] Prosecution Respondent's Brief, para. 5.80.
[535] *Ibid.*
[536] *Ibid.*, para. 5.83.
[537] *Ibid.*, paras 5.102-5.103.
[538] Trial Judgement, para. 132.
[539] *Krnojelac* Trial Judgement, para. 326.

omissions of the accused or of one or more persons for whom the accused is criminally responsible.[540]

261. Accordingly, for the crime of murder under Article 3 of the Statute to be established, the Prosecutor bears the onus of proving:

1) the death of a victim taking no active part in the hostilities;
2) that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible;
3) the intent of the accused or of the person or persons for whom he is criminally responsible
   a) to kill the victim; or
   b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[541]

262. In a joint criminal enterprise such as that conducted in Omarska camp, it is necessary to prove that the death of the victim is the result of implementing a joint criminal plan, *i.e.*, of setting up a system of ill-treatment. In this case it has to be proved that the death of the victim was the result of what happened in Omarska camp, be it inhumane conditions, beatings or ill-treatment. On this point, Kvočka rightly argues that the Trial Chamber must first establish the existence of the crime of murder. In this regard, the Appeals Chamber notes that the Trial Chamber did not provide a specific section for the murders committed in Omarska camp and for the specific responsibility of each of the accused for these murders. The Trial Chamber made, however, a number of findings throughout the Trial Judgement on the charges of murder alleged in the Indictment. The Appeals Chamber refers to its previous discussion in this respect[542] and recalls that such a generic approach does not invalidate the Trial Judgement. The Appeals Chamber dismisses Kvočka's contention that the Trial Chamber failed to evaluate the evidence in its ruling on the charges of murder.

263. In addition, contrary to Kvočka's claim, to find an accused guilty of the crime of murder it is not necessary to establish his participation in each murder. For crimes committed as part of a joint criminal enterprise it is sufficient to prove not the participation of the accused in the commission of a specific crime but the responsibility of the accused in furthering the common criminal purpose.[543]

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[540] *Ibid.*, paras 326-327. *See* also *Tadić* Trial Judgement, para. 240.
[541] *Čelebići* Appeal Judgement, para. 423; *Kordić and Čerkez* Appeal Judgement, para. 37. *See also. Jelisić* Trial Judgement, para. 35; *Kupreškić et al.* Trial Judgement, paras 560-561; *Blaskić* Trial Judgement, para. 217; *Kordić and Čerkez* Trial Judgement, para. 236; *Krstić* Trial Judgement, para. 485; *Krnojelac* Trial Judgement, para. 324; *Vasiljević* Trial Judgement, para. 205; *Stakić* Trial Judgement, para. 584; *Galić* Trial Judgement, para. 150.
[542] *See* above, paras 55-76.
[543] *See* Trial Judgement, para. 312.

The Appeals Chamber finds that the Trial Chamber did not err in finding Kvočka guilty of the crime of murder without establishing his specific responsibility for each murder committed.

264. For the foregoing reasons, the Appeals Chamber dismisses this sub-ground of appeal.

3. Charges of individual murders

265. Before reviewing Kvočka's specific allegations, the Appeals Chamber notes that he was not found guilty of murder in connection with all the incidents listed in Schedule A. A careful reading of the factual findings of the Trial Chamber shows that Kvočka was found guilty under Article 7(1) of the Statute of the murder of the following victims listed in Schedule A: Ahil Dedić,[544] Mehmedalija Nasić,[545] Ismet Hodžić[546] and Bećir Medunjanin.[547] The Appeals Chamber found no factual findings on the murder of the other persons listed in Schedule A under Count 5, namely: Abdulah Puškar, "Hanki" Ramić, Suljo Ganić, Mehmedalija Sarajlić and an unidentified detainee shot on 30 May 1992 by a guard named Pavlić. Therefore, the Appeals Chamber considers that it is not necessary to review Kvočka's arguments on the murders of Abdulah Puškar, "Hanki" Ramić, Suljo Ganić, Mehmedalija Sarajlić and the unidentified detainee shot on 31 May 1992,[548] since the Trial Chamber did not find him guilty of these murders.

(a) Murder of Ahil Dedić

266. Kvočka argues that, as the murder of Ahil Dedić occurred before he arrived at the Omarska camp, he should not have been held responsible for it.[549] The Prosecution responds that the Trial Chamber limited Kvočka's liability to the period from about 29 May to 23 June 1992 and that Dedić was brutally beaten unconscious either on 27 or 28 May.[550] It accepts that the killing may have occurred the same night Kvočka arrived at the camp for the first time, just a few hours before he commenced his duties.[551] However, it submits that Kvočka's argument at trial that the security service was not in place at that time must be rejected, as he was ordered to go to the camp and specifically to find Meakić and gather a group of police officers from the Omarska police station. In the view of the Prosecution, Kvočka heard about Dedić's death but chose to do nothing about it.

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[544] *See ibid.*, para. 76.
[545] *See ibid.*, para. 379(f).
[546] *See ibid.*, footnote 164.
[547] *See ibid.*, paras 599-609.
[548] Kvočka Appeal Brief, para. 102.
[549] *Ibid.*
[550] Prosecution Respondent's Brief, para. 5.91.
[551] *Ibid.*, para. 5.92.

According to it, there is sufficient evidence of proximity in time and place to find Kvočka liable for this murder. [552] Kvočka replies that since the Prosecution accepts that the killing of Dedić occurred a few hours before he arrived at the camp for the first time, he should not be held responsible for the murder.[553]

267. It is clear from paragraph 76 of the Trial Judgement that the Trial Chamber concluded that Ahid Dedić was beaten in Omarska Camp. Quoting from the testimony of witness Fadil Avdagić the Trial Chamber also seems to infer that Ahil Dedić was murdered. The Appeals Chamber notes that Kvočka does not dispute that Ahil Dedić was murdered in Omarska camp. The Appeals Chamber must in fact determine whether the Trial Chamber erred in finding Kvočka guilty of this murder given the time when it occurred. To do so, the Appeals Chamber must determine the date of the murder. The Appeals Chamber notes that the Trial Chamber did not establish that date. Fadil Avdagić, on the basis of whose testimony the Trial Chamber established the murder of Ahil Dedić, testified that the crime was committed in the morning of 28 May 1992, very soon after he and other detainees were transferred from Keraterm.[554] The Appeals Chamber notes that witness Ermin Striković, whom Kvočka quotes in support of his ground of appeal, testified that the incident occurred the same day, soon after he and a group of other detainees were transferred from Keraterm.[555] In its Respondent's Brief, the Prosecution refers to the evidence given by both witnesses and concludes that "*Ahil Dedić was brutally beaten unconscious either on 27 or 28 May*"[556], while accepting "*that the killing may have occurred a few hours before Kvočka arrived at the camp for the first time*",[557] *i.e.*, on 29 May 1992, which is a contradiction in terms.[558]

268. The Appeals Chamber holds that since the Trial Chamber provided no detailed information or convincing factual basis, it has not been proved that the murder of Ahil Dedić was committed after Kvočka's arrival in Omarska camp, the time limit set by the Trial Chamber on Kvočka's responsibility. The Appeals Chamber grants this ground of appeal and finds that the Trial Chamber erred in finding Kvočka guilty of the murder of Ahil Dedić.

(b) Murder of Ismet Hodžić

269. Kvočka submits that the Trial Chamber erred in finding him guilty of the murder of Ismet Hodžić. He argues that the witness who testified about Ismet Hodžić's death, Jasmir Okić, only

[552] *Ibid.*
[553] Kvočka Reply Brief, paras 81 and 82.
[554] Ermin Striković, T. 3583-3585.
[555] Fadil Avdagić, T. 3423-3429.
[556] Prosecution Respondent's Brief, para. 5.91.
[557] *Ibid.*, para. 5.92.
[558] *See* Trial Judgement, paras 346-348, 356.

heard about it from Hodžić's brother.[559] He submits that, as there is no record of the deaths that occurred at the camp during his stay, and people may have died of natural causes, it is impossible to evaluate this incident.[560] According to the Prosecution, the Trial Chamber concluded that the medical care at Omarska was grossly inadequate,[561] and since the ICRC Commentary (Additional Protocol I) to Article 75(1)(a) of Additional Protocol I recognizes that murder includes manslaughter by wilful negligence, the substantial cause of the death of Hodžić must be attributed to the personnel of the camp because of their wilful omission to provide medical care to him.[562] It argues that Kvočka must be held liable as the death resulted from a prolonged lack of medical care and Kvočka was in a position to assist detainees in receiving medical care.[563] Kvočka replies that he was not in the camp at the time and that this murder should be separately analysed.[564]

270. Having noted that several detainees with chronic medical conditions died from lack of attention in Omarska camp,[565] the Trial Chamber indicates in a footnote that Ismet Hodžic, a diabetic, died.[566] The Appeals Chamber interprets this terse reference as a factual finding on the murder alleged by the Prosecution in Schedule A of the Indictment. It first has to be established whether the circumstances in which Ismet Hodžić died constitute murder. The Trial Judgement is silent on the circumstances surrounding Ismet Hodžić's death. Having examined the testimony cited by the Trial Chamber,[567] the Appeals Chamber is satisfied that a reasonable trier of fact could conclude that the victim died as a result of deliberate lack of treatment for his chronic ailment. It is therefore reasonable to conclude that Ismet Hodžić, who died as a result of wilful omission to provide medical care, was murdered.

271. The Appeals Chamber will now consider whether Kvočka could reasonably be held responsible for this murder. In accordance with the testimony cited by the Trial Chamber, the death of Ismet Hodžić occurred in June 1992, although it cannot be established whether it occurred before or after Kvočka left the camp. Nor can it be established, on the basis of the testimony – not even approximately – when Ismet Hodžic arrived at Omarska camp, in other words when the denial of medical care started. The testimony of Witness AK, which is cited by the Prosecution, states that a diabetic, who was about 20 years old and had been detained in the camp since May 1992, died as a

[559] Kvočka Appeal Brief, para. 102, p. 64.
[560] *Ibid.*
[561] Prosecution Respondent's Brief, para. 5.96.
[562] *Ibid.*, paras 5.97-5.98.
[563] *Ibid.*, para. 5.98.
[564] Kvočka Reply Brief, para. 80.
[565] Trial Judgement, para. 63.
[566] *Ibid.*, footnote 164 referring to the testimony of Jasmir Okic, T. 2566-2567.
[567] Jasmir Okic, T. 2566-2567.

result of lack of drugs.[568] The Appeals Chamber notes that the person's name is not specified and that, apart from diabetes, there is no evidence that this person was Ismet Hodžić. Nor did the Trial Chamber make any reference to this in support of its finding. The Appeals Chamber finds that the evidence is insufficient to establish that the acts or omission that caused Ismet Hodžić's death occurred during the time that Kvočka was employed in the camp. Since Kvočka's responsibility has been limited by the Trial Chamber to crimes committed during the time that he was employed in the camp, *i.e.* from about 29 May to 23 June 1992, the Appeals Chamber finds that no reasonable trier of fact could have held Kvočka responsible for the murder of Ismet Hodžić.

(c) Murder of Mehmedalija Nasić

272. Kvočka agrees that the murder of Mehmedalija Nasić did occur, but that, according to the testimony of different witnesses, the murder was a result of an altercation.[569] Additionally, Kvočka submits that the testimony of witnesses Dragan Popović, Jasmir Okić and himself suggested that he was not in the camp when the murder occurred. He argues that there is only one witness claiming the opposite, Mirsad Ališić, and that his credibility is in question.[570] The Prosecution responds that it was open to the Trial Chamber to accept the evidence of Mirsad Ališić and Azedin Oklopćic over that of the Appellant and Popović.[571] The Prosecution submits that Kvočka was found to be aware of the murder as he was standing right next to the guard who shot the victim, and that he offered a motive for the killing when he chastised another witness for "failing to keep Nasić quiet".[572] Kvočka replies that the Prosecution points out in its Respondent's Brief that the murder of Mehmedalija Nasić happened because the victim disobeyed the rules, and that the Trial Chamber could have concluded on the evidence that he was not present in the camp when the murder happened.[573] He adds that the testimony of Alisić is "completely unacceptable", as the consistent evidence of witnesses Dragan Popović, Jasmir Okić, and Kvočka himself shows that he was not present at the time of the murder.[574] He requests the Appeals Chamber to vacate the conviction for this murder.[575]

273. The Appeals Chamber first recalls that the presence of the participant in a joint criminal enterprise at the time the crime is committed by the principal offender is not required for liability to

[568] Witness AK, T. 2023-2025.
[569] Kvočka Appeal Brief, para. 102, p. 65.
[570] *Ibid.*
[571] Prosecution Respondent's Brief, para. 5.84.
[572] *Ibid.*
[573] Kvočka Reply Brief, para. 84.
[574] *Ibid.*
[575] *Ibid.*

be incurred.[576] Kvočka's argument that he was not physically present at the time the crime was committed is therefore without merit and does not need to be addressed by the Appeals Chamber.

274. The Trial Chamber's finding of murder in the case of Mehmedalija Nasić is based on the testimony of witness Mirsad Alisić.[577] The Appeals Chamber is satisfied that a reasonable trier of fact could reach the same conclusion on the basis of this testimony. Kvočka does not show that the Trial Chamber committed an error of fact when it accepted the testimony of Mirsad Alisić and found that Mehmedalija Nasić was the victim of murder as part of the joint criminal enterprise. The Appeals Chamber dismisses this ground of appeal.

(d) Murder of Bećir Medunjanin

275. Kvočka was charged as a co-perpetrator in the murder of Bećir Medunjanin in the "white house" in June 1992. He submits that he did not know about this incident at all, and that Witness T did not mention Kvočka in his testimony.[578] He argues that the Kozara's Gazette published that Medunjanin was arrested on 11 or 12 June 1992 and might be brought to the Omarska camp on 13 or 14 June.[579] The testimony of witness Fadil Avdagić stated that the death of Medunjanin occurred on 16 or 17 June, but, Kvočka submits, he was absent from the camp from 16 to 19 June.[580] The Prosecution responds that Kvočka's physical absence is immaterial to his liability, as he was still officially assigned to the camp and continued to carry out his duties after his leave.[581] The beatings of Medunjanin, which led to his death, occurred immediately after his arrival at the camp on 10 June, when Kvočka was at the camp.[582] It argues that since this assault occurred before Kvočka left the camp on 23 June, he must be held liable for this killing.[583] Kvočka replies that since the Prosecution accepts that the murders of Bećir Medunjanin happened during his official leave from the camp, he should not have been held responsible for these murders.[584]

276. The Appeals Chamber refers to its earlier findings on the temporal limitation of Kvočka's criminal responsibility as determined by the Trial Chamber[585] and recalls that Kvočka is responsible for the crimes, for which he is charged by the Prosecution, which were committed in Omarska camp from about 29 May to 23 June 1992, during the time that he was employed in the camp. The

[576] *Krnojelac* Appeal Judgement, para. 81. *See* above, para. 112.
[577] Trial Judgement, para. 379(f), quoting Mirsad Alisić, T. 2485-2486.
[578] Kvočka Appeal Brief, para. 102, p. 66.
[579] *Ibid.*
[580] *Ibid.*
[581] Prosecution Respondent's Brief, para. 5.85.
[582] *Ibid.*
[583] *Ibid.*, paras 5.86-5.87.
[584] Kvočka Reply Brief, paras 81-82.
[585] *See* above, para. 255.

Appeals Chamber recalls once again that the physical presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required for liability to be incurred.[586] With regard to knowledge of this specific crime, the Appeals Chamber concurs with the finding of the Trial Chamber that a participant in a joint criminal enterprise would not need to know of each crime committed in order to be criminally liable.[587] Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently is enough in this regard. The Appeals Chamber is therefore satisfied that Kvočka has failed to show that the Trial Chamber erred in holding him criminally responsible for the murder of Bećir Medunjanin. The Appeals Chamber holds that this ground of appeal is without merit.

(e) Conclusion

277. For the foregoing reasons, the Appeals Chamber reverses the Trial Chamber's findings on the murder of Ahil Dedić and Ismet Hodžić and finds Kvočka not guilty of these two murders. The Appeals Chamber considers nevertheless that these two errors do not invalidate Kvočka's conviction for murder under Count 5 insofar as it upholds Kvočka's convictions for the murders of Mehmedalija Nasić and Bećir Medunjanin. The Appeals Chamber will assess any impact these two errors may have on the sentence in Chapter VII (Sentencing).

E. Kvočka's criminal liability for the crime of torture (ground of appeal 6)

278. Under this ground of appeal, Kvočka submits that the Trial Chamber erred in finding him responsible for the torture of detainees in the Omarska camp as charged in Count 9 of the Indictment.[588]

1. Required elements of the crime of torture

279. Kvočka submits that the Trial Chamber considered that the elements of torture in an armed conflict required, *inter alia*, the infliction of severe pain or suffering and that at least one of the persons involved in the torture process be a public official or a *de facto* organ of a State or any other authority-wielding entity.[589] Kvočka argues that the Trial Chamber should have evaluated all the

[586] *See* above, para. 112.
[587] Trial Judgement, para. 312 and footnote 686.
[588] Kvočka Appeal Brief, paras 108-132.
[589] *Ibid.*, para. 112, referring to *Furundžija* Trial Judgement, para. 162 and *Akayesu* Trial Judgement, para. 594.

constituent elements of the crime of torture with respect to all the persons listed as victims of torture in Schedule A of the Indictment. He contends that the Trial Chamber erred in failing to do this.[590]

(a) Participation of a public official

280. Kvočka submits that the crime of torture requires, *inter alia* that the perpetrator or one of the perpetrators be a public agent.[591] Consequently, he submits that the Trial Chamber erred in finding that Žigić and Knežević participated in the crime of torture, as they were not public agents.[592]

281. The Prosecution responds that it is not a requirement of the crime of torture that the perpetrator or one of the perpetrators must be a State or public official. After reviewing the relevant ICTY and ICTR jurisprudence, the Prosecution claims that, in this case, the Trial Chamber implicitly rejected the requirement of the *Furundžija* Trial Judgement that at least one of the persons involved be acting in a "non-private capacity".[593] It adds that the *Kunarac* Appeals Chamber held that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual outside the framework of the Torture Convention.[594] It claims that there are no cogent reasons to depart from the law identified in the *Kunarac* Appeal Judgement.[595]

282. Nevertheless, the Prosecution argues that, even if there is such a requirement, it was met in the circumstances of this case. It contends that the evidence shows that none of the perpetrators involved in the acts of torture in this case were acting in a private capacity.[596] According to the Prosecution, Kvočka was found guilty of acts of torture committed within the confines of a camp set up by the Bosnian Serb entity, where abuse of non-Serb detainees was standard procedure. It argues that the torture was committed by camp personnel and officials of various entities and agencies representing the Bosnian Serb entity acting in a non-private capacity. The Prosecution thus contends that the "*Furundžija* requirement" is satisfied.[597] Moreover, the Prosecution argues that Kvočka's assertion regarding Žigić and Knežević must be dismissed, as those two individuals were both mobilised soldiers at the material time and were able to commit torture as a result of the

[590] *Ibid.*, paras 113, 116, 123-127.
[591] *Ibid.*, paras 120-121.
[592] *Ibid.*, para. 127, p. 76.
[593] Prosecution Respondent's Brief, paras 5.112-5.119.
[594] *Ibid.*, paras 5.120-5.121, quoting *Kunarac et al.* Appeal Judgement, para. 148. The Prosecution submits that the Appeals Chamber nevertheless appears to have reserved its judgement on whether "a person acting in private capacity could be found guilty of the crime of torture".
[595] Prosecution Respondent's Brief, paras 5.122-5.125.
[596] *Ibid.*, paras 5.107 and 5.126.
[597] *Ibid.*, paras 5.127-5.131.

assistance given to them by camp officials.[598] It submits that apart from their personal involvement, there was sufficient evidence to prove that officials or organs representing the Republika Srpska were consenting to, acquiescing in or failing to prevent or punish these acts of torture.[599]

283. Contrary to Kvočka's allegation,[600] the Appeals Chamber considers that the Trial Chamber did not require that at least one of the perpetrators of the act of torture be a public agent. The Trial Chamber began by noting that the *Kunarac* Trial Judgement departed from the previous jurisprudence by not requiring the involvement of a state official or any other authority-wielding person in order for the offence to be regarded as torture.[601] The Trial Chamber continued that it was persuaded by the reasoning of the *Kunarac* Trial Judgement that the state actor requirement imposed by international human rights law was inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.[602] The position taken by the Trial Chamber in this respect is clearly illustrated by the title chosen to introduce the discussion related to this question, namely, "(i) No State Actor Requirement". In addition, when enunciating the definition applied to the present case, the Trial Chamber deliberately omitted any public agent requirement.[603]

284. The Appeals Chamber will next consider whether or not the Trial Chamber committed an error of law in not requiring that the crime of torture be committed by a public official or, in the case of a plurality of perpetrators, that at least one of the persons involved in the torture process be a public official. This question was resolved by the Appeals Chamber in the *Kunarac* Appeal Judgement. In that case, the Appeals Chamber concluded that the *Kunarac* Trial Chamber was correct to take the position that the public official requirement was not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.[604] The Appeals Chamber in the present case reaffirms that conclusion. As a result, the Appeals Chamber finds that Kvočka's argument that he could not be found guilty of torture for acts perpetrated by Žigić and Knežević on the ground that they were not public officials is bound to fail, regardless of the precise status of these two individuals. This sub-ground of appeal is rejected.

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[598] *Ibid.*, paras 5.132-5.134.
[599] *Ibid.*
[600] Kvočka Appeal Brief, paras 112 and 127, p. 76.
[601] Trial Judgement, para. 138.
[602] *Ibid.*, para. 139.
[603] *See* Trial Judgement, para. 141.
[604] *Kunarac et al.* Appeal Judgement, para. 148.

(b) The Trial Chamber's evaluation of the constituent elements

285. Kvočka argues that when evaluating his responsibility for the crime of torture, all its constituent elements need to be established in every individual case.[605] He argues that the Trial Chamber did not accept or apply this method to evaluate the charges against him and thus erred in not evaluating the pain or suffering of every victim of torture enumerated in the Schedules of the Indictment. Kvočka submits that this resulted in a wrong conclusion regarding his responsibility as a co-perpetrator for the crime of torture. According to him, the Trial Judgement failed to show what was accepted and what was rejected by the Trial Chamber in reference to the charges against him.[606]

286. The Prosecution agrees that Article 23(2) of the Statute and Rule 98*ter*(C) of the Rules require that a judgement of a Trial Chamber be accompanied by a "reasoned opinion in writing".[607] However, it adds that a tribunal is not obliged to give a detailed answer to every argument raised, nor is it required to recount and justify its findings in relation to every submission made during trial.[608] The Prosecution submits that, in the absence of some indication that the Trial Chamber did not weigh all the evidence that was presented to it, the Trial Chamber's reasoned opinion will not be defective as a result of a failure to refer to a witness, even if that witness' evidence contradicts the findings of the Trial Chamber.[609] The Prosecution is of the opinion that a Trial Chamber is only required to make findings of those facts which are essential to a determination of guilt on a particular count, and is not required to make findings in relation to other facts which are not essential, even if they were expressly alleged in the Indictment.[610] Finally, the Prosecution submits that the legal test is whether a judgement indicates the material findings of fact made by the Trial Chamber, indicates the evidence on which those findings are based, and the reasons why those facts, in law, render the accused criminally liable for the crimes of which he is found guilty.[611]

287. The Prosecution submits that the Trial Chamber adequately set out its "crime based" factual findings, held that the Prosecution had established beyond a reasonable doubt that acts of torture as defined under common Article 3 of the Geneva Conventions and Article 5(f) of the Statute were committed at the camp, and considered all the legal elements of torture.[612] It also submits that the Trial Chamber indisputably correctly applied the standard of proof defined in its Decision on

[605] Kvočka Appeal Brief, para. 121.
[606] *Ibid.*, paras 116, 123.
[607] Prosecution Respondent's Brief, para. 2.16.
[608] *Ibid.*, paras 2.17-2.18.
[609] *Ibid.*, para. 2.18.
[610] *Ibid.*, para. 2.19.
[611] *Ibid.*, para. 2.20.
[612] *Ibid.*, para. 5.140.

Defence Motions for Acquittal.[613] Although the Trial Chamber stated that it did not intend to recount every single act of violence and abuse, it made specific, summarised, core findings relating to torture,[614] and found that the beatings alleged in the Indictment, and threats of rape and other forms of sexual violence, amounted to torture.[615] The Prosecution also notes that Kvočka chose not to challenge at trial that torture had taken place at the Omarska camp.[616] In light of the above arguments, the Prosecution submits that acts of torture were committed during Kvočka's stay at the camp, which were sufficient in law to hold him liable as a participant in the joint criminal enterprise encompassing the acts of torture.[617]

288. With regard to the alleged insufficiency of reasoning in the Trial Judgement, the Appeals Chamber refers to its previous consideration of the issue and reaffirms that a Trial Chamber is required only to make findings of facts, which are essential to a determination of guilt on a particular count, and that it is in the discretion of the Trial Chamber to decide which legal arguments to address.[618] In this respect, the Appeals Chamber recalls that Schedules A to E are an integral part of the Indictment. The Appeals Chamber previously noted that, in the Trial Judgement, the Trial Chamber had adopted a generic approach, not making factual findings in relation to each incident contained in the Schedules and underlying crimes contained in the Indictment.[619] An individualised approach would have been preferable.[620] However, the Appeals Chamber has already stated that the generic approach of the Trial Chamber does not render the Trial Judgement invalid where a crime is based on a number of individual instances, as long as the Trial Chamber actually made factual findings on individual crimes underlying the convictions of the Appellants.[621]

289. The Appeals Chamber emphasizes that a crime is made out only if all its constituent elements are established. If the crime requires an objective or subjective element which is not proven, the crime has not been established. The crime of torture was defined by the Trial Chamber as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.[622] The Appeals Chamber notes that this definition is not

[613] *Ibid.*, para. 5.141.
[614] *Ibid.*, para. 5.142.
[615] *Ibid.*, paras 5.143-5.144.
[616] *Ibid.*, paras 5.146-5.148.
[617] *Ibid.*, para. 5.161.
[618] *See* above, para. 23.
[619] *See* above, para. 72.
[620] *See* above, para. 73.
[621] *See* above, paras 74-75.
[622] Trial Judgement, para. 141.

challenged by the parties. The Appeals Chamber considers that the fact that Kvočka did not dispute at trial that torture occurred in the camp did not relieve the Prosecution of its obligation to prove the crimes of torture it specifically alleged in the Indictment and that Kvočka incurred criminal responsibility for each of them beyond reasonable doubt. As such, the Trial Chamber was required in relation to each victim whose name is listed in the Indictment to establish, first, if the victim had endured severe pain or suffering, whether physical or mental, and, second, if this pain or suffering had been intentionally inflicted for one of the prohibited purposes.

290. The Appeals Chamber notes that no factual findings for torture can be found in the Trial Judgement for the following victims named in Schedule A: Witness A, Witness AL, Eno Alić, Fikret Harambašić, Asef Kapetanović,[623] Avdo Kapetanović and Abdulah Puškar. The Appeals Chamber underlines that Kvočka was not found guilty for the torture of these individuals. However, a review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Kvočka was found guilty under count 9 of the Indictment for torture committed against the following persons listed in Schedule A: Witness AJ,[624] Witness AK,[625] Emir Beganović,[626] Abdulah Brkić,[627] Muhamed Cehajić,[628] Slavko Ećimović,[629] Jasmin Hrnić,[630] Hase Ičić,[631] Asef Kapetanović,[632] Emir Karabašić,[633] Silvije Sarić,[634] Nusret Sivac[635] and Witness T.[636]

291. The Appeals Chamber considers that, once the material findings of fact were identified, the Trial Chamber was required to indicate the reasons why those facts, in law, rendered Kvočka criminally liable for the crime of torture. Although the Trial Chamber did not make specific legal findings as to each incident for which Kvočka was found guilty of torture, the Appeals Chamber notes that the Trial Chamber made general legal findings, in paragraphs 157 and 158 of the Trial Judgement regarding the prohibited purpose as well as in paragraphs 144, 145, 149, 151 and 164 regarding the severe pain or suffering endured by the detainees in the Omarska camp. In light of these general findings, the Appeals Chamber finds that the Trial Chamber considered that the

[623] This is a different individual than the victim with the same name mentioned by the Trial Chamber in the Judgement; *cf.* footnote 632, below.
[624] *See* Trial Judgement, paragraphs and respective footnotes of paragraphs 597-598.
[625] *Ibid.*, paragraphs and respective footnotes of paragraphs 74-75, 597-598 and 691(c).
[626] *Ibid.*, paras 598, 685, 691(d), 692.
[627] *Ibid.*, paras 597, 598, 685, 691(c).
[628] *Ibid.*, para. 493.
[629] *Ibid.*, para. 589.
[630] *Ibid.*, para. 534.
[631] *Ibid.*, para. 535.
[632] *Ibid.*, paras 597-598, 685 and 691(c). The victim named Asef Kapetanović referred to here is the one tortured in the "white house" and on the Pista, not the one killed upon his arrival at the camp.
[633] *See* Trial Judgement, para. 530.
[634] *Ibid.*
[635] *Ibid.*, footnote 194 referring to the witness' testimony.
[636] *Ibid.*, paras 609 and 691(c).

requirement of severe pain or suffering was met for each of the incidents listed in Schedule A which had been factually established. This was, in the view of the Appeals Chamber, a conclusion a reasonable trier of fact could have made. This sub-ground of appeal is dismissed.

2. Alleged Factual Errors

(a) Error relating to general findings

292. Kvočka notes that, in paragraph 151 of the Trial Judgement, the Trial Chamber took into account not only the nature, purpose, consistency and severity of the abuse, when evaluating the perpetrator's acts, but also the status of both the victims and the perpetrators. He challenges the Trial Chamber's findings for two reasons.[637] First, he submits that the elements considered by the Trial Chamber do not meet the requirement of the existence of severe pain or suffering. Secondly, he contends that he had no authority as a security service member to influence or improve the conditions of detention, including the quality and quantity of water and food, conditions that were recognized by the Trial Chamber as elements of torture.[638]

293. The Prosecution responds that Kvočka's argument that he is not liable because the security service could not influence or improve the conditions at the camp is misconceived, since the inhumane conditions, such as the lack of food and hygiene, were never alleged or found to amount to torture. The Prosecution submits that, on the contrary, the findings relating to torture centred on the beatings and sexual offences that took place in the camp.[639]

294. With regard to Kvočka's first contention, the Appeals Chamber notes that Kvočka manifestly failed to provide the Appeals Chamber with arguments in support of his objection and failed to provide precise references to any relevant part of the Trial Judgement as required by the Practice Direction on Formal Requirements for Appeals From Judgement.[640] The Appeals Chamber cannot be expected to consider a party's submission if it is vague and suffers from other formal and obvious insufficiencies.[641] As a result, the Appeals Chamber dismisses this contention without considering its merits.

295. Turning to Kvočka's second argument, the Appeals Chamber recalls that Kvočka was found criminally responsible as a co-perpetrator of the crimes committed as part of the joint criminal enterprise of the Omarska camp at the time when he was employed there. When assessing the

[637] Kvočka Appeal Brief, para. 124.
[638] *Ibid.*
[639] Prosecution Respondent's Brief, para. 5.150.
[640] IT/201, issued 7 March 2002.

responsibility of an accused for crimes committed as part of a joint criminal enterprise, it is not a matter of determining what the accused could have done but what he did do to contribute to the joint criminal enterprise. That Kvočka was unable to improve the conditions of detention is of no consequence to his criminal responsibility since his contribution to the joint criminal enterprise encompassing the crimes resulting from the conditions of detention has been established. The argument put forward by Kvočka is thus bound to fail.

(b) Kvočka's absence from the camp

296. Kvočka submits that the Trial Chamber held that he was not responsible for crimes committed in the period when he was absent from the camp and, therefore, it should have considered his work schedule in the camp to take into account his days off.[642] He specifically submits that he is not liable for the torture of Eno Alić, Fikret Harambašić, Jasmin Hrnić, Hase Ičić, Emir Karabašić and Senad Muslimović as they were tortured on 18 June 1992 during his absence from the camp.[643]

297. The Prosecution responds that it is irrelevant that Kvočka was absent from the camp if, through his contribution, he furthered the functioning of the system of ill-treatment.[644] The Prosecution further argues that an individual who intends to contribute to a continuing system of ill-treatment does not confine his criminal will to the commission of individual crimes, but rather to the system itself: his conduct is part of the continuing system of mistreatment.[645] More specifically, Kvočka's liability for crimes committed during his sporadic and temporary periods of absence is not excluded, since there were clear findings that he was still liable for crimes committed during his two periods of absence.[646]

298. The Appeals Chamber begins by noting that Kvočka was not found guilty by the Trial Chamber in relation to the torture of Eno Alić and Fikret Harambašić.[647] The Appeals Chamber further notes that it has already determined that the Trial Chamber did not limit Kvočka's responsibility to the period he was physically present in the camp but held him responsible for

[641] *See Vasiljević* Appeal Judgement, para. 12; *see* also above, para. 15.
[642] Kvočka Appeal Brief, para. 126.
[643] *Ibid.*, para. 127, p. 75.
[644] Prosecution Respondent's Brief, para. 5.152, relying on its submissions contained in paras 3.10-3.11.
[645] *Ibid.*, para. 3.11.
[646] *Ibid.*, para. 5.158.
[647] *See* above, para. 290.

crimes committed in the camp from about 29 May to 23 June 1992, *i.e.*, during the time that he was employed in the camp.[648] This sub-ground of appeal therefore fails.

(c) Specific charges of torture

(i) Torture of Abdulah Puškar and Silvije Sarić

299. Kvočka submits that Abdulah Puškar and Silvije Sarić were allegedly tortured on 20 June 1992. He submits that Witnesses A, K, B and J confirmed that they saw the victims in the camp[649] and that Witnesses B and J also claimed that they heard screams one night on the first floor of the Administration Building and recognised the voice of Puškar. However, they did not give an approximate date of the incident.[650] Kvočka argues that, as Witness AK testified that he saw Puškar being pulled out from "Mujo's room" on the ground floor of the Administration Building between 20 and 30 July 1992, the torture of Puškar must have happened after 20 July 1992, and therefore after his departure from the camp.[651] Kvočka argues that he cannot be held responsible for this act of torture.[652]

300. The Prosecution responds that the evidence shows that the torture of Silvije Sarić occurred on or about 10 June, and forms the basis for his liability for the persecution charge, as the acts of torture were committed during Kvocka's stay at the camp, which is sufficient in law to hold him liable in the joint criminal enterprise for acts of torture.[653] The torture of Abdulah Puškar, however, occurred sometime in July, thus falling outside the period of Kvočka's employment at the Omarska camp and does not form the basis for his liability.[654]

301. The Appeals Chamber notes that Kvočka was not held responsible for the torture of Abdulah Puškar since the Trial Chamber did not make any factual finding in this respect.[655] As regards the torture of Silvije Sarić, the Appeals Chamber considers that Kvočka has failed to identify a discernible error committed by the Trial Chamber. Consequently, this sub-ground of appeal is dismissed.

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[648] *See* above, para. 255.
[649] Kvočka Appeal Brief, para. 127, p. 75.
[650] *Ibid.*
[651] *Ibid.*
[652] *Ibid.*
[653] Prosecution Respondent's Brief, para. 5.162.
[654] *Ibid.*, para. 5.163.
[655] *See* above, para. 290.

(ii) Torture of Slavko Ećimović

302. Kvočka submits that no evidence was presented at trial relating to the alleged torture of Slavko Ećimović during June 1992.[656] He asserts that Ećimović was the head of the armed formations that carried out the armed attack in Prijedor on 30 June 1992 and that he stayed in the camp only for a short period.[657] Kvočka submits that the exact date of his torture was not known, and that none of the required elements of torture was proved beyond reasonable doubt.[658]

303. The Prosecution responds that the Trial Chamber specifically found that Ećimović had been severely beaten on 10 June 1992. It adds that the Trial Chamber found that Slavko Ećimović had been brutalised when he arrived at the camp, that the evidence showed that Kvočka was present at his arrival, and that the victim and two other detainees were subsequently tortured by Žigić two days later, removed from the camp and never seen again.[659]

304. Contrary to Kvočka's argument, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find Kvočka criminally responsible for the torture of Slavko Ećimović on the basis of the evidence presented at trial. The Appeals Chamber notes that, when referring to the torture of Slavko Ećimović, the Trial Chamber relied on the testimony of Witness AK, who testified that Slavko Ećimović had been very severely beaten on 10 June 1992.[660] Although the Trial Chamber did not make any specific legal finding in respect to this victim, the Appeals Chamber reasserts that the general legal findings made in the Trial Judgement were meant to encompass, among others, this factual finding. This sub-ground of appeal is therefore rejected.

(iii) Torture of Witness AK, Asef Kapetanović,[661] Witness AJ and Emir Beganović

305. Kvočka submits that the torture of Witness AK, Asef Kapetanović, Witness AJ and Emir Beganović occurred between 7 and 12 June 1992 and constituted one of the first cases of severe beatings. He argues that he should not be found responsible for these beatings since he did not want to, nor did he contribute to, the severe physical pain and psychological suffering of these victims.[662] Kvočka points to his relationship with Bosnian Muslims to substantiate his argument.[663] Further, he contends that the torture of these individuals was carried out without the participation of a public

[656] Kvočka Appeal Brief, para. 127, pp. 75-76.
[657] *Ibid.*, para. 127, p. 75.
[658] *Ibid.*, para. 127, pp. 75-76.
[659] Prosecution Respondent's Brief, para. 5.166.
[660] *See* Trial Judgement, para. 589, referring to Witness AK's testimony. *See* Witness AK, T. 2026-2036.
[661] The victim Asef Kapetanović referred to here is the individual tortured in the White house and in the Pista, not the individual killed upon his arrival at the camp.
[662] Kvočka Appeal Brief, para. 127, p. 76, and para. 131.
[663] *Ibid.*, para. 127, p. 76.

agent, which was considered by the Trial Chamber to be a requisite element of the crime of torture.[664]

306. The Prosecution responds that the Trial Chamber found that the beatings of Beganović by Žigić did not amount to torture but cruel treatment. It adds that they occurred during Kvočka's period of employment at Omarska camp.[665] The Prosecution submits that the Trial Chamber also found that the beatings of Witness AK, Asef Kapetanović, Witness AJ and Slavko Ecimović occurred on or about 10 June 1992, and thus fell within Kvočka's period of employment at the camp.[666] With regard to the argument that Kvocka did not contribute to the suffering of the victims and did not want them to suffer, the Prosecution contends that Kvočka has misapprehended the *mens rea* element of torture.[667] It submits that the Appeals Chamber in *Furundžij*a held that the *mens rea* of torture requires proof that the "act or omission must be intentional" and must aim at a prohibited purpose, but that there is no requirement that the prohibited purposes be realised, only that the act or omission was motivated, even in part, by one of the prohibited purposes.[668]

307. As to Emir Beganović, the Appeals Chamber notes that the Trial Chamber found that he had been beaten on 10 June 1992 and also humiliated by Zoran Žigić the same day.[669] Having established that Emir Beganović had not been beaten by Zoran Žigić, the Trial Chamber concluded that Žigić was not guilty of torture but of cruel treatment in relation to this victim.[670] The Appeals Chamber considers that this legal finding of cruel treatment is limited to Žigić's liability. Despite the fact that the Trial Chamber did not explicitly state that the beatings perpetrated against Emir Beganović amounted to torture, the Appeals Chamber is of the view that the Trial Chamber did find Kvočka criminally responsible for torture for the beatings of Emir Beganović in light of the Trial Chamber's general legal findings.[671]

308. Turning to Kvočka's argument that he neither wanted nor contributed to the infliction of severe pain or suffering, the Appeals Chamber has already determined that, in contributing to the daily operation and maintenance of the Omarska camp, Kvočka allowed the perpetuation of the system of ill-treatment, thereby furthering the common criminal purpose. As such, Kvočka contributed to the perpetration of the crimes committed when he was employed in the camp, including the crimes of torture. Further, the Trial Chamber correctly established that Kvočka knew

[664] *Ibid.*, para. 131.
[665] Prosecution Respondent's Brief, para. 5.164.
[666] *Ibid.*, para. 5.165.
[667] *Ibid.*, para. 5.136.
[668] *Ibid.*
[669] Trial Judgement, paras 593 and 597.
[670] *Ibid.*, paras 598, 691(d).
[671] *See* above, paras 290-291.

the common criminal purpose of the Omarska camp and intended to participate in it, which encompassed the perpetration of the crimes. Therefore, Kvočka's argument that he should not be found responsible since he had not wanted or contributed to the severe physical pain and psychological suffering of Witness AK, Asef Kapetanović, Witness AJ and Emir Beganović is rejected.

309. With regard to the alleged requirement of the participation of a public agent, the Appeals Chamber refers to its previous developments[672] and rejects Kvočka's sub-ground of appeal.

(iv) Torture of Avdo Kapetanović and Asef Kapetanović[673]

310. Kvočka asserts that he protected other detainees with his body when Avdo Kapetanović and his son Asef Kapetanović were shot dead on their arrival at the camp.[674]

311. The Appeals Chamber notes that Kvočka was not found guilty in respect of these two victims since the Trial Chamber did not make any factual findings in this regard.[675]

F. Kvočka's criminal liability for persecutions as a crime against humanity (ground of appeal 4)

312. The Appeals Chamber will now consider Kvočka's fourth ground of appeal in which he claims that the Trial Chamber erred in finding him guilty on Count 1 of the Indictment, namely, persecutions as a crime against humanity.

313. Kvočka recalls that the *Kupreškić* Trial Chamber defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5"[676] and adds that in the *Kordić and Čerkez* Trial Judgement the Trial Chamber concluded that acts enumerated in other sub-clauses of Article 5 could constitute persecutions, as well as acts mentioned elsewhere in the Statute and those not cited in the Statute constituting deprivation of basic human rights.[677] He concludes that acts of persecution must be of equal gravity or severity to other acts enumerated

[672] *See* above, para. 284.
[673] The victim to whom it is referred here is the one allegedly killed upon his arrival at the camp.
[674] Kvočka Appeal Brief, para. 128.
[675] *See* above, para. 290.
[676] Kvočka Appeal Brief, para. 72, quoting *Kupreškić et al.* Trial Judgement, para. 621.
[677] Kvočka Appeal Brief, para. 72.

under Article 5 of the Statute.[678] Accordingly, Kvočka proceeds to contest the conclusions of the Trial Chamber on each of the constitutive acts of persecution of which he has been found guilty.

314. As regards the general arguments raised by Kvočka in connection with the definition of the crime of persecutions, the Appeals Chamber stresses at the outset that it is unable to identify the error or errors alleged by Kvočka. Consequently, the Appeals Chamber declines to consider these general arguments and will deal with the specific errors Kvočka alleges regarding the criminal acts that constitute persecutions.

1. Specific criminal acts that constitute persecutions as a crime against humanity

315. Before turning to Kvočka's specific allegations, the Appeals Chamber notes that he was not found guilty of persecutions in connection with all the incidents listed in Schedule A under count 1 of the Indictment. A careful reading of the factual findings of the Trial Chamber shows that Kvočka was found guilty under Article 7(1) of the Statute of the persecutions committed against the following individuals listed in Schedule A: Witness A,[679] Zuhra Hrnić,[680] Witness AM,[681] Omer Mešan,[682] Sabit Murčehajić,[683] Witness AI,[684] Nusret Sivac[685] and Sifeta Sušić[686] who were confined in inhumane conditions. The detainees Emir Beganović,[687] Abdulah Brkić,[688] Muhamed Cehajić,[689] Jasmin Hrnić,[690] Witness AK,[691] Hase Ičić,[692] Asef Kapetanović,[693] Emir Karabašić,[694] Witness T,[695] Azedin Oklopčić,[696] Silvije Sarić[697] and Witness AJ[698] were confined in inhumane conditions and were victims of beatings. Witness J,[699] Witness B,[700] Witness F[701] and Witness K[702]

[678] *Ibid.*
[679] Trial Judgement, paragraphs or respective footnotes of paras 452 and 557.
[680] *Ibid.*, paragraphs or respective footnotes of paras 86, 94 and 107.
[681] *Ibid.*, paragraphs or respective footnotes of paras 49, 94-96.
[682] *Ibid.*, paragraphs or respective footnotes of paras 437, 482, 490, 518 and 541.
[683] *Ibid.*, paragraphs or respective footnotes of paras 58, 482, 483 and 493.
[684] *Ibid.*, paras 86, 368 and 382.
[685] *Ibid.*, paragraphs or respective footnotes of paras 55, 82, 370, 391, 435, 436, 445, 482, 487, 493 and 495.
[686] *Ibid.*, paragraphs or respective footnotes of paras 71, 98, 370, 391, 436, 540, 547 and 561.
[687] *Ibid.*, paragraphs or respective footnotes of paras 593, 597, 598 and 685.
[688] *Ibid.*, paragraphs or respective footnotes of paras 437 and 593.
[689] *Ibid.*, para. 493.
[690] *Ibid.*, para. 534.
[691] *Ibid.*, paragraphs or respective footnotes of paras 382, 387, 411, 444, 483, 527, 528, 569, 587-593, 597-598.
[692] *Ibid.*, paragraphs or respective footnotes of paras 93, 514, 520, 528, 535, 542 and 614.
[693] *Ibid.*, paras 483, 530, 585-598, 685. The victim named Asef Kapetanović to which it is referred here is the one tortured in the White house and in the Pista, not the one killed upon his arrival at the camp.
[694] *Ibid.*, para. 530.
[695] *Ibid.*, paras 599-609.
[696] *Ibid.*, paragraphs or respective footnotes of paras 85, 368, 436, 487, 528, 536, 537, 540 and 593.
[697] *Ibid.*, para. 530.
[698] *Ibid.*, paragraphs or respective footnotes of paras 55, 59, 368, 487, 585-598.
[699] *Ibid.*, paras 548 and 549.
[700] *Ibid.*, paragraphs or respective footnotes of paras 49, 50, 54, 71, 104, 107, 436, 437, 444, 445, 491, 518, and 546.
[701] *Ibid.*, paras 547, 561.
[702] *Ibid.*, paras 551, 552, 559.

were confined in inhumane conditions and victims were of rape or sexual violence. Ahil Dedić,[703] Ismet Hodžić,[704] Bećir Medunjanin,[705] Mehmedalija Nasić,[706] were detained and killed in the camp. As to Ahil Dedić and Ismet Hodžić, the Appeals Chamber recalls that it reversed the Trial Chamber's findings and found Kvočka not guilty of these two murders.[707] For the same reasons which have led to this conclusion, the Appeals Chamber further vacates Kvočka's conviction for persecutions (confinement in inhumane conditions) in respect of Ahil Dedić and Ismet Hodžić.

316. No factual findings could be found in the Trial Judgement for the following individuals contained in Schedule A under count 1: Eno Alić, Refik Begulić, Witness AV, Zlata Bilajac, 12 men with the family name Garibović, Husein Hodžić, Mehmed Hadžić, Fikret Harambašić, Safet Ilić, Sakib Jakupović, Witness AU, Witness AF, Witness M, Ferid Mujčić, Witness AL, Muharem Nezirević, Abdulah Puškar, Hanki Ramić and Reuf Travančić. The Appeals Chamber concludes that Kvočka has not been found guilty in respect of these individuals.

(a) Harassment, humiliation and psychological abuse

317. Kvočka argues that acts of harassment, humiliation and psychological abuse do not constitute the crime of persecutions.[708] He submits that, under *Kupreškić*,[709] in order for an act to be held as persecution, it must be of equal gravity or severity as the criminal acts listed in Article 5 of the Statute, and that the acts in question do not rise to this standard.[710]

318. The Prosecution responds that this submission does not have a factual or legal basis, and that the Trial Chamber correctly considered harassment, humiliation and psychological abuse as acts of persecution, as is supported by the *Krnojelac* Trial Judgement, the *Blaškić* Trial Judgement and the *Aleksovski* Appeal Judgement.[711] It submits that those acts against Bosnian Muslims amounted to a gross or blatant denial of fundamental human rights, thus satisfying the legal criterion of seriousness.[712]

319. Referring to the case-law of the Tribunal, the Trial Chamber defined the constitutive elements of the crime of persecution as follows: "(1) the occurrence of a discriminatory act or omission; (2) a basis for that act or omission founded on race, religion, or politics; and (3) the intent

[703] *Ibid.*, para. 76.
[704] *Ibid.*, footnote 164.
[705] *Ibid.*, paras 599-609.
[706] *Ibid.*, paras 83 and 379(f).
[707] *See* above, paras 268, 271, 277.
[708] Kvočka Appeal Brief, para. 83.
[709] *Ibid.*, para. 72, quoting *Kupreškić et al.* Trial Judgement, para. 621.
[710] Kvočka Appeal Brief, paras 72 and 81-82; Kvočka Reply Brief, paras 63 and 64.
[711] Prosecution Respondent's Brief, paras 5.66, 5.68 and 5.70.

to infringe an individual's enjoyment of a basic or fundamental right"[713] and, in more general terms, defined persecutions as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5".[714]

320. The Appeals Chamber finds no error in the constitutive elements identified by the Trial Chamber but prefers to adopt the wording of the *Krnojelac* Appeal Judgement, which was rendered after the delivery of the Trial Judgement in the present case and which it has endorsed in all its recent judgements:

> (…) the crime of persecution consists of an act or omission which:
> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[715]

321. The Appeals Chamber also notes that with respect to the *actus reus* of the crime of persecutions, the Trial Chamber rightly noted that the acts included in the crime of persecution, be they considered in combination or separately, are of the same gravity as the enumerated crimes in Article 5 of the Statute.[716] Kvočka does not in fact contest the standard of gravity but refers to it to show the Trial Chamber's alleged error. The Appeals Chamber points out that to apply the standard of gravity, the acts must not be considered in isolation, but in context, by looking at their cumulative effect.[717]

322. The Appeals Chamber will further determine whether the charges of harassment, humiliation and psychological abuse as established in this case were of sufficient gravity to constitute crimes of persecution under Article 5(h) of the Statute.

323. Harassment, humiliation and psychological abuse are not listed as such under Article 5 of the Statute nor do they constitute specific offences under other articles of the Statute. The Appeals Chamber notes however that Common Article 3(1)(c) of the Geneva Conventions prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment". The specific

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[712] *Ibid.*, para. 5.73.
[713] Trial Judgement, para. 184, referring to *Tadić* Trial Judgement, para. 715.
[714] Trial Judgement, para. 184, refering to *Kupreškić et al.* Trial Judgement, para. 621.
[715] *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113; *Blaskić* Appeal Judgement, para. 131; *Kordić and Čerkez* Appeal Judgement, para. 101.
[716] Trial Judgement, paras. 184-185.

offence of outrages upon personal dignity also appears in Article 75(2)(b) of Additional Protocol I.[718] The Appeals Chamber also considers that acts of harassment and other psychological abuse, depending on the circumstances, can clearly be assimilated to violations of the "mental well-being of persons" prohibited under Article 75(2)(a) of Additional Protocol I.[719] The Appeals Chamber recalls incidentally that acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law.

324. Contrary to Kvočka's claim, the Trial Chamber endeavoured to show in what respect the acts of harassment, humiliation and psychological abuse committed in the camp reached the degree of gravity of the crimes against humanity explicitly listed in the Statute. The Trial Chamber argued as follows:

> (…) The conditions of detention prevailing in the camp – gross overcrowding in small rooms without ventilation, requiring the detainees to beg for water, and forcing them to relieve bodily functions in their clothes – were themselves a form of abuse, and were intended to harass, humiliate, and inflict mental harm on the detainees. The constant berating, demoralizing, and threatening of detainees, including the guards' coercive demands for money from detainees, and the housing of detainees in lice-infected and cramped facilities were calculated by participants in the operation of the camp to inflict psychological harm upon detainees. Just as rape and forced nudity are recognized as crimes against humanity or genocide if they form part of an attack directed against a civilian population or if used as an instrument of the genocide, humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution.
>
> The Trial Chamber is also satisfied that the horrendous conditions of detention and the demoralizing treatment of detainees in Omarska camp were sufficiently degrading and traumatizing to constitute *per se* an outrage upon personal dignity, which qualifies as persecution since it was clearly committed on discriminatory grounds.[720]

325. The Appeals Chamber has no doubt that, in the context in which they were commited and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution. The Appeals Chamber finds the conclusion reached by the Trial Chamber reasonable. This ground of appeal is therefore dismissed.

(b) Murder

326. Kvočka claims that the Trial Chamber erred in finding him guilty of murder as persecution with respect to Silvije Sarić. He submits that the list of victims for Counts 1 to 3 is the same as that for Counts 4 and 5, only with the addition of Silvije Sarić. The Indictment stated that Sarić was

[717] *See* Trial Judgement, para. 185; also *Kupreškić et al.* Trial Judgement, paras 615(e) and 622; *Krnojelac* Trial Judgement, para. 434.
[718] *See* also Article 4(2)(e) of Additional Protocol II.
[719] *See ibid.*
[720] Trial Judgement, paras 190-191 (footnote omitted).

killed on 20 June 1992, but, according to the Defence, his murder occurred between 20 and 30 July 1992, when the Appellant was not in the camp.[721] Kvočka submits that since the Prosecution accepts that he was not held responsible for the deaths of Suljo Ganić, "Okić", Adbulah Puškar and Mehmedalija Sarajlić, he could not have been liable for the murder of Silvije Sarić because the witnesses who testified about the murder of Abdulah Puškar stated that Silvije Sarić and Abdulah Puškar were killed at the same time.[722] There is no response in this regard from the Prosecution.

327. On reading Schedule A of the Indictment,[723] the Appeals Chamber notes that the name Silvije Sarić does indeed appear on the Prosecution's list of victims of crimes of persecution, inhumane acts and outrages upon personal dignity with which Kvočka is charged (Counts 1 to 3). The Appeals Chamber points out, however, that it is stated that Silvije Sarić was a victim of "confinement in inhumane conditions, beating and torture on the first floor of the administration building" and that murder is never mentioned. The Appeals Chamber also underlines that the name of Silvije Sarić does not appear on the Prosecution's list of victims of murder under Counts 4 to 5.[724] The Appeals Chamber finally notes that, in its Judgement, the Trial Chamber did not enter a finding on the alleged murder of Silvije Sarić but merely referred to the beating he may have suffered during his detention in Omarska camp.[725] Even if the evidence tends to show that Silvije Sarić could have been murdered during his detention in Omarska, the Appeals Chamber notes that Kvočka was not found guilty of the murder of Silvije Sarić. The ground of appeal relating to the murder of Silvije Sarić is therefore without merit and must accordingly be dismissed.

(c) Torture

328. The Appeals Chamber refers to its previous discussion in this respect and recalls that Kvočka's ground of appeal relating to torture was dismissed in its entirety.

(d) Rape and sexual assault

329. Kvočka argues that the Prosecution did not prove beyond reasonable doubt that the alleged rapes and sexual assaults happened during his stay in the camp.[726] Kvočka submits that the victims of rape and sexual assault as identified by the Prosecution were Witnesses A, F, J and K.[727] He recalls the evidence that Witness A arrived at the Omarska camp on around 18 to 20 June 1992,

[721] Kvočka Appeal Brief, para. 74 and Kvočka Reply Brief, para. 65.
[722] Kvočka Reply Brief, paras 66-67.
[723] Schedule A, counts 1-3.
[724] Schedule A, counts 4 and 5.
[725] Trial Judgement, para. 530.
[726] Kvočka Appeal Brief, para. 81.
[727] *Ibid.*, para. 76.

Witness K arrived on 17 June, Witness F at the beginning of June and Witness J around 9 June,[728] and that, during the proceedings, the Trial Chamber rejected the testimony of Witness A in regard to the alleged rapes and sexual assaults.[729] Kvočka contends that he was dismissed from Omarska on 23 June 1992 and that he was absent from the camp from 2 to 6 June 1992 and from 16 to 19 June 1992.[730]

330. The Prosecution accepts that the witnesses arrived at the camp on the dates mentioned by Kvočka and that they did not provide conclusive evidence as to the dates on which the sexual assault and rapes occurred.[731] It submits that he should not have been found criminally liable in respect of these offences.[732] It submits further that the Trial Chamber's finding that Kvočka was guilty of the crime of persecution under Count 1 should be reversed to the limited extent that it refers to "sexual assault and rape", but that allowing this appeal to this limited extent should not affect the sentence imposed by the Trial Chamber.[733]

331. Kvočka opposes the Prosecution's submission that dismissal of the charges of sexual assault and rape should not affect the imposed sentence.[734] He submits that, as the charge of sexual assault and rape as persecution constituting a crime against humanity has been very severely punished in *Furundzija* and *Kunarac*, a dismissal of this charge should substantially affect his sentence.[735]

332. The Appeals Chamber notes again that, in its Judgement, the Trial Chamber stated that none of the accused would be found responsible for the crimes committed before the date of his arrival in the camp or after he left the camp.[736] To this effect, the Trial Chamber established that Kvočka held a position in the camp during the period from about 29 May to 23 June 1992.[737] Later, the Trial Chamber found that "the crimes alleged against Kvočka in the Amended Indictment were committed in Omarska during the time that he was employed in the camp".[738]

333. The Appeals Chamber notes first that the parties concur on the fact that no conclusive evidence was provided by the Prosecution on the dates on which Witnesses F, J and K were raped and sexually assaulted. The Appeals Chamber then points out that, with the exception of the

[728] *Ibid.*, para. 78.
[729] *Ibid.*, para. 79.
[730] *Ibid.*, para. 80.
[731] Prosecution Respondent's Brief, para. 5.56.
[732] *Ibid.*
[733] *Ibid.*
[734] Kvočka Reply Brief, para. 55.
[735] *Ibid.*, para. 55.
[736] Trial Judgement, para. 349.
[737] *Ibid.*, para. 356.
[738] *Ibid.*, para. 413(c).

assaults committed by Nedeljko Grabovac against Witness J,[739] the Trial Chamber did not enter in the Trial Judgement any finding as regards the dates or approximate dates on which these crimes were allegedly committed. In finding the accused liable for sexual violence the Trial Chamber refers to pages 5385 to 5387 of the transcripts.[740] On the review thereof, the Appeals Chamber notes that the witness provides no date or approximate date for the acts of sexual violence committed against her, and that the Trial Chamber could not properly rely on this witness testimony to conclude that these crimes were committed during the time that Kvočka was employed in the camp.

334. The Appeals Chamber finds that the Trial Chamber erred in stating that rape and sexual assault with which Kvočka was charged in the Indictment were committed in Omarska during the time that he was employed there and, consequently, erred in convicting Kvočka of "persecution for … sexual assault and rape."[741] The Appeals Chamber upholds this ground of appeal and quashes this conviction. The Appeals Chamber will consider whether the quashing of this conviction may impact on the sentence in the chapter on sentencing.

(e) Confinement in inhumane conditions

335. Although the Trial Chamber found that confinement in inhumane conditions was punishable pursuant to Article 5 (e) and (i) of the Statute, Kvočka argues that it was impossible for him to influence the imprisonment or release of detainees, and that he should not have been held responsible on this charge.[742]

336. The Prosecution responds that Kvočka's inability to release the detainees was irrelevant to his persecutory act in that the underlying act for which he is charged relates to the confinement of detainees in inhumane conditions and not their unlawful confinement.[743] It argues that the Trial Chamber did not conclude that Kvočka should have released the detainees but concluded that he could have done more to mitigate the terrible conditions in the camp.[744]

337. In reply, Kvočka argues that since the Trial Chamber concluded that he was a member of the so-called internal security, and that members of this security service could not affect the quantity and quality of food, accommodation conditions and medical treatment, he was not able to mitigate

[739] See Trial Judgement para. 99, referring to T. 4779-4783 in footnotes 240 and 241. Witness J testified that Nedeljko Grabovac, alias Kapitan, stayed in the camp approximately ten days in July 1992: Witness J, T. 4780.
[740] Trial Judgement, footnote 686.
[741] *Ibid.*, para. 752.
[742] Kvočka Appeal Brief, para. 84.
[743] Prosecution Respondent's Brief, para. 5.57.
[744] *Ibid.*

conditions in the camp.[745] He submits that the Prosecution did not prove beyond any reasonable doubt that he could have done more to mitigate the terrible conditions in the camp.[746] He argues that members of extraordinary security were not authorised to evaluate the detention conditions, as their only duties were to provide security. They could not affect decisions on arrests, conduct investigations or file criminal charges.[747]

338. When assessing the responsibility of an accused for crimes committed as part of a joint criminal enterprise, it is not a matter of determining what the accused could have done but what he did do to contribute to the joint criminal enterprise. The Appeals Chamber has upheld the Trial Chamber's finding that Kvočka was criminally responsible as a co-perpetrator of the crimes committed as part of the joint criminal enterprise in Omarska camp during the time when he was employed there. That Kvočka was unable to prevent certain crimes is of no consequence since his contribution to the joint criminal enterprise encompassing those crimes has been established. In this sense, the arguments put forward by Kvočka are bound to fail. The Appeals Chamber dismisses this ground of appeal.

(f) Conclusion

339. For the foregoing reasons, the Appeals Chamber upholds Kvočka's sub-ground of appeal on rape and sexual assault and dismisses his other sub-grounds of appeal. The Appeals Chamber stresses that the Trial Chamber's error with regard to rape and sexual assault is not liable to invalidate the Trial Judgement and that the impact it may have on sentencing will be considered in the relevant chapter.

2. Kvočka's *mens rea* for persecutions as a crime against humanity

340. Kvočka argues that the Trial Chamber erred in convicting him for persecutions as the Prosecution did not prove beyond reasonable doubt either that he shared the aim of the discriminatory policy or that he possessed the necessary discriminatory intent.[748]

(a) Discriminatory policy

341. Kvočka submits that, in *Kordić and Čerkez,* the Trial Chamber held that the *mens rea* for the crime of persecution was proved by the fact that the accused shared the aim of the discriminatory policy, but that, in the present case, the Prosecution did not prove that he shared that aim, while, on

[745] Kvočka Reply Brief, para. 56.
[746] *Ibid.*, para. 57.
[747] *Ibid.*, para. 58.

the contrary, he associated closely with non-Serbs.[749] The Prosecution submits that there is no requirement that a discriminatory policy existed or that, if it did, the accused took part in the formulation of such a discriminatory policy, as shown by the *Kunarac* Appeal Judgement.[750] In his Reply Brief, Kvočka accepts that there is no requirement that a discriminatory policy existed or that the accused took part in the formulation of such a policy and submits that this subsection of his ground of appeal does not need to be considered. [751]

342. As a result, the Appeals Chamber declines to consider this sub-ground of appeal.

(b) Discriminatory intent

343. Kvočka agrees with the Trial Chamber's finding that discrimination was the main feature that distinguished the crime of persecution from other crimes against humanity, and that discrimination must be based on political, racial or religious grounds.[752] He also concurs that persecutions can only be committed with direct intent[753] and that persons suspected of sympathising with non-Serbs can also be responsible for persecutions.[754] However, Kvočka submits that he did not have the discriminatory intent for persecutions for political and religious reasons.[755] He points out that he is married to a Bosnian Muslim and had close association with non-Serbs;[756] that he was a member of the moderate Reformist Party of Ante Marković and that he was dismissed from duty at the Omarska camp after being considered a traitor and suspected of supporting Bosnian Muslims.[757]

344. The Prosecution responds that the Trial Chamber held that Kvočka had the requisite intent for two reasons. First, virtually all the crimes were committed against the non-Serb detainees of the camp, and thus the acts or omissions were committed on discriminatory grounds. Secondly, there was clear evidence that Kvočka shared the discriminatory intent of the perpetrators, as he knowingly participated in a joint criminal enterprise.[758] The Prosecution argues that his association with the Muslim community did not detract from the finding that he shared the discriminatory intent of those who physically perpetrated the crimes, that his acts of benevolence cannot obliterate

[748] Kvočka Appeal Brief, para. 96.
[749] *Ibid.*, para. 95.
[750] Prosecution Respondent's Brief, paras 5.74-5.75.
[751] Kvočka Reply Brief, para. 68.
[752] Kvočka Appeal Brief, para. 86 referring to Trial Judgement, para. 194.
[753] *Ibid.*, para. 87.
[754] *Ibid.*, para. 89.
[755] *Ibid.*, para. 90.
[756] *Ibid.*, para. 92.
[757] *Ibid.*, paras 93-94.
[758] Prosecution Respondent's Brief, paras 5.62-5.65

his criminal liability, and that it was open to the Trial Chamber to conclude that such acts could not constitute significant mitigation.[759]

345. In reply, Kvočka submits that a discriminatory intent must relate to a specific act for which the accused is charged, as the definition of persecution demands that the act or omission be factually persecutory.[760] Kvočka submits that his association with the Muslim community, his political affiliation and his duty as a professional policeman are facts that disprove the existence of a discriminatory intent.[761] He asserts that the Trial Chamber founded its finding of his discriminatory intent on the *presumption* that his stay in the camp was voluntary, rather than on the evidence.[762]

346. The Appeals Chamber stresses that the parties concur that discriminatory intent is required in order to prove a crime of persecution. In addition to his argument about an absence of discriminatory intent on his part, Kvočka nevertheless seems to contend that the Trial Chamber erred by not systematically analysing the discriminatory nature of the crimes committed in Omarska camp. The Appeals Chamber recalls that the Trial Chamber established the discriminatory nature of the joint criminal enterprise encompassing the crimes committed in Omarska camp, and considers that Kvočka fails to prove that the Trial Chamber erred.

347. The Appeals Chamber concurs with the Trial Chamber's reasonable and cogent finding that the crimes committed in the camp were committed with the intent to discriminate against and subjugate the non-Serb detainees,[763] the ultimate aim of the joint criminal enterprise. Regarding Kvočka, the Trial Chamber found that he had the intent to discriminate against the non-Serbs detained in the camp.[764] In this respect, the Appeals Chamber recalls that, on the question of Kvočka's *mens rea*, it concluded that the Trial Chamber did not err when it found, based on the evidence before it, that Kvočka had the intent to contribute to the joint criminal enterprise of the Omarska camp. The Appeals Chamber is of the opinion that, in the context of the case, the intent to contribute to the joint criminal enterprise and discriminatory intent is one and the same thing. The same conclusion must then be reached when determining whether the facts of the case could have led a reasonable trier of fact to conclude that Kvočka shared the discriminatory intent of the perpetrators of the crimes committed in furtherance of the joint criminal enterprise. Hence, the

[759] *Ibid.*, para. 5.60.
[760] Kvočka Reply Brief, paras 71 and 72.
[761] *Ibid.*, paras 74-75.
[762] *Ibid.*, para. 76.
[763] Trial Judgement, paras 197-198, 202.
[764] *Ibid.*, para. 413(e).

Appeals Chamber considers that the Trial Chamber did not commit an error in its conclusion set out in paragraph 413(e) of the Trial Judgement that Kvočka had the required discriminatory intent.

IV. SEPARATE GROUNDS OF APPEAL OF RADIĆ

348. In his Appeal Brief, Radić has identified five grounds of appeal. The second ground of appeal and parts of his first ground have been discussed above as they overlapped with grounds advanced by other appellants.[765] As the remaining grounds of appeal are sometimes repetitive, and sometimes raise parallel issues under different headings, the Appeals Chamber has partially rearranged the order in which they are addressed for ease of reference. Radić's fifth ground of appeal relates to the sentence, and will be discussed in section VII of this Judgement.

A. The right to a fair and impartial trial (ground of appeal 1)

349. In his first ground of appeal, Radić contends that he was denied the right to a fair and impartial trial. He advances three sub-grounds of appeal: (i) he was not adequately informed about the charges against him because the mode of criminal liability was not pleaded in the Indictment; (ii) the Trial Chamber did not make findings with regard to the Schedules; and (iii) the Trial Chamber violated Rule 93 of the Rules when using certain evidence to establish a consistent pattern of conduct. The first sub-ground has been discussed already;[766] the Appeals Chamber now turns to the remaining two.

1. Schedules

350. Radić submits *inter alia* that the Trial Chamber violated his right to a fair and impartial trial by failing to make factual findings in respect to each incident listed in the Schedules.[767] The Appeals Chamber has already discussed the merits of this argument;[768] it turns now to an analysis of the Trial Judgement to determine what factual findings the Trial Chamber actually made to support Radić's convictions.

351. Radić was not found guilty of persecution, murder and torture in respect of all the incidents listed in Schedule C. A review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Radić has been found guilty, pursuant to Article 7(1) of the Statute, of persecution under count 1 of the Indictment in respect of the following victims contained in Schedule C: Mirsad Ališić,[769] Zuhra Hrnić,[770] Witness AM,[771] Zihad Mahmuljin,[772] Omer Mešan,[773]

[765] *See* above, paras 77-119.
[766] *See* above, paras 26-54.
[767] Radić Appeal Brief, paras 26-31, as well as Radić Reply Brief, paras 5-16.
[768] *See* above, paras 55-76.
[769] Trial Judgement, paragraphs or respective footnotes of paras 79, 82, 86, 368, 379, 381, 532 and 534.

Sabit Murčehajić,[774] Witness AI,[775] Nusret Sivać,[776] Sifeta Sušić[777] and Ermin Striković[778] who were confined in inhumane conditions. The detainees Emir Beganović,[779] Zlatan Beširević,[780] Abdulah Brkić,[781] Witness Y,[782] Muhamed Cehajić,[783] Jasmin Hrnić,[784] Witness AK,[785] Hase Ičić,[786] Asef Kapetanović,[787] Emir Karabašić,[788] Gordan Kardum,[789] Witness T,[790] Azedin Oklopčić,[791] Silvije Sarić[792] and Witness AJ[793] were victims of beatings. Witness J,[794] Witness B,[795] Witness F[796] and Witness K[797] were victims of sexual violence. Ahil Dedić,[798] (FNU) Gavranović,[799] Riza Hadžalić,[800] Bećir Medunjanin,[801] Mehmedalija Nasić,[802] Safet Ramadanović[803] and Asmir Crnalić[804] were detained and killed in the camp.

352. As to count 5 of the Indictment, a review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Radić has been found guilty, pursuant to Article 7(1) of the Statute, of murder under count 5 of the Indictment in respect of the following victims contained in Schedule C: Ahil Dedić,[805] (FNU) Gavranović,[806] Riza Hadžalić,[807] Bećir Medunjanin,[808]

[770] *Ibid.*, paragraphs or respective footnotes of paras 86, 94 and 107.
[771] *Ibid.*, paragraphs or respective footnotes of paras 49, 94-96 and 529.
[772] *Ibid.*, para. 74, footnote 194.
[773] *Ibid.*, paragraphs or respective footnotes of paras 437, 482, 490, 518 and 541.
[774] *Ibid.*, paragraphs or respective footnotes of paras 58, 482, 483 and 493.
[775] *Ibid.*, paras 86, 368 and 382.
[776] *Ibid.*, paragraphs or respective footnotes of paras 55, 82, 370, 391, 435, 436, 445, 482, 487, 493 and 495.
[777] *Ibid.*, paragraphs or respective footnotes of paras 71, 98, 370, 391, 436, 540, 547 and 561.
[778] *Ibid.*, paragraphs or respective footnotes of paras 94, 527, 530 and 541.
[779] *Ibid.*, paragraphs or respective footnotes of paras 74, 593, 597.
[780] *Ibid.*, footnote 194.
[781] *Ibid.*, paragraphs or respective footnotes of paras 437, 455, 527, 593.
[782] *Ibid.*, para. 531.
[783] *Ibid.*, para. 493.
[784] *Ibid.*, para. 534.
[785] *Ibid.*, paragraphs or respective footnotes of paras 43, 75, 382, 387, 411, 444, 483, 527, 569 and 587-593.
[786] *Ibid.*, paragraphs or respective footnotes of paras 514, 528, 535 and 614.
[787] *Ibid.*, paras 483, 530, 585-598.
[788] *Ibid.*, para. 530.
[789] *Ibid.*, para. 445.
[790] *Ibid.*, paras 599-609.
[791] *Ibid.*, paragraphs or respective footnotes of paras 85, 368, 436, 487, 528, 536, 537, 540 and 593.
[792] *Ibid.*, para. 530.
[793] *Ibid.*, paragraphs or respective footnotes of paras 55, 59, 368, 487, 585-598.
[794] *Ibid.*, paras 548 and 549.
[795] *Ibid.*, paragraphs or respective footnotes of paras 49, 50, 54, 71, 104, 107, 436, 437, 444, 445, 491, 518, 546.
[796] *Ibid.*, paras 547, 561.
[797] *Ibid.*, paras 551, 552, 559.
[798] *Ibid.*, para. 76.
[799] *Ibid.*, para. 531.
[800] *Ibid.*, paras 445, 537.
[801] *Ibid.*, paras 599-609.
[802] *Ibid.*, paras 83 and 379.
[803] *Ibid.*, paras 495 and 536.
[804] *Ibid.*, paras 83, 487 and 491.
[805] *Ibid.*, paras 76-77. The Appeals Chamber understands that the Trial Chamber recounted the facts leading to the death of this victim because it believed them to be established beyond reasonable doubt.
[806] *Ibid.*, para. 531.
[807] *Ibid.*, paras 445 and 537.

Mehmedalija Nasić[809] and Safet Radamanović.[810] The Trial Chamber found that Asmir Crnalić was shot dead[811] but his name is listed only under count 1 of the Indictment (persecution),[812] not under count 5 (murder). As far as Jasmin Hrnić is concerned, the Trial Chamber found that he was detained at Omarska and beaten up,[813] but the Appeals Chamber cannot identify a finding of the Trial Chamber as to the death of Jasmin Hrnić. Similarly, there is no finding by the Trial Chamber regarding the alleged death of Silvije Sarić as a result of beatings.[814] With regard to Emir Karabašić, the Trial Chamber found that he collapsed after a severe beating; but nothing in the Trial Judgement indicates that he died as a result of this beating.[815] Of 22 murders listed in Schedule C, Radić has been found guilty of murder in six cases.

353. As to count 9 of the Indictment, a review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Radić has been found guilty, pursuant to Article 7(1) of the Statute, of torture under count 9 of the following victims contained in Schedule C: Abdulah Brkić,[816] Slavko Ećimović,[817] Riza Hadžalić,[818] Hase Ičić[819] and Witness T.[820] Of 15 incidents of torture or cruel treatment listed in Schedule C, Radić has been found guilty of torture under count 9 of the Indictment in five.

354. Finally, Radić was also charged with rape and sexual assault against female prisoners, including Witnesses A, K, E, F, J, L and Zlata Cikota.[821] The Appeals Chamber notes that an entire section of the Trial Judgement covers Radić's personal involvement in sexual violence.[822] Factual findings have been reached by the Trial Chamber for the following victims listed in the relevant section of the body of the Indictment or Schedule C: Witnesses K,[823] Zlata Cikota,[824] Witness F[825]

[808] *Ibid.*, paras 599-609.
[809] *Ibid.*, paras 83 and 379(f).
[810] *Ibid.*, para. 536.
[811] *Ibid.*, paras 83, 487 and 491.
[812] Under the name Mirso Crnalić also known as Asmir.
[813] Trial Judgement, para. 534.
[814] *Ibid.*, para. 530.
[815] *Ibid.*, para. 530.
[816] *Ibid.*, paras 593, 598.
[817] *Ibid.*, para. 589.
[818] *Ibid.*, para. 537.
[819] *Ibid.*, para. 535.
[820] *Ibid.*, paras 599-609.
[821] Indictment, para. 42. Zlata Cikota is listed in Schedule C, together with Witnesses A, K, F and J.
[822] Trial Judgement, paras 546-561.
[823] *Ibid.*, paras 551-553, 559.
[824] *Ibid.*, paras 547, 559.
[825] *Ibid.*, paras 547, 559.

and J.[826] With regard to Witness A, the Trial Chamber noted that she testified that Radić had raped her, but that the Trial Chamber could not rely on her testimony.[827]

355. No factual findings at all could be found in the Trial Judgement for the following individuals contained in Schedule C: Abdulah Puškar, Samir Avdić, Witness AV, Ivan Hrvat, Ferid Mujčić, Mustafa Balić, Eno Alić, Velid Badnjević, Hilmaja Balić, Said Bešić, Zlata Bilajac, Amer Cerić, Witness X, Dedo and Edin Crnalić, Husein Crnkić, Durat Dautović, Midhet Fazlić, Suljo Ganić, Samir Hodžić, Dalija Hrnić, Irvan Hrvat, Maho Habibović, Fikret Harambašić, Witness AU, Emir Karagić, Witness M, Eso Mehmedagić, Ibrahim Mešinović, Midhet Mujkanović, Witness AL, Muharem Nezirević, Hanki Ramić, Mehmedalija Sarajlić, Enes Sahbaz, Mevludin Sejmenović, Sefik Sivac, Miro Soljaja and Reuf Travančić.

356. Contrary to Radić's allegations, the Trial Chamber did not find him guilty of certain crimes under counts of the Indictment without establishing the facts underlying each of these counts. Even if the Trial Chamber made an error by failing to list the incidents established beyond reasonable doubt underlying each crime for which Radić was found guilty, this error does not invalidate the Trial Judgement, as explained above.[828] This ground of appeal therefore fails.

2. Consistent pattern of conduct

357. As a separate sub-ground under his first ground of appeal, Radić challenges the Trial Chamber's use of the testimony of Nedzija Fazlić and Witness AT as evidence of a consistent pattern of conduct, pursuant to Rule 93. Radić asserts that, when the Trial Chamber used the testimony of Witness AT to establish a consistent pattern of conduct pursuant to Rule 93, it violated the Rules.[829] According to Radić, the Trial Chamber also violated Rule 93 (B), which provides that the Prosecutor shall, pursuant to Rule 66, disclose to the Defence any evidence pointing to a consistent pattern of conduct, which the Prosecution never did with regard to Witness AT.[830] Radić submits that since the Prosecution did not request the application of Rule 93, the Trial Chamber should not have applied it on its own.[831]

358. The Prosecution responds that Rule 93 embodies a principle similar to that of "similar fact evidence" recognized in many common law jurisdictions and that, under that principle, the evidence of other crimes showing special knowledge, opportunity, or *modus operandi*, need not be identified

[826] *Ibid.*, paras 548-549, 559.
[827] *Ibid.*, para. 557.
[828] *See* above, paras 74-76.
[829] Radić Appeal Brief, paras 33-34.
[830] *Ibid.*, para. 35.

in the Indictment.[832] It notes that the *Kupreškić et al.* Appeal Judgement held that disclosure of Rule 93 evidence pursuant to Rule 66 was not sufficient in light of the version of Rule 65*ter* adopted in April 2001. When, however, such evidence had been disclosed before this version of Rule 65*ter* entered into force (as in *Kupreškić* itself), it could remain on the record. The Prosecution states that this applies to the present case.[833]

359. In the present case, the Trial Chamber found evidence admissible under Rule 93 in two instances. The Trial Chamber found reliable the testimony of Nedzija Fazlić, according to which Radić had promised to help her in exchange for sexual favours, and of Witness AT, who testified that Radić forced her once to have sexual intercourse with him. As no mention was made of these two victims in the Indictment, the Trial Chamber did not consider them when determining the guilt of Radić. However, it found that their testimony could assist in establishing a consistent pattern of conduct.[834]

360. The Appeals Chamber notes that the Trial Chamber never referred to a consistent pattern of conduct when assessing the evidence on which it based Radić's conviction. It appears that the Trial Chamber, although satisfied that a consistent pattern of conduct of Radić had been established, made no use of this pattern of conduct when assessing the evidence for the particular offences of which Radić was convicted. Radić has not identified to what extent relief was sought when submitting this sub-ground of appeal. He did not demonstrate that the removal from the record of the evidence in question would have had any impact on the Trial Judgement. The Appeals Chamber, therefore, finds that he failed to identify an error on the part of the Trial Chamber.

B. Radić's criminal liability for the crime of persecutions (ground of appeal 3)

361. Under this ground of appeal, Radić challenges his conviction for persecution as a crime against humanity under count 1 of the Indictment.[835]

1. The finding that the underlying crimes were discriminatory

362. Radić submits that the Trial Chamber erred in concluding that a criminal act can be discriminatory if the perpetrator acts with discriminatory intent only. In his view, there must be discriminatory consequences to hold an act discriminatory.[836] Radić also submits that it is not

[831] *Ibid.,* para. 36.
[832] Prosecution Respondent's Brief, paras 6.84-6.86.
[833] *Ibid.*, paras 6.87-6.88.
[834] Trial Judgement, paras 547, 556.
[835] Radić Appeal Brief, para. 64.
[836] *Ibid.*, paras 72-74.

sufficient to establish that he was aware of his acts being discriminatory, but that he must have consciously intended to discriminate.[837] The Prosecution responds that Radić has not shown that the Trial Chamber erred by inferring his discriminatory intent from his conduct, and from the fact that he participated knowingly and wilfully in a joint criminal enterprise which comprised a system of maltreatment in which detainees were persecuted on discriminatory grounds.[838]

363. The Trial Chamber found that all the detainees in the Omarska camp were non-Serbs or persons suspected of sympathizing with non-Serbs. Virtually all offences were committed against non-Serbs. The establishment of the camp formed only one element of a common plan to drive the non-Serb population of Prijedor out of the territory.[839] Radić does not challenge these findings, nor does he dispute that the crimes committed in the Omarska camp, for which he was convicted under this count, deny or infringe fundamental rights of the victims. In the present case, the Appeals Chamber found that the Trial Chamber correctly defined the crime of persecution.[840] Under the given circumstances, there is no doubt that the underlying crimes were committed upon discriminatory grounds, and had discriminatory effects.

2. Radić's discriminatory intent

364. Radić contests the Trial Chamber's conclusion that the individual discriminatory intent required for the crime of persecution could be inferred from the discriminatory character of the Omarska camp.[841] Radić argues that the existence of the Omarska camp cannot *per se* establish his discriminatory intent because the *Krnojelac* Trial Chamber held that such intent of the accused needed to be established for every individual act.[842] Radić argues that the Trial Chamber's failure to establish his discriminatory intent without further evidence, and the "automatic" attribution of discriminatory intent violated the rights of the accused.[843] Further, Radić refers to the case of *Georgiadis v. Greece*[844] of the European Court of Human Rights to demonstrate that a court of law must "give much more specific reason" when its finding is of "decisive importance for appellant's rights" and when the findings include "assessment of factual issues".[845]

[837] *Ibid.,* para. 75.
[838] Prosecution Respondent's Brief, para. 6.141.
[839] Trial Judgement, paras 197-198.
[840] *See* above, paras 319-320.
[841] Radić Appeal Brief, para. 67.
[842] *Ibid.,* para. 71.
[843] *Ibid.*
[844] *Georgiadis v. Greece*, 29 May 1997, Eur. Ct. H. R., Report 1997-III.
[845] Radić Appeal Brief, para. 77.

365. The Prosecution submits that the Trial Chamber's articulation of the *mens rea* for persecution is legally beyond reproach,[846] that a trier of fact is permitted to infer an accused's discriminatory intent from many factors including the conduct itself and the context in which it occurs.[847] In the view of the Prosecution, the Trial Chamber was correct in concluding that a participant in a joint criminal enterprise must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that these acts facilitated the crimes committed through the enterprise.[848]

366. The Appeals Chamber agrees with Radić that the discriminatory intent of crimes cannot be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity. However, the discriminatory intent may be inferred from the context of the attack, provided it is substantiated by the surrounding circumstances of the crime.[849] Accordingly, the Appeals Chamber found in the case *Prosecutor v. Krnojelac* that, when beatings were inflicted only on the non-Serb detainees in a prison, it was reasonable to conclude that these beatings were committed because of the political or religious affiliation of the victims, and that these acts were committed with the requisite discriminatory intent.[850] In the present case, it appears that almost all the detainees in the camp belonged to the non-Serb group. It was reasonable to conclude that the reason for their detention was their membership in this group and therefore of a discriminatory nature.

367. Radić argues that he did not share the goal of the discriminatory policy, but that he reluctantly served in the camp only because of the explicit orders of his superior. The Appeals Chamber recalls that discriminatory intent must be distinguished from the motive for doing so.[851] The Trial Chamber inferred Radić's discriminatory intent from his knowledge of the persecutory nature of the crimes, and his knowing participation in the system of persecution pervading Omarska camp.[852] The Appeals Chamber finds that it was reasonable to reach the conclusion that Radić acted with discriminatory intent from the facts of the case, regardless of his personal motives for doing so. His personal motives may become relevant at the sentencing stage, but not as to the finding of his criminal intent.

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[846] Prosecution Respondent's Brief, para. 6.143.
[847] *Ibid.*, para. 6.144.
[848] *Ibid.*, para. 6.146.
[849] *Krnojelac* Appeal Judgement, para. 184.
[850] *Ibid.*, para. 186; *Kordić and Čerkez* Appeal Judgement, para. 950.
[851] *See* above, para. 106.
[852] Trial Judgement, para. 571(g).

368. The Appeals Chamber understands that Radić, by his reference to the case of *Georgiadis v. Greece*[853] of the European Court of Human Rights, contends that the Trial Chamber failed to give sufficient reasons for his conviction. The Appeals Chamber recalls that every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98 *ter* (C).[854] However, the Trial Chamber is not under the obligation to justify its findings in relation to every submission made during trial. It is therefore necessary for any appellant claiming an error of law due to the lack of a reasoned opinion to identify the specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[855] The Appeals Chamber finds that the Trial Chamber's findings as to Radić's discriminatory intent meet this standard, and that Radić has failed to identify any particular omission on the part of the Trial Chamber.

3. The sexual offences did not involve discrimination

369. Radić also asserts that the acts of rape and sexual violence charged do not involve discrimination based on religion, ethnicity, or political belief.[856] He submits that the Trial Chamber found personal motives in the acts of rape as persecution, but failed to establish what constituted his discriminatory intent.[857]

370. The Appeals Chamber finds that Radić, again, does not distinguish between intent and motive. The Trial Chamber found that the sexual violence was directed only against women of non-Serb origin,[858] and Radić does not contest this finding. It was, for the reasons set out in the preceding section, reasonable to conclude that Radić acted with the required discriminatory intent, notwithstanding his personal motives for committing these acts.

C. Alleged factual errors (ground of appeal 4)

371. In his fourth ground of appeal, Radić challenges various factual findings of the Trial Chamber.

[853] *Georgiadis v. Greece*, 29 May 1997, Eur. Ct. H. R., Report 1997-III.
[854] *Kunarac et al.* Appeal Judgement, para. 41; *Furundžija* Appeal Judgement, para. 69; *see* above, para. 23.
[855] *See* above, para. 25.
[856] Radić Appeal Brief, para. 73.
[857] *Ibid.*, para. 66.
[858] Trial Judgement, para. 560.

1. The position of Radić within the Omarska camp

(a) Assessment of witnesses' testimony

372. Radić submits that the Trial Chamber did not establish beyond reasonable doubt that he was the shift leader of guards and held a position of authority.[859] He relies on the testimony of Witnesses B, AJ, AK, AI and Mirsad Alisić to argue that none of the witnesses was certain that he had authority over other guards.[860] Radić argues that the Trial Chamber quoted the evidence given by Witnesses AK and B but that it left out the part of the testimony in which Witness B stated that "not all the guards would have obeyed Radić".[861] In addition, Radić argues that the Trial Chamber did not take into consideration the evidence given by several witnesses testifying to the effect that he was not in a position of authority and not different from other guards,[862] and that the Trial Chamber did not consider the affidavits of a number of witnesses who had been guards at the time when Radić was in Omarska camp.[863]

373. The Prosecution responds that the partial extracts of the evidence presented by Radić in his Appeal Brief are not representative of the extensive evidence before the Trial Chamber.[864] It points out that Radić had already highlighted in his Final Trial Brief the excerpts of evidence upon which he now relies in his Appeal Brief.[865] Furthermore, the Prosecution submits that nothing in the Trial Judgement suggests that the Trial Chamber did not adequately consider the evidence given by Witnesses DC/2, DC/3 and Starkević,[866] as references to their evidence are included in the Judgement.[867]

374. The Appeals Chamber notes that the Trial Chamber relied on the evidence given by a large number of witnesses to establish Radić's position in the camp.[868] Radić does not challenge the testimony given by these witnesses, with the exception of Witness B. Witness B's testimony was, in Radić's view, misinterpreted by the Trial Chamber, because she had stated that not all the guards obeyed Radić.[869] A close reading of Witness B's testimony reveals that she explicitly called Radić a

[859] Radić Appeal Brief, para. 86.
[860] *Ibid.*, paras 88-92.
[861] *Ibid.*, para. 93.
[862] He relies in particular on Witnesses DC/2, DC/3 and Branko Starkević in this respect, Radić Appeal Brief, paras 96-98.
[863] Radić Appeal Brief, para. 99.
[864] Prosecution Respondent's Brief, para. 6.16. The Prosecution refers to the evidence considered by the Trial Chamber in para. 6.17.
[865] *Ibid.*, para. 6.18.
[866] In the Trial Judgement, the name is spelled Starkević; in the witness list, Starcević.
[867] Prosecution Respondent's Brief, para. 6.20. The Prosecution also considers Witness J's evidence, para. 6.35.
[868] Paras 513-524 of the Trial Judgement and the pertaining footnotes include references to fifteen witnesses.
[869] Radić Appeal Brief, para. 88.

shift leader, and positively stated that he had authority over the guards, and that *most* of them obeyed him:

> Q. From what you saw during your time in the camp, did you believe that Mladjo Radic did have the authority to control the conduct of the guards on his shift?
>
> A. Absolutely.
>
> Q. In your opinion, if he had wanted to, could he have prevented beatings that day?
>
> A. Well, if he has the duty of being a shift leader, then I also think he has the authority to prevent something from being done as well, or to make a report of it to the command.
>
> Q. Based on what you observed in the camp, if he had given such an order, that is, not to beat the prisoners, do you believe the guards on his shift would have obeyed him?
>
> A. I hope that most of them would, but not all of them. Most of them would have listened to him.[870]

Considering that the Trial Chamber never found that all the guards obeyed Radić, or that he had absolute and unchallenged authority in the camp, the Appeals Chamber finds his reliance on Witness B's testimony misconceived.

375. With regard to Witness DC/3 and Branko Starkević, the Appeals Chamber notes that their testimony is at least contradictory as to their knowledge about Radić's position in the camp. When asked if Radić was in charge of a shift, Witness DC/3 answered that he could not tell about this, because he had no access to that type of information.[871] Branko Starkević said that he had seen Radić two or three times in the camp. When he was asked whether he could conclude on those occasions if Radić had any position in the camp, he answered in the negative.[872] With regard to Radić's argument that the Trial Chamber failed to consider the untested affidavits of witnesses who had been guards in Omarska camp on Radić's shift, the Appeals Chamber recalls that it is primarily in the Trial Chamber's discretion to determine what weight to give to which evidence.[873] The Appeals Chamber concludes that Radić seeks to substitute his own evaluation of the evidence for that of the Trial Chamber. His evaluation is not accepted.

(b) Radić's assistance to detainees

376. Radić further objects to the conclusion of the Trial Chamber that he held a position of authority in the camp because he offered assistance to detainees "when it was possible",[874] relying

[870] Witness B, T. 2368-2369.
[871] Witness DC/3, T. 8823.
[872] Branko Starkević, T. 9284.
[873] *See* above, para. 19.
[874] Radić Appeal Brief, para. 107.

on the evidence of Witness B, Ermin Striković and Witness E.[875] In addition, he refers to the testimony of several Defence witnesses to show that he helped detainees by bringing them clothes, food, and medication, but that he had to do so secretly.[876] The Prosecution argues that it was not unreasonable for the Trial Chamber to infer from the evidence of Radić's assistance or protection of certain detainees that he could do so because he had some degree of power and authority in the camp, and that Radić has not shown that no reasonable tribunal could have drawn this inference from the evidence.[877]

377. A close reading of the evidence on which Radić relies reveals that it does not support his submission that he offered assistance to detainees not from a position of authority, but had to do so in secret. For example, Radić submits that Witness DC/1 stated that Radić had no influence in the camp. A close reading of Witness DC/1's testimony, however, reveals that Radić did not tell Witness DC/1 that he did not have any influence at all in the camp, but that he was not in the position to *release* the witness.[878] The Trial Chamber never found that as a guard shift leader Radić had the authority to release detainees, but that he was able to stop abuses if he chose to do so.[879] For the same reason, Radić's argument that Witness DC/6's testimony showed that the policemen did not obey him[880] is misconceived. Witness DC/6 recounted that he was brought to the Omarska camp. There he met Radić, who, after checking his name, told the policemen who had brought Witness DC/6 to the camp to take him back to Ljubija. The policemen left the camp with the witness, but went to Prijedor and asked for further instructions at the police station. Finally, Witness DC/6 was taken to the Keraterm camp.[881] These events only show that Radić's authority could be overruled by orders from the Prijedor Police Station. This is not inconsistent with the Trial Chamber's findings, which had found that the camp had been established by the order of the chief of the Prijedor Public Security Station.[882]

378. The Appeals Chamber finds that there is no conclusive evidence showing that Radić had to act clandestinely when assisting detainees. Witness DC/4 had only heard so from another person; she herself had not been detained in Omarska camp.[883] Radić misstates the testimony of Witness DC/5 when submitting that the witness said that he had been given bread by Radić, but that another

[875] *Ibid.*, paras 109-111.
[876] *Ibid.*, paras 113-120.
[877] Prosecution Respondent's Brief, para. 6.26.
[878] Witness DC/1, T. 8753.
[879] Trial Judgement, para. 520.
[880] Radić Appeal Brief, para. 119.
[881] Witness DC/6, T. 8922-8923.
[882] Trial Judgement, para. 28.
[883] Witness DC/4, T. 8851.

guard took it away, swearing.[884] Witness DC/5 in fact stated that the guard took away the bread given to the witness by Radić, but, at the same time, the guard threatened the witness not to tell Radić about the guard's behaviour.[885] Contrary to Radić's assertion, this evidence shows that he had some authority over the guards, and that they were at least concerned about his reactions when they maltreated a detainee assisted by him. Moreover, it would not be improbable for an official in a prison camp, even one holding a position of authority, to keep secret any favours granted to selected detainees.

379. The Appeals Chamber, therefore, finds that a reasonable trier of fact could conclude from the assistance which Radić offered to selected detainees that he held a position of authority and influence in the camp.

(c) Radić had no effective control over the guards in "Krkan's shift"

380. Radić submits that there was no evidence to show that he had "mechanisms to impose his authority"[886] and was different from other guards in his shift.[887] He claims that the Trial Chamber's finding that he was not responsible under Article 7(3) of the Statute, because it was unclear whether he exercised effective control over the guards, was inconsistent with the finding that he held a position of authority.[888] He further maintains that the Chamber's finding that anarchy prevailed in the camp supports his claim.[889] In addition, he submits that the Trial Chamber erred in concluding from the fact that his shift was called "Krkan's shift" that he was actually the shift leader.[890] Finally, Radić disputes the finding of the Trial Chamber that he was responsible for the crimes committed by Žigić, pointing out that the Trial Chamber also found that Žigić did not belong to the camp personnel. He argues that this finding is inconsistent with the ruling in the *Sikirica* Sentencing Judgement that a guard shift leader was not responsible for persons entering the camp to harass detainees.[891]

381. The Prosecution responds that Radić misstated the Trial Chamber's point regarding his Article 7(3) liability, since the Chamber found it unnecessary to rule on the point of effective control.[892] In its view, the finding that he was a shift leader is not inconsistent with the above decision by the Trial Chamber, as a person exercising significant authority is not necessarily a

[884] Radić Appeal Brief, para. 118.
[885] Witness DC/5, T. 8885.
[886] Radić Appeal Brief, para. 152.
[887] *Ibid.*, para. 123.
[888] *Ibid.*, para. 122.
[889] *Ibid.*, para. 155.
[890] *Ibid.*, para. 142.
[891] *Ibid.*, para. 154 with reference to *Sikirica et al.* Sentencing Judgement, para. 28.

superior in terms of Article 7(3).[893] The Trial Chamber also considered the fact that his shift was called "Krkan's shift" and the argument that this was so because Radić was well known to many detainees and guards.[894] In conclusion, the Prosecution argues that Radić has not shown why the Trial Chamber was unreasonable in finding him to be a shift leader with significant authority over other guards on his shift.[895]

382. With regard to Radić's argument that the Trial Chamber's finding that he was not responsible under Article 7(3) of the Statute is inconsistent with the finding that he held a position of authority, the Appeals Chamber refers to the discussion of Kvočka's third ground of appeal and recalls that not every position of authority and influence necessarily leads to superior responsibility under Article 7(3) of the Statute.[896]

383. Equally without merit is Radić's argument that he cannot be held responsible for crimes he was unable to prevent because of the chaotic situation in the camp. The Trial Chamber found that the Omarska camp functioned as a joint criminal enterprise,[897] and that Radić knowingly and substantially contributed to the functioning of the camp.[898] Once the Trial Chamber had established these facts, the conclusion that Radić was responsible for the crimes committed during his participation in the joint criminal enterprise was correct, regardless of his power to prevent individual crimes. Unlike the position under Article 7(3) of the Statute, responsibility for participation in a joint criminal enterprise under Article 7(1) of the Statute does not require proof that the perpetrator has the authority to prevent the crimes.[899] Radić is responsible not because he did not prevent the crimes in question, but because he supported and furthered a criminal enterprise which allowed individuals to maltreat detainees at will.

384. With regard to Radić's argument as to why his shift was called "Krkan's", the Appeals Chamber notes that the Trial Chamber based its conclusion that Radić held a position of authority in the camp on a number of circumstances.[900] The fact that the shift was called "Krkan's shift", Krkan being the nickname of Radić, was not among them. In fact, the Trial Chamber explicitly noted that, according to Radić, his shift was called "Krkan's" because detainees knew him from before the

[892] Prosecution Respondent's Brief, para. 6.28.
[893] *Ibid.*, para. 6.29.
[894] *Ibid.*, para. 6.32.
[895] *Ibid.*, para. 6.37.
[896] *See* above, para. 144 and also para 104.
[897] Trial Judgement, para. 319.
[898] *Ibid.*, para. 566.
[899] For the requirements of responsibility under Article 7(3), *see Čelebići* Appeal Judgement, paras 190-192.
[900] Trial Judgement, paras 513-526.

conflict.[901] His argument that the Trial Chamber did not consider the testimony of witnesses explaining why this shift was called "Krkan's" [902] is therefore irrelevant.

385. Radić's argument that the Trial Chamber's findings are inconsistent with the *Sikirica et al.* Sentencing Judgement is inapposite. In the *Sikirica et al.* Sentencing Judgement, the Trial Chamber noted that the Prosecution and the accused Damir Došen agreed that it was not always possible for Damir Došen to prevent other persons, not on the staff, from entering the Keraterm camp at will and mistreating the detainees.[903] However, nothing in that judgement indicates that the Trial Chamber did not hold Damir Došen *responsible* for the acts committed by these persons, even if he could not prevent them from entering the camp.[904]

386. In summary, the Appeals Chamber concludes that the Trial Chamber based its finding as to Radić's position and authority in the camp on a number of circumstances which were supported by substantive evidence. Radić has failed to show that no reasonable trier of fact could have arrived at this finding. This sub-ground of appeal fails.

2. Crimes committed by guards on Radić's shift

387. Radić submits that the Trial Chamber erroneously concluded that he was responsible for the maltreatment and intimidation of detainees including murder and torture in the Omarska camp, and that his failure to intervene to prevent crimes committed during his shift indicated his approval of the crimes.[905] Radić argues that this conclusion was based on the testimony of Hase Ičić and Mirsad Alisić.[906] He submits that the testimony of Hase Ičić was contradictory. He argues that Hase Ičić's testimony that he met Radić in the morning and then again at around 10 p.m. or 11 p.m. is inconsistent with the Trial Chamber's finding that the change of guards took place at 7 a.m. and 7 p.m.[907] Radić further argues that the testimony of Mirsad Alisić, along with the testimony of Witnesses AI and B, showed that the three guards who were in the same shift with Radić – Predojević, Popović and Paspalj – beat the detainees on their own initiative.[908] Further, he argues that the Trial Chamber's finding that he failed to intervene and that his passive behaviour was understood as approval and encouragement is undermined by its finding that he did not have

[901] *Ibid.*, para. 519.
[902] Radić Appeal Brief, para. 141.
[903] *Sikirica et al.* Sentencing Judgement, para. 28.
[904] The *Sikirica et al.* Trial Chamber made particular findings as to the crimes committed by these visitors, among them Zoran Žigić; *Sikirica et al.* Sentencing Judgement, paras 95-100.
[905] Radić Appeal Brief, paras 157-159.
[906] *Ibid.*, paras 160 and 167.
[907] *Ibid.*, paras 160-165.
[908] *Ibid.*, paras 166-176.

effective control over the guards.[909] Therefore, he concludes, he cannot be held responsible for the crimes committed by these guards.[910]

388. The Appeals Chamber finds that the alleged contradiction in Hase Icić's testimony is only minor and did not prevent a reasonable trier of fact from relying on the testimony of this witness.

389. Radić's argument that he cannot be held responsible for the crimes committed by the guards of his shift because he was unable to prevent these crimes has already been discussed.[911] In addition, the Appeals Chamber notes that Radić does not argue that he ever actually tried to prevent the guards on his shift from committing crimes. It was, therefore, open for a reasonable trier of fact to conclude that Radić's failure to intervene encouraged the commission of crimes.

3. Radić's knowledge of camp conditions and crimes

390. The Trial Chamber noted that Radić had maintained that he had never seen signs of mistreatment on any detainees, though he admitted in cross-examination that he had seen such signs on prisoners leaving the interrogation rooms.[912] The Trial Chamber, based on the evidence given by a large number of witnesses, "fully and forcefully" rejected Radić's claim that he did not notice evidence of any abuses committed in the camp.[913]

391. Radić contests the Trial Chamber's view that he had denied knowledge of the crimes committed in the Omarska camp.[914] He argues that he was aware of the maltreatment, but could do nothing to prevent the crimes. In his view, his knowledge alone is not sufficient to hold him responsible for the crimes.[915]

392. The Appeals Chamber considers that it is irrelevant at this point whether Radić denied at the trial any knowledge of the crimes committed in the camp. The fact is that he was aware of the crimes. On appeal, he does not challenge the Trial Chamber's finding that he was aware of the abuse of detainees. Once he was aware of the crimes committed in the camp, but still continued to support and further the functioning of the camp by carrying on with his duties in the camp, he is responsible for these crimes, regardless of his power to prevent them.[916]

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[909] *Ibid.*, para. 185.
[910] *Ibid.*, para. 189.
[911] *See* above, para. 383.
[912] Trial Judgement, para. 539.
[913] *Ibid.*, para. 544.
[914] Radić Appeal Brief, para. 193.
[915] *Ibid.*, para. 206.
[916] *See* above, para. 383.

4. Sexual crimes

393. Radić challenges the Trial Chamber's finding that he raped Witness K, attempted to rape Witness J[917] and committed sexual violence against Witnesses J, K, Sifeta Susić and Zlata Cikota.[918] He submits that these findings are based upon an incorrect evaluation of the evidence presented.[919] Radić also submits that the Trial Chamber erred in law in finding that he raped Witness K. He argues that whereas, under the Yugoslav Penal Code, the crime of rape involves permanent and lasting resistance of the victim and simultaneous use of force or threat, the Trial Chamber erroneously held "that the resistance of victims in Omarska was broken due to conditions of imprisonment and that Radić applied force or threat".[920]

394. The Prosecution submits that the Trial Chamber correctly applied the *Kunarac et al.* Appeal Judgement definition of rape. It argues that domestic rape laws are irrelevant, as the Statute of the Tribunal defines the crime of rape by reference to international law.[921]

395. The Trial Chamber relied on the definition of rape as given in the *Kunarac et al.* Trial Judgement,[922] which reads as follows:

> In light of the above considerations, the Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.[923]

This definition was confirmed by the Appeals Chamber, which added that the "assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts".[924] Any diverging definition of the crime in Yugoslav law is irrelevant. Radić's argument that the Statute was not in force when the crimes were committed[925] is without merit: the prohibition of rape in armed conflicts has been long recognized in international treaty law as well as in customary international law.[926]

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[917] Radić Appeal Brief, para. 208.
[918] *Ibid.,* para. 209.
[919] *Ibid.*, para. 211.
[920] *Ibid.*, para. 211.
[921] Prosecution Respondent's Brief, para. 6.62.
[922] Trial Judgement, para. 177.
[923] *Kunarac et al.* Trial Judgement, para. 460.
[924] *Kunarac et al.* Appeal Judgement, para. 128.
[925] Radić Reply Brief, para. 75.
[926] *Furundžija* Trial Judgement, para. 168; *Čelebići* Trial Judgement paras 476-479; *Furundžija* Appeal Judgement, para. 210.

396. The Trial Chamber determined that "in cases of sexual assault … a status of detention will normally vitiate consent in such circumstances".[927] This is consistent with the jurisprudence of the Tribunal;[928] Radić has not demonstrated any error of the Trial Chamber.

397. Finally, Radić appears to submit that the Trial Chamber's reasoning with regard to its findings about Radić's involvement in sexual violence is insufficient.[929]

398. The Appeals Chamber recalls that a Trial Chamber is not required to articulate every step of its reasoning, nor is a Trial Chamber obliged to recount and justify its findings in relation to every submission made during trial.[930] The Appeals Chamber dismisses Radić's argument that the Trial Chamber failed to satisfy the requirement of a reasoned opinion with regard to its findings about his involvement in sexual violence.

(a) Witness J

399. Radić challenges the Trial Chamber's finding that he attempted to rape Witness J. He argues that Witness J recounted a similar incident when she was assaulted by a man nicknamed "Kapitan", and that it was impossible that two individuals would try to rape Witness J in the same manner within a short period of time.[931] In addition, Radić submits that the Trial Chamber's conclusion that he committed sexual violence against Witness J by attempting to rape her is erroneous.[932] He argues that Witness J's own testimony precludes his conviction because she testified that during the alleged incident she "practically stopped resisting" Radić's advances. Therefore, he contends, he could have completed the crime, but abandoned it voluntarily.[933] Radić also argues that the conviction for Witness J cannot stand because he was not charged with attempting to rape Witness J, but of sexually attacking her.[934]

400. With respect to the "abandonment" defence to the charge of sexual violence against Witness J, the Prosecution points out that Radić was not convicted of attempted rape but of sexual assault. Thus, even if Radić voluntarily abandoned the attempt to rape Witness J, the act of sexual violence

[927] Trial Judgement, para. 555.
[928] *Furundžija* Trial Judgement, para. 271; *Kunarac et al.* Appeal Judgement, paras 132-133.
[929] Radić Appeal Brief, para. 292.
[930] *See* above, para. 23.
[931] Radić Appeal Brief, para. 278.
[932] *Ibid.*, paras 270-273.
[933] *Ibid.*, paras 273-276.
[934] *Ibid.*, para. 290.

would already have been committed.[935] Therefore, in the view of the Prosecution, no variance exists between the Indictment and his conviction.

401. Radić's argument that Witness J described two almost identical incidents, one involving Radić, the other involving a man nicknamed "Kapitan", was considered by the Trial Chamber and rejected.[936] Reviewing Witness J's testimony, the Appeals Chamber notes that she clearly distinguished between the two incidents, and that her description of them differed in significant details.[937] It was, therefore, open for the Trial Chamber to find that Witness J fell victim to two similar assaults, one committed by Radić, the other one committed by the person nicknamed "Kapitan". The Appeals Chamber does not agree with Radić's contention that such an occurrence was impossible in circumstances where it was "commonplace for women to be subjected to sexual intimidation or violence".[938]

402. With regard to sexual violence, the Trial Chamber found Radić guilty of persecution by crimes including sexual assault and rape (count 1 of the Indictment)[939] and torture (count 16 of the Indictment).[940] Count 15 (rape as a crime against humanity) was dismissed, because the crime was subsumed within the conviction for persecution.[941] Therefore Radić's argument, that he was convicted for attempted rape although he had been charged with regard to Witness J with "sexual attack" only, is without merit. The Trial Chamber identified attempted rape as one form of sexual violence, and convicted Radić accordingly for persecution for crimes including sexual violence.[942] For the same reason, Radić's defence that he abandoned the completion of the crime voluntarily is unfounded: the crime of sexual violence was already completed when Radić finally released Witness J, after he had ejaculated over her thighs and her skirt.[943]

(b) Witness K

403. Radić argues that the testimony of Witness K is not reliable,[944] as there were differences between Witness K's written statements and her testimony before the Trial Chamber.[945] Radić

[935] Prosecution Respondent's Brief, para. 6.76.
[936] Trial Judgement, para. 549.
[937] For example, Radić told her after he released her that they should have sexual intercourse on another occasion "the proper way" (T. 4779), whereas "Kapitan" told her that if she would continue to resist, he could be rough, much rougher than on that occasion (T. 4782).
[938] Trial Judgement, para. 98.
[939] *Ibid.*, paras 573, 578, 761.
[940] *Ibid.*, para. 578, 761. Radić was also convicted for torture under count 9 of the Indictment, but this conviction refers to torture by beatings, *cf.* Indictment, para. 38.
[941] Trial Judgement, para. 579.
[942] *Ibid.*, paras 573-574.
[943] Witness J, T. 4778.
[944] Radić Appeal Brief, para. 212.
[945] *Ibid.*, paras 213-214.

contends that the case of *Prosecutor v. Sikirica et al.,* in which Witness K's allegations of rape against an accused were not sufficient to establish his guilt, illustrates that she is not a credible witness.[946] Radić submits that the Trial Chamber wrongly rejected the testimony of Vinka Andjić, whose evidence refuted an important part of Witness K's testimony.[947]

404. With respect to Witness K, the Prosecution responds that the Trial Chamber considered the alleged inconsistencies in the evidence, and still found Witness K reliable.[948]

405. The Appeals Chamber notes that the Trial Chamber considered most of Radić's arguments concerning Witness K's testimony. Despite the existing differences between the earlier statements and Witness K's testimony before the Trial Chamber, the Trial Chamber found her testimony credible.[949] Having reviewed the relevant parts of the Trial transcript, the Appeals Chamber finds that it was open to a reasonable trier of fact to accept Witness K's testimony.

406. Radić argues that the Trial Chamber erred by rejecting Vinka Andzić's testimony.[950] Vinka Andzić stated that she had never taken Witness K to Radić's room, whereas Witness K had recounted that it was Vinka Andzić who had called her and brought her to Radić.[951] However, the Appeals Chamber agrees with the Prosecution that a reasonable trier of fact could disregard the testimony of a witness who testified that the female detainees praised Radić as a fine man who treated them correctly, and that the female detainees were living in Omarska camp in "excellent conditions".[952]

407. The fact that in the case *Prosecutor v. Sikirica et al.* the Defence and the Prosecution written plea agreement did not rely on Witness K's testimony that she was raped by Duško Sikirica does not have any impact on the Trial Chamber's findings in the present case. Facts stipulated in a plea agreement are not adjudicated facts. The Trial Chamber in the case *Prosecutor v. Sikirica et al.* did not rule on Witness K's reliability. In any event, the rape of Witness K by Duško Sikirica in the Keraterm camp and her rape by Radić in the Omarska camp are two different sets of facts. Even if a Trial Chamber had found that Witness K's testimony about her rape by Duško Sikirica was unreliable, it was still open for another reasonable trier of fact to conclude that her testimony about her rape by Radić in the Omarska camp was credible.

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[946] *Ibid.*, paras 234-246.
[947] *Ibid.*, paras 249-252.
[948] Prosecution Respondent's Brief, para. 6.68.
[949] Trial Judgement, para. 552.
[950] Radić Appeal Brief, paras 255-256.
[951] Vinka Andzić, T. 9133-9134; Witness K, T. 4983.
[952] Vinka Andzić, T. 9133, 9150.

(c) Witness F, Sifeta Sušić, Zlata Cikota

408. Radić finally submits that the individual charges of sexual attack upon Witness F, Sifeta Sušić, and Zlata Cikota cannot be considered as grave violations of the provisions of international humanitarian law, so that they do not fall within the Tribunal's jurisdiction.[953]

409. Radić neither challenges the factual findings of the Trial Chamber with regard to these victims, nor does he contest the Trial Chamber's determination that he inflicted by his assaults severe pain and suffering on Witness F, Sifeta Sušić, and Zlata Cikota.[954] The Trial Chamber was justified in drawing the conclusion that Radić's attacks on these victims amounted to torture. The Appeals Chamber agrees with the Prosecution's argument that torture is, by definition, a serious violation of international humanitarian law.[955]

410. This sub-ground of appeal accordingly fails.

5. The application of the joint criminal enterprise doctrine

411. The Appeals Chamber understands that Radić challenges the Trial Chamber's application of the joint criminal enterprise doctrine to his case.[956] His submissions concerning this issue are found in various places throughout his Appeal Brief; the Appeals Chamber has rearranged them in order to consider them more conveniently.

(a) Omarska camp as a joint criminal enterprise

412. Radić contests the Trial Chamber's finding that the Omarska camp functioned as a joint criminal enterprise. He argues that, according to the Trial Chamber's findings, anarchy and lawlessness prevailed in the camp. Thus, in his view, it is doubtful if a common design existed at all. Even if one existed, he submits, the Appellants were not aware of it and did not participate in its formulation.[957]

413. The Appeals Chamber has already determined that the systemic form of joint criminal enterprise does not require proof of an agreement between the participants.[958] Radić's argument as to the lawlessness and anarchy in the camp is inapposite. The existence of the camp and the organization of the guard service required a certain amount of organization. In fact, with regard to

[953] Radić Appeal Brief, para. 291.
[954] Trial Judgement, para. 561.
[955] Prosecution Respondent's Brief, para. 6.82.
[956] Radić Appeal Brief, para. 307.
[957] *Ibid.*, para. 53.
[958] *See* above, paras 117-118.

the intent of persecution of the non-Serb population of the Prijedor area, the camp functioned with terrible efficiency. The lawlessness and anarchy, referred to by the Trial Chamber, allowed the guards to maltreat the detainees at will.

(b) Radić's *mens rea*

414. Radić submits that he did not willingly or intentionally participate in the maintenance of the camp. On the contrary, he submits that: (i) he considered the camp solely his place of work, to which he was assigned by orders of his superiors;[959] (ii) he was a conscientious worker and had a tendency of obedience and conformity, as supported by the psychological report on his personality;[960] and (iii) he was married with three children and fear for his family persuaded him not to confront the orders of his superiors.[961] Radić argues that he was not a willing participant in a joint criminal enterprise and was only concerned not to do anything in regard to his superiors or towards detainees that could create trouble for himself.[962] In addition, he submits that he was not aware that he could contribute to the maintenance and the functioning of the camp before his departure for Omarska.[963]

415. The Prosecution responds that the preceding additional reasons for staying at the camp were considered by the Trial Chamber but given little weight because the evidence showed that Radić never missed a shift, and that the Trial Chamber considered that those reasons did not amount to excuses or defences to liability for participating in war crimes or crimes against humanity.[964] The Prosecution argues that Radić might not know the exact scope of the criminality of the activities in the camp before he arrived, but that, over time, he gained this knowledge.[965]

416. The Appeals Chamber notes that Radić acknowledges that he was aware of the crimes committed in the camp.[966] His argument, that he worked in the camp because of his orders and fear of the consequences of disobeying them, confounds intent and motives.[967] As long as he participated in the functioning of the camp knowingly and willingly, his motives for doing so are irrelevant to the finding of his guilt.

[959] Radić Appeal Brief, para. 300.
[960] *Ibid.*, para. 301-302.
[961] *Ibid.*, para. 303.
[962] *Ibid.*, para. 305.
[963] *Ibid.,* para. 304.
[964] Prosecution Respondent's Brief, para. 6.108.
[965] *Ibid.*, para. 6.112.
[966] Radić Appeal Brief, para. 206; *cf.* above, para.391.
[967] *Cf.* above, para.367.

417. In addition, Radić submits that the Trial Chamber erred in reaching the conclusion that he had a choice not to stay in the camp.[968] He argues that he made a request to leave the camp, but the request was rejected.[969] He also submits that the Trial Chamber erred in finding that other guards had the choice to leave the camp, as the evidence demonstrated that certain guards left the camp, but only temporarily. In his view, there was no evidence that guards left the camp permanently and of their own will due to disagreement about the functioning of the camp.[970]

418. The Trial Chamber noted that it was not convinced that Radić had no choice but to stay in the camp. It found that he chose to be "conscientious" and stayed at the camp, never missing a single shift.[971] Radić acknowledged that the discipline in the camp was so lax that guards left the camp to work their fields or even went swimming.[972] Moreover, Kvočka, who held as the factual equivalent of deputy commander of the camp security a more important position than Radić, was dismissed from the camp without suffering any further repercussions. These facts show that camp personnel had other alternatives than conscientiously fulfilling their duties. The Appeals Chamber concludes that it was open for a reasonable trier of fact to find that Radić's conscientious fulfilment of his obligations in the camp was due to his own decision.

(c) The significance of Radić's participation

419. Radić contests the Trial Chamber's finding that his participation in the Omarska camp was a significant one.[973] He argues that the camp was established by order of Simo Drljača, and that the Appellants were responsible neither for the arrest nor for the release of detainees. He points to the Trial Chamber's finding that none of the Appellants had influence on the conditions in the camp.[974] In addition, he submits that he could not prevent the guards on his shift from committing crimes.[975] Radić contends that the system would have functioned without his contribution, and that his participation was not essential and therefore insignificant.[976]

420. The Prosecution rejects Radić's "piecemeal approach" and argues that the totality of evidence of Radić's position, conduct, experience and participation in the camp allowed the Trial

[968] Radić Appeal Brief, paras 294-297.
[969] *Ibid.*, para. 296.
[970] *Ibid.*, paras 296-299.
[971] Trial Judgement, paras 563-565.
[972] Mlado Radić, T. 11297.
[973] Radić Appeal Brief, para. 62.
[974] *Ibid.*, para. 41.
[975] *Ibid.*, para. 310(c) (e).
[976] *Ibid.*, para. 62.

Chamber to conclude that his conduct made him a co-perpetrator of crimes committed in pursuance of the joint criminal enterprise of the Omarska camp.[977]

421. The Appeals Chamber has already determined that Radić's challenges of the factual findings of the Trial Chamber are unfounded. Likewise, Radić's assertion that he could not prevent crimes has been discussed. The Appeals Chamber recalls that the Prosecution need not demonstrate that the accused's participation in the joint criminal enterprise is a *sine qua non*, without which the crimes could or would not have been committed.[978] Furthermore, it is, in general, not necessary to prove the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.[979] The Appeals Chamber finds that Radić has not shown why no reasonable trier of fact could have found that he participated in the joint criminal enterprise.

6. Conclusion

422. The Appeals Chamber finds that because Radić has not demonstrated any factual error on the part of the Trial Chamber, his fourth ground of appeal is rejected.

[977] Prosecution Respondent's Brief, para. 6.116.
[978] *See* above, para. 98.
[979] *See* above, para. 97.

V. SEPARATE GROUNDS OF APPEAL OF ŽIGIĆ

423. Žigić filed his Appeal Brief on 21 May 2002, without identifying specific grounds of appeal. Pursuant to an order of the Pre-Appeal Judge of 14 June 2002, he filed a consolidated list of grounds of appeal on 3 July 2002 (hereinafter referred to as "Žigić Additional Document"), listing 47 grounds of appeal. However, many of these grounds of appeal refer to the same sections of his Appeal Brief, whereas in other cases he advances identical arguments in support of different grounds of appeal. Several of his grounds of appeal refer to the issue of joint criminal enterprise, which has already been discussed.[980] To avoid repetition, the Appeals Chamber therefore has rearranged his grounds of appeal.

A. Alleged errors concerning more than one ground of appeal

1. Standard of review

(a) Admissible grounds of appeal

424. In several cases, Žigić has asked the Appeals Chamber to consider his Final Trial Brief as forming part of his Appeal Brief.[981] As ground of appeal 47, he submits "all others grounds defined in Appellant's Brief, but not mentioned in this Document [sic]."[982]

425. The Appeals Chamber recalls that an appellant is obliged to clearly set out his grounds of appeal as well as the arguments supporting them. He has to provide the Appeals Chamber with exact references to paragraphs in judgements, transcript pages, exhibits or any authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made, so that the Appeals Chamber may fulfil its mandate in an efficient and expedient manner.[983] General references to the submissions made during the trial clearly do not fulfil this requirement, and therefore will be disregarded by the Appeals Chamber. The same applies to Žigić's ground of appeal 47.

[980] *See* above, paras 26-119.
[981] *See e.g.*, Žigić Appeal Brief, paras 152, 284. In para. 29 he even requested the Appeals Chamber to consider his entire Final Trial Brief as component of his Appeal Brief.
[982] Žigić Additional Document, para. 58.
[983] *Kunarac et al.* Appeal Judgement, paras 44-45. *See* above, para. 15; also para. 294.

(b) Additional evidence

426. The Appeals Chamber has granted in part a motion by Žigić to adduce additional evidence,[984] and has heard two additional witnesses and two rebuttal witnesses. In determining whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice, the Appeals Chamber has set out the applicable test in the *Kupreškić et al.* Appeal Judgement:

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.[985]

In *Blaskić*, the Appeals Chamber cited and affirmed that test. The Appeals Chamber noted that in the context of the *Kupreškić* case, the Appeals Chamber simply applied a deferential standard of review to the totality of the evidence admitted both at trial and on appeal, because the appellant had successfully established that no reasonable trier of fact could have reached a finding of guilt based on that evidence.[986] However, as the Appeals Chamber in *Blaškić* further correctly noted, the Appeals Chamber in *Kupreškić* was not faced with the question of what test to apply where the outcome would be that in light of the trial evidence considered together with the additional evidence admitted on appeal, "a reasonable trier of fact could reach a conclusion of guilt beyond a reasonable doubt."[987] In that case, the Appeals Chamber in *Blaškić* concluded that "it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal."[988] Consequently, the Appeals Chamber in *Blaškić* answered the question left open in *Kupreškić*, further developing the test first articulated therein.

In reaching this conclusion, the Appeals Chamber in *Blaškić* underscored that such a standard of review is necessary in the interests of justice as well as for reasons of due process when considering a case before this International Tribunal because, if any lower standard were to be applied, "then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based

[984] Decision on Appellants' Motion to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004.
[985] *Kupreškić et al.,* Appeal Judgement, paras 75-76
[986] *Blaškić* Appeal Judgement, para. 22. *Cf. Musema* Appeal Judgement, paras. 184-194. In *Musema,* the Appeals Chamber applied that same deferential standard of review in quashing the accused's conviction for rape because it found that on the basis of the totality of the evidence, a trier of fact *would* have reasonable doubt as to the accused's guilt.
[987] *Blaškić* Appeal Judgement, para. 23.
[988] *Ibid.*

on the totality of the evidence relied upon in the case … be reached by either Chamber beyond reasonable doubt."[989]

The Appeals Chamber in *Blaškić* indicated, when summarizing the above test, the following two steps in a case where an error of fact is alleged and additional evidence proffered by the Defence is admitted:

> (i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.[990]
>
> (ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[991]

427. It has of course to be borne in mind that, as the Appeals Chamber has noted several times, the task of hearing, assessing and weighing the evidence is left primarily to the Trial Chamber:

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness's testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.[992]

428. Therefore, the Appeals Chamber will uphold a conviction on the basis that a reasonable trier of fact could have arrived at a conviction on the evidence on the trial record in two cases:

(i) if there is no additional evidence admitted;

(ii) if additional evidence is admitted, but upon further review, is found to be not credible or irrelevant, so that it could not have been a decisive factor in reaching the decision at trial.[993]

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[989] *Ibid.*

[990] The Appeals Chamber notes that this is a summary of the test developed in para. 23 of the *Blaškić* Appeal Judgement and must therefore be read taking into consideration the entire context of the decision with regard to this holding. In light of the affirmation of the test first articulated in the *Kupreškić* Appeal Judgement and the reasoning found in paras 22-23 of the *Blaškić* Appeal Judgement, the Appeals Chamber considers that the Appeals Chamber in *Blaškić* obviously considered that if such a determination is also reached on the basis of the trial record *taken together* with the evidence admitted on appeal, then no further examination of the matter is needed.

[991] *Blaškić* Appeal Judgement, para. 24(c).

[992] *Kupreškić et al.* Appeal Judgement, para. 32 (footnote omitted). This was confirmed by *Blaškić* Appeal Judgement, para. 17.

[993] *See e.g. Kupreškić et al.* Appeal Judgement, paras 338-348. In *Kupreškić*, the Appeals Chamber considered the testimony of Witness AT, admitted as additional evidence under Rule 115, as it pertained to Drago Josipović's appeal. The Appeals Chamber concluded that because Witness AT could not bring himself to tell the truth about his own involvement in the Ahmići attack and because Witness AT's wife was a close relative of Josipović, Witness AT's evidence was "so unreliable" as to Josipović's appeal that it was incapable of making his conviction for participation in the attack on Ahmići unsafe. Thus, the Appeals Chamber in *Kupreškić* did not need to take into consideration this additional evidence together with the evidence before the Trial Chamber and simply reviewed the safety of Josipović's conviction on the basis of whether a reasonable trier of fact could have convicted him on the basis of the trial record

2. Alleged errors concerning the Indictment (grounds of appeal 44, 21, 29 and 35)

429. In several instances, Žigić raises objections in relation to the Indictment. The Appeals Chamber understands him to be concerned about the form of the Indictment, in particular the use of Schedules, which Žigić alleges have led to confusion and have hampered his defence. Secondly, he maintains that he was not properly charged with some of the crimes of which he was convicted.

(a) Žigić was not fairly informed about charges against him; the charges are not properly defined especially through Schedules A, B, C, D and E (grounds of appeal 33 and 34)

430. Most of the arguments Žigić raised under this ground of appeal have been already discussed.[994] In addition, Žigić submits that the parallel existence of confidential and public Schedules caused problems for his Defence.[995]

431. The public versions of the Schedules were filed as a consequence of the Trial Chamber's decision of 22 February 2001.[996] In his Appeal Brief, Žigić only advances arguments of a general nature and does not identify any specific prejudice to his defence. Reviewing the arguments exchanged at the Pre-Defence Conference, the Appeals Chamber notes that Žigić was concerned that the confidentiality of the Schedules would prevent him from contacting possible witnesses.[997] To address these concerns, the Trial Chamber issued the decision of 22 February 2001, and the Prosecution filed the new public and confidential Schedules. Žigić fails to identify any problems his Defence encountered afterwards. The Appeals Chamber agrees with the argument of the Prosecution that "[a]ny confusion can be addressed at trial by explanations sought from the Prosecution or from the Trial Chamber," or by an application to grant additional time to prepare the defence.[998] Žigić did not employ any of these possibilities.

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alone. It is true that the Appeals Chamber in *Kupreškić* then proceeded to assess Witness AT's testimony together with the trial record as if it *theoretically was* reliable evidence and concluded that, even then, it would not challenge the safety of Josipović's conviction. However, the Appeals Chamber considers that this latter analysis was pure *dicta* given that Witness AT's evidence had already been rejected as "so unreliable" by the Appeals Chamber in *Kupreškić* that it did not need to be considered any further with regard to reviewing Josipović's conviction. *See also Rutaganda* Appeal Judgement, paras. 473-489, wherein the Appeals Chamber found that the additional evidence admitted in support of the accused's alibi was insufficiently probative for challenging the accused's conviction *because* the evidence so lacked credibility. The Appeals Chamber came to this conclusion because the evidence consisted of a personal opinion that was formulated upon underlying information that appeared to have no relevance for establishing that alibi.

[994] *See* above, paras 26-76.

[995] Žigić Appeal Brief, para. 67; Žigić Reply Brief, para. 14.

[996] Decision on Zoran Žigić's Motion for Rescinding Confidentiality of Schedules Attached to the Indictment, 23 february 2001.

[997] T. 6805-6806 (Private Session).

[998] Prosecution Respondent's Brief, paras 4.42 and 4.38.

(b) Žigić was convicted of offences that were not pleaded in the Indictment (grounds of appeal 21, 29, 35 and 44)

432. Žigić submits that the Trial Chamber found him responsible for some acts he had not been charged with, either in the Indictment or in the Schedules. He argues that the Trial Chamber erred in convicting him for persecution against witnesses Abdulah Brkić, AE, V and Edin Ganić and for the torture of Abdulah Brkić because these names were not mentioned in the Indictment. It is his position that, according to the Schedules, he was not charged with torture or inhumane acts against Witnesses AE, V and Edin Ganić, whereas other crimes alleged in the Schedules, such as the murder of "Hanki" Ramić and the persecution and torture of "Dalia" Hrnić, Jasmin Čepić, Fadil Avdagić and Witness AC, were not mentioned in the Judgement.[999]

433. The Appeals Chamber notes that Abdulah Brkić's name is listed in Schedule D exclusively under counts 11-13 (torture and cruel treatment), whereas Edin Ganić, Witnesses AE and V are listed under counts 1-3 (persecution) exclusively. For Edin Ganić and Witness AE, the Schedule mentions persecution by confinement in inhumane conditions and beating. For Witness V the Schedule mentions persecution by confinement in inhumane conditions only. The Trial Chamber found Žigić guilty of persecution of all four victims, and of torture with respect to Abdulah Brkić and Witness AE.

434. In order to address Žigić's complaints, the Appeals Chamber has to determine (i) whether the Trial Chamber returned convictions on the basis of material facts not pleaded in the Indictment; and (ii) if the Appeals Chamber finds that the Trial Chamber did rely on such facts, whether the trial of Žigić was thereby rendered unfair.[1000] The Appeals Chamber recalls its finding in the *Kupreškić et al.* Appeal Judgement:

> The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes."[1001]

In this context, the *Kupreškić* Appeals Chamber referred to the decision of the Trial Chamber in the present case of 12 April 1999:

[999] Žigić Appeal Brief, paras 61-63.

> As to the Defence request for more specific information regarding victims of the crimes alleged, the degree of detail that is required presents a special difficulty, and it is in this area that the contrast between a domestic criminal law system and an international criminal tribunal is most pronounced. There can be little doubt but that the identity of the victim is information that is valuable to the Defence in the preparation of their cases. But the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims. However, if the Prosecution is in a position to do so, it should.[1002]

In the view of the Trial Chamber, the scale of the crimes committed, in particular in the Keraterm and Omarska camps, made it impossible for the Prosecution to include information about all of the victims. The Prosecution did name a large number of victims, and the Appeals Chamber will also take this into consideration when determining the second aspect mentioned above, namely, whether the exclusion of particular information rendered the trial unfair.

(i) Edin Ganić (ground of appeal 44)

435. With regard to Edin Ganić, the charge is specified in Schedule D as confinement in inhumane conditions and beating. The Appeals Chamber understands that Žigić challenges his conviction, because he was charged with persecution by beating and was convicted of persecution by committing an inhumane act.[1003] Considering the fact that the Trial Chamber correctly found that "mutilation and other types of severe bodily harm, beating and other acts of violence" fall under the category of inhumane acts,[1004] the Appeals Chamber does not find any error of law in its reasoning.

436. Žigić further submits that he was accused of beating Edin Ganić on 4 June 1992, whereas, according to the evidence accepted by the Trial Chamber, this incident took place by the end of June 1992.[1005] The Appeals Chamber recalls the *Kunarac et al.* Appeal Judgement:

> [M]inor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur.[1006]

Žigić was charged with one beating of Edin Ganić in the Keraterm camp on 4 June 1992; the Indictment named as "other perpetrators" Nenad Banović, Pedrag Banović, Goran Laić and Dušan Knežević. The Trial Chamber found that Žigić, Pedrag Banović, Dušan Knežević and other people[1007] beat Edin Ganić on or shortly before the 29th of June.[1008] As Edin Ganić was brought to

[1000] *Kupreškić et al.* Appeal Judgement, para. 87.
[1001] *Ibid.*, para. 89 (footnotes omitted).
[1002] Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 23.
[1003] Žigić Appeal Brief, para. 62.
[1004] Trial Judgement, para. 208.
[1005] Žigić Appeal Brief, para. 365.
[1006] *Kunarac et al.* Appeal Judgement, para. 217.
[1007] In addition to the names the Trial Chamber referred to, Edin Ganić mentioned the "Banović brothers" and one Laić, T. 5906.

the camp around 25 June[1009] and recounted only one incident involving Žigić in Keraterm, there is no doubt that the Indictment and the Judgement refer to the same incident, only under a different date. Although Žigić challenged the credibility of the witnesses to this incident, the exact date was irrelevant to his Defence. He has not identified any prejudice his Defence suffered from the inclusion of the wrong date in the Indictment.

(ii) Abdulah Brkić (ground of appeal 21)

437. Žigić claims that the charge of torture of Abdulah Brkić was improperly excluded from the original Indictment. It was only included in Schedule D, which came to his notice in May 1999 and was kept confidential until 1 March 2001, which made it difficult for him to prepare his defence.[1010] He submits that his right to have concrete and clear charges was violated.[1011] The Prosecution notes that counts 11-13 of the Indictment indicate that Žigić participated in the torture and/or beating of prisoners at the Omarska, Keraterm and Trnopolje camps, *including* specified incidents involving specified victims. The Prosecution submits that the use of the word "including" indicates that the specified incidents and victims were not exhaustive. Further, the Prosecution argues that Abdulah Brkić is mentioned in the Schedule with sufficient detail to put Žigić on notice of the charge he had to meet.[1012]

438. The Appeals Chamber notes that Abdulah Brkić is not mentioned in the main body of the Indictment, but in the attached Schedule D. He is listed under counts 11-13 (torture and cruel treatment) of Schedule D, but not under counts 1-3 (persecution). In relation to counts 11-13, the Indictment reads:

> 24. Between 24 May 1992 and 30 August 1992, **Miroslav KVOČKA, Dragoljub PRCAĆ, Milojica KOS, Mlađo RADIĆ** and **Zoran ŽIGIĆ** participated in persecutions of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Prijedor area, on political, racial or religious grounds.
>
> 25. The persecution included the following means:
>
> […]
>
> b. the torture and beating of Bosnian Muslims, Bosnian Croats and other non-Serbs in Prijedor municipality, including many of the people detained in the Omarska, Keraterm and Trnopolje camps in addition to those listed in Schedules A-E;

[1008] Trial Judgement, paras 656-658.
[1009] Edin Ganić, T. 5880.
[1010] Žigić Appeal Brief, paras 267-268. For further details about the Schedules and their purpose, *see* above**,** paras 55-76**.** The particulars concerning Žigić are found in Schedule D.
[1011] Žigić Appeal Brief, para. 269.
[1012] Prosecution Respondent's Brief, para. 4.43.

The Trial Chamber convicted Žigić for persecution under count 1 and for torture under count 12 against Abdulah Brkić. In both cases, the Trial Chamber entered the conviction for "crimes in the Omarska camp generally" and in particular against several victims, among them Abdulah Brkić.[1013]

439. Although the name of Abdulah Brkić was not linked to counts 1-3, it is clear that the list of victims of persecution given in the Schedules is not exhaustive. The Indictment referred to the torture of non-Serbs, including many detainees in the camps, "in addition to those listed in Schedules A-E".[1014] The facts underlying both the conviction for torture and the conviction of persecution were pleaded in the Indictment, as Žigić was convicted of persecution by means of torture. The only additional requirement for the conviction for persecution is the requirement of discriminatory intent. This specific intent was inferred by the Trial Chamber from Žigić's knowledge of the functioning of the camps as part of a widespread and systematic discriminatory attack on the civilian population. These facts were also pleaded in the Indictment; and Žigić did not raise any particular objections with regard to the finding that he committed the crime against Abdulah Brkić with discriminatory intent. The Appeals Chamber therefore does not find that Žigić suffered any prejudice by the fact that he was charged with torture, but not with persecution with regard to Abdulah Brkić. Moreover, the Appeals Chamber notes that, notwithstanding the Trial Chamber's findings that Žigić committed torture against Abdulah Brkić, Žigić was acquitted of torture as a crime against humanity because it was subsumed by the crime of persecution. If the Appeals Chamber found that Žigić did not have notice that Abdulah Brkić would be considered as a persecution victim, then the obvious result would be to enter an additional and separate conviction for torture as a crime against humanity – a result contrary to Žigić's interests.

(iii) Witness AE (ground of appeal 29)[1015]

440. Žigić submits that he was not properly charged in relation to the torture of Witness AE. The charge was mentioned neither in the Indictment nor in Schedule D.[1016] The Prosecution recalls that the beatings of Witness AE and Redžep Grabić were mentioned as particulars under count 13 of the Indictment,[1017] and that while Witness AE's name was not explicitly mentioned in Schedule D, he

[1013] Trial Judgement, para. 691.
[1014] Indictment, para. 25(b).
[1015] Žigić Additional Document, para. 40 identifies as ground of appeal 29 "Žigić is no way indicted with charge of beating of Redžep Grabić" (sic). However, as the corresponding para. 329 of Žigić's Appeal Brief refers to Witness AE exclusively, the Appeals Chamber understands that this ground of appeal refers to Witness AE only.
[1016] Žigić Appeal Brief, para. 329.
[1017] Prosecution Respondent's Brief, para. 7.193.

was included in the "group of prisoners" alleged to have been beaten by Žigić and referred to in paragraph 41(f) of the Indictment.[1018]

441. Paragraph 41 (f) of the Indictment reads:

> COUNTS 11 to 13
>
> (TORTURE and CRUEL TREATMENT)
>
> 41. Between 24 May 1992 and 30 August 1992, Zoran ŽIGIĆ and others participated in the torture and/or beating of Bosnian Muslim, Bosnian Croat and other non-Serb prisoners in the Omarska, Keraterm and Trnopolje camps, including:
>
> […]
>
> f. Between 22 and 27 June 1992, at the Keraterm camp, Zoran ŽIGIĆ, and others, including Dušan Knežević, brutally beat a group of prisoners confined in Room 2, including Redžep Grabić;

The name of one victim, Redžep Grabić, is mentioned expressly. It is not clear when the Prosecution learned that Witness AE also belonged to this group of victims. However, as Žigić was informed of the approximate date of the incident, of the name of one victim and of the name of one alleged co-perpetrator, the Appeals Chamber finds that an eventual omission of the Prosecution to provide him with the name of Witness AE as a further victim did not render his trial unfair. The charge was that he tortured "prisoners". The Trial Chamber found that he did. In addition, the Appeals Chamber notes that it was clear to Žigić that Witness AE was part of the same group of prisoners as Redžep Grabić. During his testimony on 29 August 2000, Witness AE recounted how Žigić, after beating the prisoners, ordered them to form pairs and fight each other. Witness AE and Redžep Grabić formed one of these pairs.[1019] Moreover, the Defence did not object to Witness AE's evidence about his beating as being outside the scope of the Indictment. This ground of appeal is dismissed.

(iv) Witness V (ground of appeal 35)

442. Žigić argues that the beating of Witness V was neither mentioned in the Indictment nor in any of the Schedules.[1020] He notes that the only charge related to Witness V is for confinement in inhumane conditions, and that he was convicted of persecution for having kicked and wounded Witness V, constituting an inhumane act. The Prosecution responds that counsel for Žigić did not cross-examine Witness V on his credibility or the reliability of his information as to his beating at

[1018] *Ibid.*, para. 7.196.
[1019] Witness AE, T. 4289.
[1020] Žigić Appeal Brief, para. 361.

the trial and has not demonstrated how he could have suffered any prejudice as a result.[1021] The Prosecution notes that Schedule D did include a reference to Witness V being confined in inhumane conditions.[1022]

443. The Appeals Chamber notes that Witness V is mentioned only once in Schedule D under counts 1-3 (persecution): "Witness V – Confined in inhumane conditions, 14 June – 5 August 1992." With regard to other victims, more information is provided. For example, the entry for Witness AE reads: "Witness AE – Confinement in inhumane conditions, beating with metal rod in Keraterm, June 1992." For Edin Ganić, the relevant entry reads: "Edin Ganić – Confinement in inhumane conditions and beating, 4 June 1992." With regard to Witness V, there are no references to beating. The Trial Chamber found Žigić responsible for committing an inhumane act against Witness V and convicted him of persecution.[1023]

444. Subject to the finding in the following paragraph, the Appeals Chamber finds the indictment to be too vague on this point. Even if beating constitutes one of the elements of confinement under inhumane conditions,[1024] so that the indictment can be understood to comprise also the cruel treatment of Witness V, the material fact of the inhumane act committed against Witness V was not pleaded. Schedule D only mentions the period of confinement and does not make any reference to beatings, whereas with regard to other victims, the Schedule contains not only the period of their detention, but also more specific information about beatings and torture. Thus, Žigić could initially not expect to be confronted with any particular incident with regard to Witness V.

445. The Appeals Chamber notes that Defence Counsel for Žigić did not cross-examine Witness V about Žigić's attack on Witness V, nor did he object to the witness' evidence as being outside the scope of the Indictment. The Appeals Chamber recalls that, when an appellant raises a defect in the indictment for the first time on appeal, he has the burden of showing that his ability to prepare his defence was materially impaired.[1025] In the case under appeal, Žigić does not challenge the factual findings of the Trial Chamber. It is clear that the findings of the Trial Chamber included a finding that Witness V was confined in inhumane conditions, for which Žigić was charged. Such confinement is a form of persecution. Therefore, apart from the alleged beating, Žigić was properly convicted of persecuting Witness V. Under these exceptional circumstances, the Appeals Chamber does not find that Žigić suffered any prejudice from the vagueness in the Indictment.

[1021] Prosecution Respondent's Brief, paras 7.230-7.231.
[1022] *Ibid.*, para. 7.227.
[1023] Trial Judgement, paras 690-691.
[1024] *Simić et al.* Trial Judgement, para. 97.
[1025] *See* above, para. 35.

3. Bias of the Trial Chamber, absence of reasoning (grounds of appeal 40 and 46)

446. Žigić claims the Trial Chamber was biased against him. His main argument in this respect is that the Trial Chamber failed to give sufficient reasons for his conviction.[1026] Žigić submits that, as there was an unequal treatment of facts in favour of him and those against him, this constitutes both an error of law and an error of fact.[1027]

447. The Appeals Chamber recalls that it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion that he identify the specific issues, factual findings or arguments which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision. General observations on the length of the judgement, or of particular parts of the judgement, or of the discussion of certain parts of the evidence, do not qualify as the basis of a valid ground of appeal.[1028] Whenever Žigić advances specific arguments, the Appeals Chamber will consider them in their proper context.

448. The same principle applies to the alleged bias and unfairness of the Trial Chamber. The Appeals Chamber finds that the general observations Žigić advances to support his view that the Trial Chamber was biased and unfair do not meet the requirements of a ground of appeal under Article 25 (1) of the Statute. These grounds of appeal are therefore dismissed.

4. Evidence of consistent pattern of conduct (ground of appeal 39)

449. In several instances, the Trial Chamber used evidence about incidents not charged in the indictment as corroborating evidence of a consistent pattern of conduct pursuant to Rule 93 of the Rules. Žigić argues that his conduct demonstrated no pattern of conduct, manners and other characteristics that allowed him to be singled out in Omarska and Keraterm. For example, he was not found to have beaten detainees with a specific type of tool associated with his previous activities. Žigić further submits that the Trial Chamber violated Rules 66 and 93(B), as he was not informed about the events later stated in the Trial Judgement as proof of a consistent pattern of conduct.

450. The Appeals Chamber understands that Žigić raises three different issues: (i) the Trial Chamber erred in law in its application of Rule 93, (ii) the Trial Chamber erred in law admitting the respective evidence because it was not properly disclosed, and (iii) the Trial Chamber committed an error of fact because the respective evidence was not reliable.

[1026] Žigić Appeal Brief, paras 6-56.
[1027] *Ibid.*, para. 37.
[1028] *See* above, paras 23-26.

451. The Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the Judgement, or errors of fact occasioning a miscarriage of justice. An argument that does not have the potential to affect the outcome of this appeal does not constitute an appropriate ground of appeal.[1029] As the relief sought, Žigić requested that the relevant evidence on record be replaced by a different set of facts.[1030] He has failed to demonstrate how this would affect the outcome of the appeal. The only instance he mentions in which Rule 93 evidence was applied is the murder of Bećir Medunjanin.[1031] However, a review of the Trial Chamber's finding shows that the Trial Chamber made no use of Rule 93 evidence in this context. Regarding the factual findings challenged by Žigić, the Appeals Chamber finds that he simply attributes more credibility and importance to his witnesses than to those of the Prosecution; this cannot form the basis of a successful objection.[1032] Žigić has failed to show that the alleged legal errors invalidated the decision.

5. Persecution and discriminatory intent (grounds of appeal 40, 41, 36, 38)

452. The Appeals Chamber understands Žigić to be arguing that there was an error of law in that the Trial Chamber applied an incorrect legal standard in determining whether he had the necessary *mens rea* for persecution (ground of appeal 41). He also argues that the Trial Chamber failed to give sufficient reasons for its decision (ground of appeal 40) and, finally, that its findings did not support the conclusion that he acted with discriminatory intent (grounds of appeal 17, 36 and 38).

(a) The Trial Chamber's establishment of discrimination was erroneous (ground of appeal 41)

453. Žigić claims that the Trial Chamber did not answer questions regarding discriminatory intent or the pattern that is required for conviction on persecution. He argues that discrimination must be based on comparison. It is his submission that the Trial Chamber reached the conviction for persecution simply because the perpetrators were Serbs, the victims Muslims. But he submits that the Serbs only persecuted those who were in favour of secession and who were adversaries in the armed conflict.[1033] He claims that the Trial Chamber failed to find the discriminatory intent in this charge.[1034] In response,[1035] the Prosecution argues the Trial Chamber correctly defined the elements of persecution as referring to (i) an act or omission violating a victim's basic or fundamental rights;

[1029] *Kupreškić et al.* Appeal Judgement, paras 22-23.
[1030] Žigić Additional Document, para. 50.
[1031] Žigić Appeal Brief, para. 371.
[1032] An exception is the testimony of Husein Ganić. As Žigić challenges his evidence also in the context of his conviction for the beating of Edin Ganić, the Appeals Chamber will discuss it in this context, *see* below paras 588-593.
[1033] Žigić Appeal Brief, paras 47-48.
[1034] *Ibid.*, para. 52.

(ii) the act or omission being one which was committed on political, racial or religious grounds; and (iii) the act or omission being one which was committed with discriminatory or persecutory intent.[1036] The Trial Chamber's findings supported the conclusion that the establishment of the camps fitted into a wider persecutory plan to drive the non-Serb population out of Prijedor, that those detained in the camps were selected on discriminatory grounds, and finally that virtually all offences committed in the camps were committed on discriminatory grounds.[1037] In relation to discriminatory intent, the Prosecution submits that the Trial Chamber's articulation of the *mens rea* for persecution was legally correct. The requisite discriminatory intent, the Prosecution argues, could be inferred from the conduct itself and the context in which it occurred.[1038]

454. The Appeals Chamber recalls that in the jurisprudence of the Tribunal, persecution as a crime against humanity is defined as:

> (…) an act or omission which:
>
> 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
>
> 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[1039]

The Appeals Chamber finds that there is no basis for Žigić's claim that the Trial Chamber erred in law in its definition of persecution.[1040]

455. In application of this standard, the Trial Chamber considered that when all the detainees were non-Serbs or those suspected of sympathizing with non-Serbs, it would be disingenuous to contend that religion, politics, and ethnicity did not define the group targeted for attack. In relation to the facts of the present case, the Trial Chamber noted:

> [V]irtually all the offences alleged were committed against non-Serb detainees of the camps. The victims were targeted for attack on discriminatory grounds. While discriminatory grounds form the requisite criteria, not membership in a particular group, the discriminatory grounds in this case are founded upon exclusion from membership in a particular group, the Serb group. […] There is no doubt that the attacks specifically targeted the non-Serb population of Prijedor and purported to drive this population out of the territory or to subjugate those remaining. The Trnopolje and

[1035] The Prosecution refers to the arguments in relation to Kvočka's grounds of appeal nos 5 and 6, and to Radić's ground of appeal no 3, Prosecution Respondent's Brief, para. 7.264.
[1036] Prosecution Respondent's Brief, para. 6.131.
[1037] *Ibid.*, para. 6.135.
[1038] *Ibid.*, para. 6.143-6.144.
[1039] *Krnojelac* Appeal Judgement, para. 185; *Vasiljević* Appeal Judgement, para. 113; *Blaškić* Appeal Judgement, para. 131; *Kordić and Čerkez* Appeal Judgement, para. 101.
[1040] *See* above, para 320.

> Keraterm camps appear to have been each established as part of a common plan to effectuate this goal, and the Omarska camp was clearly established to effectuate this goal. [1041]

Although the Trial Chamber made these observations in the context of the discussion of the *mens rea* for persecution, they also support the conclusion that the crimes committed in the camps discriminated in fact. In the Omarska camp, a few Bosnian Serbs were also detained, reportedly because they were suspected of having collaborated with the Muslims.[1042] Although the Trial Chamber's arguments mainly relate to the Omarska camp, it did not leave any doubt that the same conditions prevailed in the Keraterm and Trnopolje camps. Even if the Trial Chamber expressed some doubt that the Keraterm and Trnopolje camps were *established* to discriminate against non-Serbs, it clearly saw the *operation* of these camps in the same light as the Omarska camp.[1043]

456. With regard to these factual findings, Žigić argues that the Trial Chamber erred because the rationale behind the persecution was not religion or ethnicity, but the issue of secession. However, Žigić fails to identify any evidence to support this position. The evidence on the Trial Record which the Appeals Chamber reviewed does not support this view; no witness mentioned that he was ever asked about his opinion regarding secession. Moreover, even if Žigić's contention were accurate, the alleged acts would be based on political grounds; alternatively, they would be based on the racial reasons underlying the alleged secession. Such grounds would suffice to support persecution.

457. The Appeals Chamber notes that, in his Appeal Brief, Žigić refers only to two detainees who were not clearly members of the non-Serb group: Jugoslav Gnjatović, a Serb soldier, and Drago Tokmadžić, who was of half-Serbian, half-Croatian origin. Jugoslav Gnjatović was firstly detained in Keraterm and then moved to Omarska for a few days. In Keraterm, he was kept in a room with other Serb soldiers, apart from the Muslim detainees. He told the Trial Chamber that this group was treated significantly better than the other detainees:

> Q. What was your status in that military prison?
>
> A. Well, it was normal, but we weren't allowed to move around. We had the status of military policemen, we had our meals together, but we didn't have our weapons, of course.[1044]

They were sometimes provided with alcohol and cigarettes,[1045] and Jugoslav Gnjatović did not mention any beating of this group of detainees in the camp. This different treatment of Serbian and Muslim detainees confirms the finding that the maltreatment of non-Serbian detainees was

[1041] Trial Judgement, paras 197-198.
[1042] *Ibid.*, para. 21.
[1043] *Cf.* Trial Judgement, para. 645 (Keraterm), para. 682 (Keraterm and Trnopolje).
[1044] Jugoslav Gnjatović, T. 10322.
[1045] *Ibid.,* T. 10323.

committed with the requisite discriminatory intent based on their ethnic, religious or political affiliation.[1046]

458. With regard to Drago Tokmadžić, Žigić argues that he was not only half-Serbian, but had also signed a declaration of loyalty to the Serbian authorities and that he had even brought detainees to Keraterm himself.[1047] The very fact that Drago Tokmadžić had to sign a declaration of loyalty, something which was demanded of no Serbian member of the police force, including Žigić,[1048] shows that he was singled out and mistrusted because of his ethnic background.

459. The Appeals Chamber notes that there was a large amount of evidence before the Trial Chamber allowing the conclusion that the detainees in the Omarska, Keraterm and Trnopolje camps were detained there because they were members of a group defined by "religion, politics and ethnicity".[1049] Žigić does not challenge the Trial Chamber's finding that the acts committed in the camps formed part of a widespread and systematic attack against the Muslim and Croat civilian population.[1050] The objective requisites for the crime of persecution are thus met.

460. With regard to the required *mens rea*, the Appeals Chamber reiterates that persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds. This intent may not be inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity; such a context may not in and of itself amount to evidence of discriminatory intent. However, discriminatory intent may be inferred from such a context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent. Circumstances which may be taken into consideration include the systematic nature of the crimes committed against a racial or religious group and the general attitude of the alleged perpetrator as demonstrated by his behaviour.[1051]

461. Considering that all the crimes Žigić was convicted of were committed in the framework of the Omarska, Keraterm and Trnopolje camps,[1052] that these camps were part of a widespread and systematic attack on the non-Serb civilian population, and that the overwhelming majority of detainees in these camps belonged to this group, the Trial Chamber correctly found that the

[1046] *Cf. Krnojelac* Appeal Judgement, para. 186.
[1047] Žigić Appeal Brief, para. 252. The last fact was also mentioned by the Prosecution (T. 12441). However, the testimony of Witness Y on which Žigić relies does not support it: Witness Y, T. 3592 (private session).
[1048] Žigić Appeal Brief, para. 395.
[1049] Trial Judgement, para. 195.
[1050] *Ibid.*, para. 122.
[1051] *Krnojelac* Appeal Judgement, para. 184; *Blaškić* Appeal Judgement, para. 164.
[1052] For Trnopolje, the exact location of the one incident Žigić was accused of, the beating of Hasan Karabašić, is contested between the parties; the Trial Chamber found it took place inside the camp: Trial Judgement, para. 677.

discriminatory intent of Žigić against the detainees could be inferred from his activities within these camps.[1053] The Trial Chamber's findings comprise several additional circumstances which support this conclusion: Žigić accused Sead Jusufagić of "shooting at Serb soldiers and policemen", clearly indicating the ethnic background of the conflict.[1054] In Keraterm, Žigić called out detainees who were subsequently beaten and forced to sing "Chetnik" (*i.e.* Serbian) songs.[1055] Prior to his maltreatment Edin Ganić was told by Žigić to sit on the ground in the "Turkish fashion",[1056] "Turk", as used in Bosnia, being a derogative term applied to Bosnian Muslims. In Trnopolje, Žigić addressed the detainees with the greeting "Good day to you, balijas",[1057] "balijas" being another highly pejorative term for Muslims.[1058]

(b) The irrelevance of personal motives

462. In several instances, Žigić argues that he lacked the requisite discriminatory intent because, according to the Trial Chamber's findings, he committed the relevant acts for personal motives. The motive for the abuse of Edin Ganić, Žigić states, was not discrimination, but personal gain. This is supported by the Trial Chamber's finding that Žigić tried to extort money and a motorbike from Edin Ganić.[1059] Žigić submits that Drago Tokmadžić was maltreated not because of his ethnic background, but because of the hostility he incurred during his service as a police officer prior to the war.[1060]

463. The Trial Chamber explicitly noted that crimes against humanity can be committed for purely personal reasons.[1061] The Appeals Chamber confirms that

> the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.[1062]

Motive and intent must be distinguished. Personal motives, such as settling old scores, or seeking personal gain, do not exclude discriminatory intent. They may become relevant at the sentencing stage in mitigation or aggravation of the sentence,[1063] but they do not form part of the prerequisites

[1053] *Cf.* Trial Judgement, para. 202.
[1054] Trial Judgement, para. 618.
[1055] Abdulah Brkić, T. 4484.
[1056] Trial Judgement, para. 656.
[1057] *Ibid.*, para. 677.
[1058] *Cf.* Mirsad Ališić, T. 2466-2467.
[1059] Žigić Appeal Brief, para. 366 (ground of appeal no 38).
[1060] *Ibid.*, para. 252 (ground of appeal no 17).
[1061] Trial Judgement, para. 203 footnote 383.
[1062] *Tadić* Appeal Judgement, para. 270.
[1063] *Ibid.*, para. 269.

necessary for conduct to fall within the definition of a crime against humanity.[1064] Edin Ganić only became a possible object of Žigić's demands because he was detained as a Muslim and could offer no resistance, whereas Žigić was, as a member of the security forces, in a position of authority over him. The discriminatory intent and the personal covetous motive are not mutually exclusive, rather closely interlocked. In fact, the coercive demands for money from the detainees helped to create the atmosphere of insecurity, harassment and humiliation in the camps.[1065]

464. With regard to Drago Tokmadžić, Witness DD/6 and Jugoslav Gnjatović in fact stated that he had had conflicts with several persons because of his former activities as a police officer. Both witnesses stated further that these conflicts were one of the possible reasons for Drago Tokmadžić's maltreatment in the Keraterm camp.[1066] However, during his beating he was asked if there were other policemen detained in the camp. He mentioned the name of Esad Islamović, who was subsequently called out and beaten at the same time as Drago Tokmadžić. Esad Islamović was a policeman from Prijedor of Muslim background;[1067] it was not alleged that there were any conflicts with him. This shows that it was reasonable for the Trial Chamber to conclude that Drago Tokmadžić was not beaten because of particular conflicts relating to his activities as an active police officer, but because he was regarded as a member of a particular non-Serb group.[1068]

(c) The Trial Chamber's factual findings do not support the conclusion of discriminatory intent (grounds of appeal 40, 36, 38)

465. Žigić submits that the Trial Chamber failed to provide a reasoned opinion for his conviction for persecution. He notes that with respect to the victims from the Omarska Camp, the Trial Chamber concluded that discriminatory intent existed, but that it did not provide an "acceptable explanation" of this conclusion.[1069] He raises this issue as a separate ground of appeal[1070] and also with regard to his conviction for acts committed against Witness V (ground of appeal 36) and Edin Ganić (ground of appeal 38). The Prosecution submits that the Trial Chamber stated clearly that it would consider whether crimes were committed with a discriminatory intent if "an accused has raised a question as to whether an act was committed on discriminatory grounds", and that counsel

[1064] *Ibid.*, para. 272.
[1065] Trial Judgement, para. 190.
[1066] Witness DD/6, T. 9851; Jugoslav Gnjatović, T. 10331. Witness DD/5 also mentioned these conflicts, but did not attribute the maltreatment of Drago Tokmadžić to them, T. 9973.
[1067] Witness Y, T. 3608-3609. The Appeals Chamber notes that Emsud Bahonjić also was a police officer: Trial Judgement, para. 617. Non-Serbian police officers seem to have been regarded as potentially dangerous.
[1068] Witness Y, T. 3591-3594 (private session).
[1069] Žigić Appeal Brief, para. 394.
[1070] Žigić Additional Document, para. 51: ground of appeal 40.

for Žigić did not raise such a question in the Final Trial Brief.[1071] In reply, Žigić submits that, contrary to the Prosecution submission, he raised the question of his discriminatory intent regarding the relevant charges several times, including a detailed explanation in his closing arguments submitted on 18 July 2001.[1072]

466. The Appeals Chamber finds that the reasons given by the Trial Chamber for its finding that Žigić acted with discriminatory intent meet the standard of Article 23(2) of the Statute. The Trial Chamber correctly set out the applicable legal standard. Its findings support the conclusion that the violations of fundamental rights committed in the Omarska, Keraterm and Trnopolje camps were of a discriminatory nature and formed part of a widespread and systematic attack on the non-Serb civilian population of the Prijedor area. Given these general findings, the Appeals Chamber finds that the Trial Chamber could infer Žigić's discriminatory intent from his acts within the camps. As the Trial Chamber indicated, it was prepared to consider any arguments regarding the question of whether a particular act was committed on discriminatory grounds or without the knowledge or wilful participation of any accused.[1073] Žigić submits the Trial Chamber did not meet this standard, and he claims to have raised this issue several times. The Appeals Chamber notes that Žigić fails to give references as to where he supposedly did so, apart from the reference to his closing arguments submitted on 18 July 2001. Having reviewed these arguments,[1074] the Appeals Chamber finds that he submitted only general arguments on the *mens rea* required for the crime of persecution, but none with regard to particular incidents. As the Trial Chamber has considered his general arguments and given a comprehensive account of the *actus reus* and *mens rea* for the crime of persecution, it was, in the absence of any specific argument, not required to elaborate further on this point. The grounds of appeal 36, 38, 40 and 41 thus fail.

B. Žigić's conviction for the murder of Bećir Medunjanin and the torture of Witness T (grounds of appeal 4, 5, 6, 22 and 23)

467. The Trial Chamber found that Bećir Medunjanin arrived in the Omarska camp around 10 June 1992, and that whilst he was interned there he was beaten several times. On one of the following days Žigić and Dušan Knežević entered the "white house" and beat Bećir Medunjanin and Witness T. Due to the beatings inflicted on him on the preceding days, Bećir Medunjanin was already in a poor state. The next day, Žigić and Dušan Knežević beat Bećir Medunjanin and

[1071] Prosecution's Respondent's Brief, para. 7.234.
[1072] Žigić Reply Brief, para. 40.
[1073] Trial Judgement, para. 203.
[1074] T. 12594-12600.

Witness T again. As a result of these beatings, Bećir Medunjanin was critically injured and died early in the next morning.[1075]

468. Žigić challenges his conviction for the murder of Bećir Medunjanin on three grounds. He claims that there was no reliable evidence that he participated in the murder (ground of appeal 4), that the Trial Chamber erred in considering the testimony of Samir Esefin as an "identifying factor" of the murder (ground of appeal 5), and that the trial was unfair and biased (ground of appeal 6).[1076] He gives as an example the testimony by Witnesses Oklopčić and Brkić, both of whom said in previous statements that Žigić had not participated in the murder, but says that, when they were about to talk of this, they were interrupted in the examination-in-chief by the Prosecution.[1077]

469. During the proceedings on appeal, Žigić was granted leave to file additional evidence in relation to the fatal beating of Bećir Medunjanin. The Appeals Chamber heard three witnesses at hearings held at The Hague. The parties presented arguments on 21 July 2004 in respect of the testimonies of these Witnesses before the Chamber. The Appeals Chamber will first consider the grounds of appeal raised by Žigić in his Appellant's Brief, and then examine the impact of the evidence given by Witnesses KV2, KV3 and KV4 on the Trial Chamber's factual findings.

1. There was no reliable evidence that Žigić participated in the murder (grounds of appeal 4 and 5)

(a) Witness T and Samir Esefin

470. The Trial Chamber based its findings mainly on the evidence of Witness T.[1078] Žigić, however, submits that the testimony of this witness should have been dismissed because he was only a hearsay witness.[1079] He claims that Witness T did not know him and was only told by Samir Esefin that it was Žigić who took part in the murder of Bećir Medunjanin. He argues that there was no evidence to show that Samir Esefin actually witnessed the event.[1080] Moreover, Witness T "obviously lied" when he stated that he did not know the other defendants.[1081] Žigić points out that the Trial Chamber noted the Defence's objection to the admissibility of Witness T's testimony but failed to give any reason for rejecting the objection. The Trial Chamber erroneously regarded Samir Esefin as a witness.[1082]

[1075] Trial Judgement, paras 599-604.
[1076] Zigić Additional Document, paras 15-17.
[1077] Žigić Reply Brief, paras 25.3-25.4. Also, *see* para. 25.9.
[1078] Trial Judgement, para. 608.
[1079] Žigić Appeal Brief, para. 100.
[1080] *Ibid.*, para. 101.
[1081] *Ibid.*, para. 143.
[1082] *Ibid.*, para. 102.

471. The Prosecution submits, in reference to Witness T's evidence, that the mere fact that the witness did not know the first names and last names of the co-accused in the case does not make the witness unreliable, and that the variations in the evidence of Witness T and other witnesses as to the appearance of Žigić "are completely normal" having regard to the fact that they were speaking from memory of an incident which occurred eight or nine years earlier.[1083] The Prosecution submits that the finding of the Trial Chamber that Witness T was reliable and credible was reasonable.[1084] Regarding the person known as Esefin, the Prosecution contends that, although the Trial Chamber might have used incorrect terminology in describing this person's status as that of a witness, no error of fact or law in terms of Article 25 of the Statute has been demonstrated by the Appellant.[1085]

472. Žigić argues that Witness T relied only on Samir Esefin's information about the identity of the perpetrator. The Appeals Chamber finds this argument misconceived. When Witness T was asked if he knew who abused him and Bećir Medunjanin, he answered that he was told about the identity of Žigić only later:

> Q. Who told you of his identity?
>
> A. A man called Samir, known as Esefin, he appeared to have known them from before and he told me their names, and *others too later*; but he was the one. So that I already knew while I was in the "white house."[1086] (emphasis added)

Witness T noted explicitly that Samir known as Esefin was present during the incident.[1087] Contrary to the assertion of Žigić, Witness T did not rely exclusively on Samir known as Esefin to identify Žigić; he stated that the other prisoners in the "white house" also confirmed the identity of Žigić. The reference in paragraph 607 of the Trial Judgement to Samir known as Esefin as a "witness" and to his statement as "testimony" may be technically incorrect, as he was only an observer of the incident, but not a witness at the trial. The Trial Chamber did so in summarizing the argumentation of the Defence, so that there is no reason to suppose the Trial Chamber erred in the qualification of the testimony of Witness T. The technically incorrect wording does not invalidate the argumentation of the Trial Chamber.

[1083] Prosecution Respondent's Brief, para. 7.19-7.21. Also, paras 7.28-7.30.
[1084] *Ibid.*, para. 7.21.
[1085] *Ibid.*, paras 7.39-7.40.
[1086] Witness T, T. 2731 (closed session).
[1087] *Ibid.*, T. 2732 (closed session).

(b) The failure of courtroom identification

473. Žigić attaches much importance to the fact that Witness T was not able to identify him in the courtroom.[1088] The Prosecution argues that the Trial Chamber in the *Kunarac* case suggested that little weight should be placed on dock identification.[1089] The Defence replies that this applies to the positive identification of the accused, but not to the failure of a victim to identify the perpetrator in the courtroom.[1090] However, to the extent that this is correct, it is to be noted that the same Trial Chamber stated that the failure to identify the accused in court is certainly "a matter which is relevant to the reliability of the evidence of an identifying witness", but that it did not necessarily destroy any case which might be established otherwise in the evidence.[1091] In the present case, the issue of identification was raised by the Defence at trial and was noted by the Trial Chamber.[1092] The Appeals Chamber finds that it was open to a reasonable trier of fact to rely on Witness T's testimony despite the witness' failure to identify Žigić in the courtroom.

474. The assertion of Žigić that Witness T "obviously lied" when he stated that he did not know the other defendants is based on the speculation that Witness T must have known their names, because it was "logical to assume that the Prosecution informed him".[1093] This speculation without any factual basis cannot stand: The fact that the witness did not know the names of the other defendants does not show that he was unreliable. The Trial Chamber was aware of the inconsistencies of Witness T's testimony, but found that they were understandable, "considering the content of his testimony and the amount of time that had passed since the event".[1094] The Appeals Chamber finds that the Trial Chamber's conclusion was reasonable.

(c) Witness Avdagić

475. Žigić also submits that the Trial Chamber erred in holding that the testimony of witness Fadil Avdagić corroborated the testimony of Witness T. Fadil Avdagić testified that the perpetrator wore gloves, but, according to Žigić, his left hand was wounded and was heavily bandaged so as not to be able to wear a glove at all.[1095] Additionally, Fadil Avdagić noted the person had an earring, whereas Žigić submits that he never wore earrings. Žigić argues that the description of the

[1088] Žigić Appeal Brief, paras 106-109.
[1089] Prosecution Respondent's Brief, para. 8.35; *cf. Kunarac et al.* Trial Judgement, para. 562.
[1090] Žigić Reply Brief, para. 25.8.
[1091] *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal, 3 July 2000, para. 19.
[1092] Trial Judgement, para. 607.
[1093] Žigić Appeal Brief, para. 143.
[1094] Trial Judgement, para. 608.
[1095] Žigić Appeal Brief, para. 121.

perpetrator provided by Fadil Avdagić did not match his appearance at the relevant time.[1096] The Prosecution responds that the Trial Chamber was entitled to rely on the evidence of this witness and that of Witness T to find Žigić guilty for the beating of Witness T and the murder of Bećir Medunjanin.[1097]

476. The Trial Chamber was aware of the differences between the descriptions of Žigić given by Witness T and Fadil Avdagić. In the Final Trial Brief, the Defence had already submitted these arguments,[1098] and the Trial Chamber considered them, including the fact that Fadil Avdagić described the hair colour of the person he was watching as "yellowish-reddish", whereas other witnesses maintained that Žigić had black hair.[1099] On the other hand, Fadil Avdagić did identify Žigić in the courtroom and mentioned that the other detainees in the room also identified the person as Žigić.[1100] The Appeals Chamber finds that it was open to a reasonable trier of fact to rely on Fadil Avdagić's testimony as corroborating evidence.

(d) Contradictory evidence

(i) Witness Oklopčić

477. Žigić argues that the Trial Chamber overlooked many pieces of contradictory evidence, for example, the testimony of prosecution witness Azedin Oklopčić, who gave a detailed description of the incident of the beating and killing of Bećir Medunjanin. According to Žigić, the witness testified that Žigić did not murder Medunjanin and was not present during the incident. The Trial Chamber merely mentioned this evidence in a footnote of the Trial Judgement, although, according to Žigić, the witness was considered as credible by the Chamber and testified as an eyewitness. Further, Žigić points out that Azedin Oklopčić made a list of persons most responsible for crimes committed in the territory of the municipality of Prijedor. This list, which was admitted into evidence, did not mention Žigić at all and notably listed Duca Knežević as the person responsible for killing Medunjanin.[1101] The Prosecution notes that Azedin Oklopčić did not see Medunjanin dying and could give no evidence as to when or how he died, and his evidence regarding the presence of the Appellant could have no weight as it was speculative in nature. The list of names drawn by Oklopčić was not exhaustive, as Oklopčić himself declared.[1102]

[1096] *Ibid.*, paras 121-124.
[1097] Prosecution's Respondent's Brief, paras 7.26 and 7.17.
[1098] Žigić Final Trial Brief, paras 123.10 -124.5.
[1099] Trial Judgement, para. 606.
[1100] Fadil Avdagić, T. 3487.
[1101] Žigić Appeal Brief, paras 89-95.
[1102] Prosecution Respondent's Brief, paras 7.24-7.25, referring to Azedin Oklopčić, T. 1879.

478. The Appeals Chamber notes that when Azedin Oklopčić described the incident during his examination-in-chief by the Prosecution, he stated that he saw Dušan Knežević enter another room of the "white house". He then heard moans, groans and screams from this room, and, after some time, Bećir Medunjanin came crawling on all fours into the room where Azedin Oklopčić was, followed by Dušan Knežević who was beating him all the time. The witness then went on to describe how Željko Timarac abused a young man named Hankin. Later, Azedin Oklopčić and the other detainees were ordered to run out of the "white house".[1103] A reasonable Trial Chamber could draw from this testimony the conclusion that the witness was not present when Bećir Medunjanin died, so that his testimony about the person responsible for the death of Bećir Medunjanin was in fact a conclusion, not a statement of what he had seen. This is also a possible explanation why the name Žigić is not mentioned on the list drawn up by Azedin Oklopčić, apart from the fact that Oklopčić himself declared that his list was not exhaustive.[1104]

(ii) Witness R

479. According to Žigić, the testimony of Witness R in the *Tadić* trial fully corroborated the testimony of Oklopčić. He quotes from Witness R's testimony in *Tadić* to argue that this witness should have appeared as a witness in the present case. At trial, the Prosecution refused to disclose Witness R's information, and the Trial Chamber refused to have the witness summoned to testify but accepted his statement given in the *Tadić* case instead. Žigić submits that the Trial Chamber and the Prosecution thus contributed to unfair conditions for the Defence.[1105] The Prosecution notes that, in the present case, the Trial Chamber admitted the transcript of this witness's testimony in *Tadić* at the request of the Defence as an alternative to his giving testimony again. The Prosecution also submits that the admitted transcript contains nothing about Žigić's presence at the beating of Bećir Medunjanin nor about whether the witness knew who the person referred to as Žigić was.[1106] Žigić replies that the Prosecution prevented the Trial Chamber and the Defence from calling Witness R, and that similar things happened with the potential witness Mesinović.[1107]

480. The Appeals Chamber finds that the statement of Witness R in the *Tadić* case (admitted into evidence as exhibit D2/12) does not corroborate the testimony of Azedin Oklopčić. In the statement, as quoted by the Defence, the witness only mentioned that Medunjanin was kicked by Željko Timarac and Dušan Knežević, then kicked out into the corridor, where Željko started to

[1103] Azedin Oklopčić, T. 1736-1740.
[1104] *Ibid.*, T. 1879.
[1105] Žigić Appeal Brief, paras 97-98.
[1106] Prosecution's Respondent's Brief, para. 7.34-7.37.
[1107] Žigić Reply Brief, paras 25.5-25.6.

abuse him cruelly by jumping on his chest.[1108] In his testimony Azedin Oklopčić described how Dušan Knežević beat Bećir Medunjanin with a baton. The Appeals Chamber is not satisfied that the statement and Azedin Oklopčić's testimony refer to the same incident. With regard to witness Mesinović, Žigić fails to demonstrate the relevance of his evidence.

(iii) Witness Brkić

481. In addition, Žigić submits that the Trial Chamber overlooked the testimony of Abdulah Brkić, which was minimized and mentioned only in a footnote in the Trial Judgement. Žigić states that the Trial Judgement failed to mention Brkić's testimony of 21 August 2000, in which he testified that he saw Žigić in the Omarska camp only once and that was one week before the murder of Medunjanin took place. Medunjanin, on the other hand, had been killed by Dušan Knežević slitting his throat.[1109] The Prosecution responds that the Trial Chamber correctly placed no weight on Brkić's evidence that he saw Knežević slicing Medunjanin's throat.[1110]

482. Although Abdulah Brkić stated he had been told the victim of the incident he witnessed was Bećir Medunjanin, he made it clear that he was not sure if this person was actually killed. He testified that he saw Dušan Knežević inflicting a knife wound on the victim, but could not tell if this wound was lethal. Examined by the Trial Chamber, he responded:

> I do not think that it was a deep wound. It was just a cut here, below the chin, and there was some blood. I don't know whether the wound was lethal and could he die of that wound or what they did to him afterwards. All I know, that after that they simply pulled him out and left him on the grass behind the "white house."[1111]

Witness T gave a detailed account of the death of Bećir Medunjanin after his last beating,[1112] whereas Abdulah Brkić did not actually see him die. Witness T did not mention the knife attack, but this is not inconsistent with the testimony of Abdulah Brkić. Witness T stated that he lost consciousness during the incident the day before Bećir Medunjanin died.[1113] The knife attack could have taken place during this last phase. It was therefore not unreasonable for the Trial Chamber to find that the knife wound inflicted by Knežević was not the direct cause of the death of Bećir Medunjanin.

[1108] Žigić Appeal Brief, para. 97.
[1109] *Ibid.*, para. 133.
[1110] Prosecution's Respondent's Brief, para. 7.27.
[1111] Abdulah Brkić, T. 4631-4632. Trial Judgement para. 604.
[1112] Witness T, T. 2738-2739 (closed session).
[1113] Trial Judgement para. 603.

(iv) Witnesses DD/5 and DD/10

483. In support of his arguments, Žigić relies on the testimony of Witnesses DD/5 and DD/10, whose testimony, he argues, was for the most part ignored by the Trial Chamber.[1114] According to Žigić, Witnesses DD/5 and DD/10 both testified that he was not involved in the murder of Bećir Medunjanin.[1115] The Prosecution argues that Witness DD/10 could give no direct evidence as to who killed Medunjanin, and that this evidence concerning the identity of the person mentioned in connection with the death was hearsay and nothing more. The Prosecution presumes that Witness DD/10's evidence was given no weight by the Trial Chamber after consideration and in view of other evidence.[1116]

484. The Appeals Chamber notes that Witness DD/5 was biased towards Žigić. For example, this witness described Žigić as a person who was basically friendly to the detainees, who shouted at them because of his pain, but was never aggressive.[1117] This witness testified that he had never seen Žigić in the Omarska camp and that he was quite sure Žigić had never been there. This attitude of Witness DD/5 may be explained by the fact that Žigić helped Witness DD/5 and his brothers in the Keraterm camp.[1118] Considering the amount of evidence confirming the aggressive behaviour of Žigić and his visits to the Omarska camp, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to disregard the evidence given by Witness DD/5.

485. Witness DD/10 testified during the trial as follows:

> A. Well, all I can say is what I heard, because from the place that I worked, I could not see anything. I could only listen to people who came with such information. So I remember a comment or two from a man who worked for the security, whether they were two inspectors, I cannot really be specific. And I heard from them the story, and they emphasised that the "white house," the "white house" was now lighter by two of its inhabitants. And then in the story, they also mentioned a man who could have done that.
>
> Q. And was a name mentioned?
>
> A. Of course. In that conversation, that is what I tried to hear, really, who could have done it, yes. The name, the full name, the first and the last name were mentioned. One Duca Knežević's name came up. That is what I heard. I only heard that.[1119]

It was not unreasonable for the Trial Chamber to disregard the evidence of a witness who "tried to hear" a conversation, and who heard in this conversation a name mentioned, without giving any more details about the conversation.

[1114] Žigić Appeal Brief, para. 99.
[1115] *Ibid.*, paras 138-140.
[1116] Prosecution Respondent's Brief, para. 7.33.
[1117] Witness DD/5, T. 9961.

(e) Application of the *Kupreškić* standard

486. Žigić submits the Appeals Chamber should apply the standard on identification evidence as set out in *Kupreškić*.[1120] In *Kupreškić et al.,* the Appeals Chamber held that "a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing a witness' identification of the accused made under difficult circumstances."[1121] In the present case, the identification of Žigić does not rest on one witness only, and the witnesses' observations were not made under particularly restricted conditions: the witnesses could watch Žigić for some time from close proximity. Their identification of the person they watched was confirmed by a large number of detainees in the same room.

487. In conclusion, there was reliable evidence supportive of a conviction, whereas the contradicting evidence was not of such a nature that it necessarily prevented a conviction. The Appeals Chamber finds that a reasonable trier of fact could arrive at the conclusion that Žigić was liable for the fatal beating of Bećir Medunjanin. Grounds of appeal 4 and 5 are dismissed.

2. The additional evidence

488. The Appeals Chamber now examines the additional evidence. By the decision of 16 February 2004, the Appeals Chamber granted a part of the motions of Žigić pursuant to Rule 115 of the Rules and ordered additional witnesses to appear. One of them, Witness KV2, testified as a Court witness by videolink conference on 19 July 2004 about the fatal beating of Bećir Medunjanin. By the decision of 12 March 2004, the Appeals Chamber found the evidence of two witnesses admissible as rebuttal material concerning the fatal beating of Bećir Medunjanin. These witnesses, KV3 and KV4, testified by videolink conference on 20 and 21 July 2004.

(a) Witness KV2

489. Witness KV2, who had been called as a Court witness, stated he had been in the "white house" when Bećir Medunjanin was killed. His throat had been cut; Witness KV2 had seen his body lying in front of the "white house". Bećir Medunjanin had been brought to the "white house" with his wife and his son, and they had been beaten before this; the witness could see the bruises on their faces. Bećir Medunjanin had then been called out by a group of soldiers, and they started beating

[1118] *Ibid.*, T. 9994.
[1119] Witness DD/10, T. 10664 (private session).
[1120] Žigić Appeal Brief, para. 145.
[1121] *Kupreškić et al.* Appeal Judgement, para. 39.

him. Witness KV2 could not see the beating, he could only hear it. When he left the "white house" with other detainees, he saw Bećir Medunjanin's body lying in a puddle of blood.[1122]

490. When the witness was asked by Defence counsel if he still stood by his earlier statement given to the Prosecution that Žigić did not participate in the beating of Bećir Medunjanin, the witness answered in the affirmative.[1123]

491. Cross-examined by the Prosecution, Witness KV2 stated he had only heard the beating, as it took place in the hall in front of the room where Witness KV2 was then detained. The guards had ordered the detainees in this room to face the wall and not to watch. Afterwards the detainees were ordered out of the house, and had to pass by the body of Bećir Medunjanin lying in the hall. Outside, the detainees were ordered to face the asphalt of the "pista" so that Witness KV2 could not see what happened next. He had seen a wound on the neck of Bećir Medunjanin, but could not tell who had inflicted this wound.[1124]

(b) Witnesses KV3 and KV4

492. Witness KV3 stated he had been in the "white house" when Žigić entered it with two other persons, Duca and Saponja. Witness KV3 knew Žigić as a taxi-driver from Prijedor. He recognized his face, and other prisoners in Omarska said "take care, Žiga is coming" when Žigić entered the "white house". Žigić, Duca and Saponja asked for Bećir Medunjanin, ordered the detainees into another room and told them when they were in the other room to face the wall. Witness KV3 thought they were then beating Bećir Medunjanin, as he heard the sounds of a beating, but could not see directly what was going on. The detainees were then ordered out of the "white house", and on their way out they saw the body of Bećir Medunjanin lying in one of the rooms.[1125] Witness KV3 also saw Bećir Medunjanin's wife in the "white house".[1126] He did not see any other beating of Bećir Medunjanin.[1127]

493. Witness KV4 stated that around 20 June 1992, he was ordered with other detainees into the "white house". There he saw Bećir Medunjanin and his wife Sadeta in a room to the left of the entrance. Afterwards, two persons entered the "white house". One of them was Žigić, whom Witness KV4 knew as a taxi-driver from Prijedor. The other person he did not know, but other detainees told him his name was Duca. Witness KV4 saw Bećir Medunjanin thrown out of the

[1122] AT. 571-572.
[1123] AT. 576.
[1124] AT. 593-595.
[1125] AT. 631-639.
[1126] AT. 643.

room, then he was beaten by Žigić and Duca with a baton and a cable. After a while, Bećir Medunjanin did not move any more. Blood was gushing out of his neck, although Witness KV4 could not see a wound. A guard ordered the detainees out of the "white house". Witness KV4 did not see Bećir Medunjanin after this incident. He heard rumours that he had disappeared.[1128]

(c) Discussion

494. Žigić argues that the rebuttal witnesses' testimony was in clear contradiction to the evidence given by Witness T and Fadil Avdagić. Witness KV2, although he had been in touch with the Prosecution, had confirmed that Žigić did not participate in the beating of Bećir Medunjanin. Žigić submits that, had he in fact been the main perpetrator, he could not have remained unnoticed by Witness KV2.[1129] He argues that both Witness KV3 and Witness KV4 failed to identify Žigić on photo boards shown to them by the Prosecution, had given contradictory evidence and had made up the presence of Sadeta Medunjanin during the fatal beating, who, according to the Trial Judgement, had left the "white house" on an earlier occasion.[1130]

495. The Prosecution submits that the rebuttal witnesses actually strengthened the case against Žigić. Considering the particular circumstances of their stay in Omarska camp and the considerable lapse of time since these events, any minor inconsistencies in their testimony were understandable and irrelevant. The main elements of Žigić's participation in the fatal beating of Bećir Medunjanin had been confirmed by both witnesses.[1131]

496. The Appeals Chamber is convinced that the additional evidence presented by Witness KV2 does not have any impact on the Trial Chamber's findings. Although Witness KV2 reaffirmed his earlier statement to the Prosecution that he had not seen Žigić participating in the beating of Bećir Medunjanin, this evidence does not have high probative value. The beating of Bećir Medunjanin had not taken place in the room where Witness KV2 was detained, and, moreover, Witness KV2 had been ordered with the other detainees to face the wall so that he could not watch what was going on in the corridor. Witness KV2 therefore did not see the actual beating, but could only hear it. He could not exclude the possibility that Žigić joined the other persons beating Bećir Medunjanin at a moment when Witness KV2 had no visual contact with the location of the beating.

[1127] AT. 667.
[1128] AT. 671-681.
[1129] AT. 706-707.
[1130] AT. 707-711.
[1131] AT. 714-716.

497. According to the Trial Judgement, Bećir Medunjanin was beaten on several occasions. Two of these beatings took place in the "white house".[1132] There is even the possibility that beatings took place which were not noticed by Witness T. Nothing in the testimony of Witness KV2 indicates when the beating he described took place or that he had seen the last or fatal beating. This applies also to the fact that it was raining on this day; according to Fadil Avdagić, it rained every day during this period.[1133] Considering these circumstances, the Appeals Chamber is convinced that the additional evidence of Witness KV2 does not raise any doubts as to the finding that Žigić participated in the beatings of Bećir Medunjanin and was therefore responsible for his subsequent death.

498. The Appeals Chamber finds that Witness KV2's evidence does not support Žigić's case. Therefore, there is nothing to rebut. However, assuming the evidence given by Witness KV2 supported Žigić's claim that he did not take part in the fatal beatings of Bećir Medunjanin, the Appeals Chamber would have to consider this evidence in the light of the testimony of the rebuttal Witnesses KV3 and KV4. Both of them stated they had seen Žigić entering the "white house" prior to the beating. Their description of the beating matched closely the testimony of Witness KV2.[1134] Both witnesses stated clearly that they recognized Žigić at the time of the events, and that their identification of the person maltreating Bećir Medunjanin as Žigić, the taxi-driver from Prijedor, was confirmed by other detainees in the same room.[1135] The Appeals Chamber finds that their testimony is not incompatible with the evidence on the Trial Record. Žigić argues that their mentioning of Bećir Medunjanin's wife Sadeta shows that they were unreliable because Witness T had stated that Sadeta Medunjanin had been transferred to the administration building a few days before the last beating of Bećir Medunjanin. This is not necessarily a contradiction: both witnesses described only one of several beatings, and, as Žigić correctly pointed out, Witness KV4 stated that he saw Bećir Medunjanin unconscious but not dead after the beating.[1136] It is therefore possible that they described a beating several days before the last beating, when Sadeta Medunjanin was still detained in the "white house".

499. In summary, the evidence given by Witness KV2 did not show that the Trial Chamber erred in its finding that Žigić participated in the fatal beating of Bećir Medunjanin. Even if the testimony

[1132] Trial Judgement, paras 601-603.
[1133] Fadil Avdagić, T. 3442.
[1134] The beating took place in the corridor of the "white house": Witness KV2, AT. 593; Witness KV3, AT. 637; Witness KV4, AT. 680. Sadeta Medunjanin was present: Witness KV2, AT. 612; Witness KV3, AT. 643; Witness KV4, AT. 678. They saw Bećir Medunjanin lying on the floor when they were ordered to leave the building: Witness KV2, AT. 572; Witness KV3, AT. 639; Witness KV4, AT. 680.
[1135] Witness KV3, AT. 635.
[1136] AT. 680, 711.

of Witness KV2 had affected the Trial Chamber's finding, it would have been effectively rebutted by the testimony of Witnesses KV3 and KV4.

3. The fair trial issue (ground of appeal 6)

500. Žigić also submits that the Trial Chamber violated his right to a fair trial pursuant to Article 21 of the Statute. The alleged violation occurred when, after Witness T had been questioned by the Prosecution twice as to whether he could identify Žigić in the courtroom, the Presiding Judge of the Trial Chamber took over the questioning and asked the witness the same question for the third time. When Žigić objected in court, the Presiding Judge did not allow the objection, which, Žigić submits, constituted a denial of the right to object in an obviously unfair situation.[1137] Žigić argues that the Trial Chamber was biased and treated the facts in favour of Žigić differently from those in favour of conviction. He refers to Witness T's failure to identify Žigić in the courtroom, Žigić being the person he alleged had beaten him over a period of two days. He does not find credible the Trial Chamber's explanation that the witness' inability to identify him can be characterized as a "confusion of minor details" [1138] Additionally, Witness T remained at Omarska until the camp ceased to exist but never saw again the person he thought was Žigić. Žigić submits that this is inconsistent with the Trial Judgement, which stated that Žigić was constantly present in the camp. Žigić claims that his conviction for murder did not meet the standard set out in the *Čelebići* Appeal Judgement, where the Appeals Chamber stated that "an accused person should not be convicted upon the basis of a verbal ambiguity in the vital evidence."[1139] Žigić also points to the treatment of Witness DD/10 and Abdulah Brkić's testimony as another instance of the Trial Chamber's bias against information tending to exculpate him. He describes an episode in which the Trial Chamber interrupted Defence cross-examination of Abdulah Brkić regarding the murder of Medunjanin and later failed to take into account his written statement that Knežević and not Žigić slit the throat of and killed Medunjanin.[1140] Finally, Žigić submits that both the Prosecution and the Trial Chamber created unfair conditions for his Defence, because they prevented him from calling Witness R to testify by not revealing Witness R's address.[1141]

501. The Prosecution responds that the allegation of bias is unfounded as the relevant parts of the Trial Judgement contain numerous references to Defence arguments and evidence in relation to the Appellant's liability for various incidents.[1142] The Prosecution also argues that the Trial Chamber

[1137] Žigić Appeal Brief, para. 108.
[1138] *Ibid.*. Also, para. 110.
[1139] *Ibid.*, paras 110-117.
[1140] *Ibid.*, paras 130-135.
[1141] *Ibid.*, para. 98.
[1142] Prosecution Respondent's Brief, para. 7.43.

was not prevented from considering particular parts of a witness' testimony in support of a guilty verdict and that the specific instance of Witness DD/10 is not supportive of Žigić's argument, in that the testimony contained hearsay in relation to the murder of Bećir Medunjanin and was duly considered as not probative by the Trial Chamber.[1143]

502. With regard to Witness R, Žigić fails to demonstrate how the statement of this witness could have influenced the Trial Chamber. As the Appeals Chamber noted above,[1144] there are important differences between the testimony of Azedin Oklopčić and Witness R. It is unclear whether Witness R knew Žigić at all, and whether he was – during his hearing at the *Tadić* trial – asked about Žigić's presence at the incident. Žigić has therefore failed to identify an error invalidating the decision.

503. The questioning of Witness T does not indicate any bias of the Trial Chamber. The transcript shows that the witness at first stated that he was able to identify Žigić among the accused, and the ensuing questions of the Prosecution and the Presiding Judge were clearly meant to clarify the issue.[1145] From the transcript it is not clear if the witness did not identify Žigić at last; even at the end of the hearing, the witness still maintained that he was able to identify Žigić in a group of people.[1146] Under these circumstances, it was legitimate for the Trial Chamber to insist on the matter when it felt that further clarification was required.

504. With regard to the interruption of the questioning of Abdulah Brkić about the death of Bećir Medunjanin, the Defence admits that the Trial Chamber corrected the alleged error by allowing the questions the next day.[1147] Žigić argues that this interruption gave the Prosecution the opportunity to contact the witness, and the Appeals Chamber understands the suggestion to be that Abdulah Brkić was influenced by the Prosecution. However, Žigić gives no factual basis for this speculation. He does not establish that the decision of the Trial Chamber not to allow the question was erroneous. During his examination-in-chief, Abdulah Brkić never mentioned the name of Bećir Medunjanin. Cross-examined by Žigić's Counsel, he stated that he did not know Bećir Medunjanin, but that he had heard about his fate.[1148] When Žigić's Counsel asked about more details about Bećir Medunjanin's fate, the Prosecution objected. The Trial Chamber did not allow the question and ordered Žigić's Counsel to confine his questions to the subject of the examination-in-chief.[1149] The

[1143] *Ibid.*, para. 7.45.
[1144] *See* above, para. 480.
[1145] T. 2751-2754.
[1146] Witness T, T. 2767 (closed session).
[1147] Žigić Appeal Brief, para. 132.
[1148] Abdulah Brkić, T. 4528-4530.
[1149] T. 4535.

Appeals Chamber finds that, as the question concerning Bećir Medunjanin was asked during the cross-examination and had no relation to the examination-in-chief, the Trial Chamber's decision was correct.[1150] When the Trial Chamber later allowed the additional question, it did not acknowledge an error, but did so in exercise of its discretion in the interest of the administration of justice.[1151]

505. As far as Žigić points to the factual findings of the Trial Chamber in support of his allegations of unfairness and bias, his arguments fail: As shown above, it was not unreasonable for the Trial Chamber to assess the evidence as it did. Even if the assessment of the evidence was incorrect, the incorrectness does not show bias on the part of the Trial Chamber. The Appeals Chamber finds that there is no basis for the assumption of unfairness or bias. This ground of appeal fails.

4. Conviction for the torture of Witness T (grounds of appeal 22 and 23)

506. Žigić submits that there was no reliable evidence to show that he participated in the torture of Witness T.[1152] He claims that he was not at the crime scene when the torture took place. As the Judgement found that the torture of Witness T and the murder of Bećir Medunjanin occurred at the same time and place, Žigić relies on his arguments regarding the murder of Bećir Medunjanin to prove his absence from the scene of torture.[1153] His ground of appeal 23 is to be understood "[a]s grounds of appeal No. 5 and No. 6, *mutatis mutandis*".[1154]

507. As Žigić does not advance any independent arguments with regard to these grounds of appeal, and relies exclusively on the arguments the Appeals Chamber considered in the preceding sections, these grounds of appeal fail for the same reasons.

C. Žigić's conviction for the murder of Emsud Bahonjić (grounds of appeal 7, 8 and 9)

508. Žigić challenges his conviction for the murder of Emsud Bahonjić for the following reasons: (i) there is no reliable evidence that he committed the murder (ground of appeal 7); (ii) the Trial Judgement shows no causal connection between the death of Bahonjić and Žigić's acts and *mens*

[1150] *Cf.* Rule 90 (H) (i).
[1151] T. 4623-4624.
[1152] Žigić Appeal Brief, paras 279-280.
[1153] *Ibid.*, para. 280.
[1154] Žigić Additional Document, para. 34.

rea (ground of appeal 8); and (iii) the Trial Chamber was not impartial in assessing the charge of the murder of Bahonjić (ground of appeal 9).[1155]

1. There is no reliable evidence that he committed the murder (ground of appeal 7)

509. The Appeals Chamber understands that, in this ground of appeal, Žigić maintains that the Trial Chamber committed an error of fact when finding that he took part in the fatal beating of Emsud Bahonjić.

(a) Witness N

510. Žigić submits that his conviction was based on the testimony of Witness N, who claimed that Žigić was one of many persons who beat Emsud Bahonjić for many days and that Bahonjić died many days after. He claims that the Trial Chamber did not analyze the evidence before accepting it. He further argues that this testimony did not show that he was a co-perpetrator of the murder rather than the beating, and that it failed to prove beyond reasonable doubt that the beating directly resulted in Bahonjić's death.[1156] He submits that Witness N is unreliable because he was the only witness to connect the beatings of Emsud Bahonjić and Sead Jusufagić.[1157] He also argues that Witness N falsely claimed that he recognised Žigić in Keraterm by a scar on his face, as Žigić proved that the scar was caused by an injury after the Keraterm camp had been closed.[1158] He considers that the witness was not credible for a number of reasons: these included his allegation that Bahonjić was arrested by Serbian authorities at the beginning of June 1992, as a member of the Yugoslav police force, whereas that police force no longer existed in the area of Kozarac by May 1992.[1159] In addition, Žigić argues that the witness falsely stated that Emsud Bahonjić did not receive any medical treatment, although Bahonjić had been brought to a hospital after the beating.[1160]

511. The Prosecution responds that the Trial Chamber rejected Žigić's challenges to the credibility of Witness N, and that the "reliable medical documentation" referred to by Žigić did not record Bahonjić's condition when he was returned to the camp from the hospital. The Prosecution adds that the only treatment Bahonjić received at the hospital consisted of bandaging of his knee, which was a "grossly inadequate treatment" of his injuries, and that the Defence did not ask the witness at trial if Bahonjić's knee was bandaged. Further, the Prosecution submits that the reference

[1155] *Ibid.*, paras 18-20.
[1156] Žigić Appeal Brief, para. 147-150.
[1157] *Ibid.*, para. 160.
[1158] *Ibid.*, para. 162.
[1159] *Ibid.*, para. 164.

to Witness N's recollection of Bahonjić's membership in the Yugoslav Police Force in May 1992 was not related to any issue at trial and does not derogate from his testimony about what he saw Žigić do to Bahonjić.[1161]

512. The Appeals Chamber understands that, in this ground of appeal, Žigić challenges the factual findings of the Trial Chamber. The Trial Chamber relied for its findings mainly on the testimony of Witness N and the corroborating evidence given by Witness AE. It is correct that this witness is the only one who mentioned that there was one incident when Sead Jusufagić and Emsud Bahonjić were maltreated at the same time. However, Witness N gave by far the most comprehensive account of this incident and mentioned details other witnesses omitted (for example, the fact that Jusufagić was made to dismantle the machine-gun he had been forced to carry earlier). No other witness was asked if during the incident with the machine-gun Emsud Bahonjić was also present. The statement that Emsud Bahonjić and Sead Jusufagić were mistreated at the same time therefore is not irreconcilable with the other evidence before the Trial Chamber.

513. Žigić argues further that the witness is unreliable because he claimed that Emsud Bahonjić did not receive medical attention at the hospital. For the treatment received by Emsud Bahonjić in the hospital, Žigić relies on the evidence given by Dr Mirko Barudžija. This witness had no direct contact with Emsud Bahonjić, and his testimony was based exclusively on the documentation in the hospital,[1162] which was apparently not even complete.[1163] The Appeals Chamber concurs with the Prosecution that a reasonable Trial Chamber could arrive at the conclusion that the medical attention Emsud Bahonjić received there after several violent beatings – a knee bandage – was grossly inadequate and that the witness was entitled to consider this as no treatment at all.

514. The details on which Žigić relies to demonstrate the unreliability of Witness N, such as Žigić's scar or the incorrect designation of the police force to which Emsud Bahonjić belonged, do not affect the core of Witness N's testimony and did not prevent a reasonable trier of fact from relying on it.

(b) Witness Taći

515. Žigić argues that the evidence of witness Safet Taći should be excluded from the Trial Judgement as he was a hearsay witness and did not see Žigić beating Bahonjić.[1164] The Prosecution

[1160] *Ibid.*, para. 163.
[1161] Prosecution Respondent's Brief, para. 7.54-7.56.
[1162] Dr. Mirko Barudžija, T. 10966-10967.
[1163] *Ibid.*, T. 10972.
[1164] Žigić Appeal Brief, para. 151.

responds that the Trial Chamber inferred from evidence that witness Taći had heard from the victim Bahonjić himself about the danger of death the latter feared if he saw Žigić again, and that Žigić has not demonstrated that it was not open to the Trial Chamber to draw such an inference.[1165]

516. The Appeals Chamber notes that the Trial Chamber used the testimony of Safet Taći as corroborating evidence. Even if he did not mention the first name of Emsud Bahonjić, he spoke about a person named Bahonjić who was detained in room 2. Other witnesses confirmed that Emsud Bahonjić was detained in room 2, and Žigić failed to show that any other people with this surname were detained in this room at this time. A reasonable trier of fact could arrive at the conclusion that Safet Taći was speaking about Emsud Bahonjić.

(c) Witnesses AD, AE, Hase Ičić and Ervin Ramić

517. Žigić submits that the other witnesses who were called by the Prosecution did not support his conviction for the murder of Emsud Bahonjić. Witness AE stated that many people beat Bahonjić besides the Appellant, and was moreover not able to identify him in the courtroom. Žigić recalls that Witness AD claimed at trial that he never saw Žigić beating Bahonjić. Žigić also challenges the credibility of the testimony of Hase Icić and Ervin Ramić.[1166]

518. The Trial Chamber referred to the testimony of Witness AE as corroborating the evidence given by Witness N. The Appeals Chamber notes that Witness AE stated in fact "[m]any people came to beat [Emsud Bahonjić]," as he was quoted by Žigić. But Žigić omits the continuation: "but Knežević and Žigić stood out."[1167] The fact that Witness AE could not identify Žigić in the courtroom was considered by the Trial Chamber and implicitly rejected. The Appeals Chamber finds a reasonable trier of fact was entitled to do so.[1168]

519. It is also correct that Witness AD did not see the beating of Emsud Bahonjić by Žigić. However, the witness stated that Emsud Bahonjić himself, whom the witness knew very well, told him after the incident that it was Žigić who had beaten him.

520. Žigić argues that Hase Ičić and Ervin Ramić were unreliable because they stated that Žigić had been in the Keraterm camp almost every day, although he had in fact been absent for several days during the period in question. Even if this was the case, the expression "every day" may be used in a broader sense, meaning not literally every day, but rather frequently or almost every day.

[1165] Prosecution's Respondent's Brief, para. 7.69.
[1166] Žigić Appeal Brief, paras 158-176.
[1167] Witness AE, T. 4285.
[1168] For the issue of courtroom identification, *see* above, paras 473-474.

An inaccuracy of this type does not necessarily affect the reliability of a witness, and a reasonable trier of fact still can accept his or her evidence.

521. Ervin Ramić only saw Žigić during the first beating of Emsud Bahonjić. The next days, he heard Žigić calling Emsud Bahonjić out; when Emsud Bahonjić returned, he was in a terrible state, all black and blue.[1169]

522. Hase Ičić stated he did not see Žigić beating Emsud Bahonjić, but he heard Žigić calling him out. After that, Hase Ičić heard the noise of beating, screaming and cursing, accompanied by Žigić's prominent voice. Half an hour later, Emsud Bahonjić was brought back, practically unable to move. Finally, Žigić argues that the witness had "made up" a "story" about a young Albanian, which was inconsistent with the account Witness AE gave of this incident.[1170] The Appeals Chamber notes that Hase Ičić mentioned incidentally a young Albanian who was called out of room 2 and never returned.[1171] It is not even clear if this is the same person Witness AE mentioned when he recalled a young Albanian taken out and beaten by the Banović brothers over several days;[1172] in any case, the two accounts do not contradict each other.

523. The Appeals Chamber therefore finds that a reasonable trier of fact could rely on the testimonies of Ervin Ramić and Hase Ičić to corroborate the evidence given by Witnesses N and AE.

(d) Defence witnesses

524. Žigić argues that the testimony of six witnesses for the Defence, including one expert witness, was completely ignored by the Trial Chamber in the Trial Judgement. He submits that these witnesses deserved full attention as they were three detainees in Keraterm, two guardsmen in Keraterm (one of whom was indicted by the Tribunal for the same crime) and one medical doctor who worked in the hospital where Emsud Bahonjić was treated.[1173]

525. The Prosecution submits that three of the six witnesses mentioned by Žigić gave evidence that was irrelevant to the beating to death of Bahonjić,[1174] that, under the Rules and jurisprudence of the Tribunal, it is open to the Trial Chamber to admit or reject expert opinion, that one witness's evidence was unclear as to whether he saw Žigić beating Bahonjić, and that the evidence of the

[1169] Ervin Ramić, T. 5621.
[1170] Žigić Appeal Brief, para. 170.
[1171] Hase Ičić, T. 4642.
[1172] Witness AE, T. 4312.
[1173] Žigić Appeal Brief, paras 154-157.
[1174] Prosecution Respondent's Brief, paras 7.67, 7.59-7.62.

sixth witness could not affect the overwhelming weight of the evidence in favour of the Prosecution case.[1175] The Prosecution also submits that the evidence was overwhelming in favour of the Prosecution case on this count, and concludes that no bias appeared in the failure of the Trial Chamber to explain details of the evidence of the six witnesses the Appellant claims to have been ignored by the Chamber.[1176]

526. As the Appeals Chamber has already noted, the testimony of Dr Mirko Barudžija was based on apparently incomplete hospital records. In addition, it should be noted that even this witness stated the diagnosis *status febrilis* and *dehidratio* he found in the documentation "would indicate a serious clinical state. The patient had a high temperature, he was dehydrated, which probably constituted a very serious state, very serious condition."[1177]

527. Witness DD/2 had seen Emsud Bahonjić being beaten once, but did not know about his later fate; he even did not know whether Bahonjić died.[1178] Witness DD/5 did see beatings in which Žigić did not participate, but he had left the Keraterm camp before Emsud Bahonjić died.[1179] Jugoslav Gnjatović saw Emsud Bahonjić only when he was already dead.[1180] Witness DD/9 did not know Emsud Bahonjić, he had only heard about him once. He did not know what happened to him.[1181] The Appeals Chamber finds that any reasonable trier of fact could disregard these witnesses, as their testimony was irrelevant to the essential findings.

528. Witness DD/6 in fact gave a different account of Emsud Bahonjić's death. He stated that Emsud Bahonjić was beaten after an escape attempt by members of the Territorial Defence; the witness learned about his death later.[1182]

529. The testimony of Witness DD/6 is in fact the only testimony in direct contradiction to the accounts of Witness N and the corroborating witnesses the Trial Chamber relied on. Although the Trial Chamber does not give any explanation, it is clear from its decision that it disregarded the evidence of Witness DD/6 and preferred the account given by Witness N. The Appeals Chamber finds that Žigić has not demonstrated that no reasonable trier of fact could arrive at the conclusion that he actually took part in the fatal beatings of Emsud Bahonjić. Contrary to his assertion, he did not show that the testimony of Witness N and the corroborating evidence were so unreliable that

[1175] *Ibid.*, paras 7.63-7.68.
[1176] *Ibid.*, para. 7.73. It also refers to its responses both to ground 46 and to similar arguments in relation to the murder of Medunjanin.
[1177] Dr Mirko Barudžija, T. 10970.
[1178] Witness DD/2, T. 9677-9678.
[1179] Witness DD/5, T. 9969.
[1180] Jugoslav Gnjatović, T. 10326.
[1181] Witness DD/9, T. 10417.

they were not a valid basis for his conviction. Also when the evidence of the Defence witnesses – including Witness DD/6 – is considered, it was open to a reasonable trier of fact to find that Žigić participated in the fatal beatings.

530. The Appeals Chamber therefore has only to determine if the failure of the Trial Chamber to give the reasons for this part of the decision is an error of law. Žigić does not rely on this failure in this context as a separate ground of appeal. The Trial Chamber pointed out the evidence it was relying on, and even quoted the essential parts of this evidence. It failed only insofar as it did not explain why it disregarded the testimony of Witness DD/6. The Appeals Chamber finds that this failure does not invalidate the decision. This ground of appeal fails.

2. The Trial Judgement shows no causal connection between the death of Bahonjić and Žigić's acts and *mens rea* (ground of appeal 8)

531. Žigić argues that the Trial Chamber did not explain the issue of *mens rea* in relation to the acts of which he was accused, and that this lack of explanation alone would render the conviction unsafe. He claims that there is no detail as to when and how severely he beat the victim, whether others had also beaten the victim after Žigić, when the victim died, and who delivered the fatal blows.[1183]

532. The Appeals Chamber understands Žigić's submission in this ground of appeal to be that the Trial Chamber committed an error of fact, because the factual findings of the Trial Chamber do not support his conviction for the murder of Emsud Bahonjić. In this context, Žigić submits that the Appeals Chamber should apply the standard of the *Čelebići* Appeal Judgement.[1184] In *Čelebići,* the Trial Chamber had established that there had been two beatings, and that the death of the victim was a result *only* of the second beating, whereas the first beating did not cause his death. The question for the Appeals Chamber arose whether it had been established that the accused had taken part in the second beating.[1185] In the present case, the Trial Chamber found that Emsud Bahonjić died from the cumulative effects of several beatings, and that Žigić participated in several of these beatings.[1186] The factual finding that Emsud Bahonjić died from the cumulative effects of these beatings is adequately supported by the evidence quoted by the Trial Chamber. As a participant in several of these beatings, Žigić is liable as a co-perpetrator for the death of Emsud Bahonjić.

[1182] Witness DD/6, T. 9847-9850.
[1183] Žigić Appeal Brief, para. 150.
[1184] *Ibid.*, para. 180.
[1185] *Čelebići* Appeal Judgement, paras 440-441.
[1186] Trial Judgement, paras 617, 622.

533. With regard to *mens rea*, the Trial Chamber did not explicitly state that Žigić acted with the intent to kill Emsud Bahonjić. The Trial Chamber found that Žigić asked Emsud Bahonjić, after he had called him out, "Will I have to feed your children?", and that the violent beatings continued even after Emsud Bahonjić was in such a critical condition that he could hardly walk. From these circumstances a reasonable trier of fact could conclude that Žigić participated in the beatings, that he did so in the knowledge that his acts might lead to the death of Emsud Bahonjić, and therefore acted with general intent. This ground of appeal therefore fails.

3. The Trial Chamber was not impartial in assessing the charge of the murder of Bahonjić (ground of appeal 9)

534. Žigić refers explicitly to the same arguments he used to support his ground of appeal 7.[1187] As this ground of appeal failed, and as Žigić does not submit any independent argument for the alleged partiality of the Trial Chamber, the Appeals Chamber finds that this ground of appeal also has no merit.

D. Žigić's conviction of murder of Sead Jusufagić (grounds of appeal 10, 11 and 12)

535. Žigić challenges his conviction for the murder of Sead Jusufagić in the Keraterm camp on the following grounds: (i) there is no reliable evidence that he committed the murder (ground of appeal 10); (ii) the Trial Judgement shows no causal connection between the death of Sead Jusufagić and Žigić's acts and *mens rea* (ground of appeal 11); and (iii) the Trial Chamber was not impartial in assessing the evidence about the murder of Sead Jusufagić (ground of appeal 12).

536. Žigić claims that the testimony of Witness N and Ervin Ramić was unreliable as there were numerous inconsistencies with the evidence given by other witnesses.[1188] Žigić further claims that the Trial Judgement made no reference to the many witnesses who testified that he did not kill Jusufagić or was not involved in the beating.[1189] Žigić argues that there was "no *actus reus* or *mens rea* elements with respect to causal relation between Žigić's acts and the death of Sead Jusufagić".[1190] Žigić believes that the Trial Chamber ignored 90 percent of the Defence evidence, and held him guilty of the murder of Sead Jusufagić, known as "Car", on the basis of insignificant parts of the evidence which supported his conviction.[1191]

[1187] Žigić Additional Document, para. 20.
[1188] Žigić Appeal Brief, paras 187-188, 191-195.
[1189] *Ibid.,* paras 196-209.
[1190] *Ibid.*, para. 213.
[1191] Žigić Appeal Brief, para. 184.

537. The Prosecution responds that the Trial Chamber was entitled to prefer the evidence of three witnesses, including Witness N and Abdulah Brkić, to that of Witness DD/5 which might mitigate Žigić's guilt.[1192] Although the Appellant maltreated Jusufagić, he claims that he is not guilty of his murder. The Prosecution submits that the accepted evidence supplies both *actus reus* and *mens rea* necessary to establish Žigić's complicity in the crime.[1193]

538. The Appeals Chamber acknowledges that the evidence quoted by the Trial Chamber is not free from contradictions: on the one hand, the Trial Chamber quoted Žigić's unsworn statement that he admitted one kick, and that this account was confirmed by several witnesses; on the other hand, it quoted witness Ervin Ramić, who had testified that Žigić maltreated Sead Jusufagić on several occasions, kicking him and asking him if he was still alive. From the references in the Trial Judgement it is clear that the Trial Chamber was aware of the contradicting evidence. In the light of the conclusion of the Trial Chamber that Žigić is responsible for Sead Jusufagić's death,[1194] however, it is clear that the Trial Chamber preferred the evidence supporting Žigić's conviction to the Defence evidence.

539. Ervin Ramić recounted the incidents which led to the death of Sead Jusufagić (also known as "Car") as follows:

> And Duca then arrived and Zoran, Zoran Zigic. They entered a room, and they started beating Car. They beat him for about half an hour, and Car lost consciousness. After that, Zoran Zigic came back on several occasion, kicking him and saying, "Are you still alive, balija?" After that, they left him lying there, and the next day Car died. He was taken out and left by the container.[1195]

The Appeals Chamber finds that a reasonable trier of fact could rely on this evidence to find that Žigić severely beat Jusufagić several times.[1196] Žigić's general intent to kill Jusufagić could be inferred from Žigić's address to his victim: "Are you still alive?" Žigić's use of the highly derogative term "balija" strongly indicates his discriminatory intent. Therefore, the Appeals Chamber finds that a reasonable trier of fact could conclude that Žigić was criminally responsible for Sead Jusufagić's murder.

540. As an additional ground of appeal, Žigić submitted that the Trial Chamber was not impartial in assessing the evidence about the murder of Sead Jusufagić (ground of appeal 12). However, in view of the preceding analysis, the Appeals Chamber finds that this ground of appeal is without merit.

[1192] Prosecution Respondent's Brief, para. 7.86.
[1193] *Ibid.*, para. 7.87.
[1194] Trial Judgement, para. 623.
[1195] Ervin Ramić, T. 5618-5619.
[1196] This was supported by Abdulah Brkić, who noted that Žigić beat Jusufagić "many times": T. 4484.

E. Žigić's conviction for the murder of Drago Tokmadžić (grounds of appeal 13, 14, 15, 16 and 17)

541. Žigić challenges his conviction for the murder of Drago Tokmadžić in the Keraterm camp. The Trial Chamber found

> Edin Ganić witnessed Drago Tokmadžić being beaten. While Žigić beat Edin Ganić, Žigić warned him that he had to be careful or he might end up "like that pig," pointing at Drago Tokmadžić. Žigić then instructed Goran Lajić to "finish that off" and Goran Lajić continued to beat Drago Tokmadžić.[1197]

After the beating, Drago Tokmadžić was returned to his room; fifteen minutes later he died of his injuries.

542. As the Appeals Chamber understands Žigić's arguments, he submits that the Trial Chamber (i) committed an error of fact when finding him liable for the death of Drago Tokmadžić (grounds of appeal 13, 14 and 15), (ii) committed an error in law when qualifying his participation in the beating as co-perpetration of murder, (iii) was not impartial when assessing the evidence (ground of appeal 16), and (iv) erred in the application of Articles 3 and 5 of the Statute (ground of appeal 17).

543. During the proceedings on appeal, Žigić was granted leave to file additional evidence in relation to the fatal beating of Drago Tokmadžić.[1198] The Appeals Chamber heard Witness KV1 as a Court witness on 23 March 2004. The Appeals Chamber will first consider the alleged factual error raised by Žigić in his Appellant's Brief, and then examine the impact of the testimony of Witness KV1 on the Trial Chamber's factual findings.

1. There was no reliable evidence that Žigić committed the murder (grounds of appeal 13, 14 and 15)

(a) Unreliability of Witnesses Y and Edin Ganić

544. Žigić submits that the Trial Chamber failed to take into consideration the testimony given by eleven witnesses, but held him guilty for the crime based on the evidence given by two contradictory witnesses, namely, Witness Y and Ganić, without giving explanation, or even taking notice, of the contradictions.[1199] Žigić argues that the Trial Chamber identified him as the perpetrator of the murder only by evidence regarding the reflection of headlights on the ceiling,

[1197] Trial Judgement, para. 631.
[1198] Decision on Appellants' Motions to Admit Additional Evidence Pursuant to Rule 115, 16 February 2004.
[1199] Žigić Appeal Brief, paras 15, 216, 249.

mentioned in the evidence of Witness Y.[1200] Witness Edin Ganić, on the other hand, testified that, while Žigić was beating the witness, he instructed Goran Lajić to "finish that off", which, Žigić claims, shows that he was not involved in the beating of Tokmadžić and therefore he could not be a co-perpetrator of the murder. Žigić also claims that the phrase "finish that off" was ambiguous; therefore he could not be convicted based on this phrase. He argues that his instruction to "finish off" Tokmadžić meant to end the beating, not to kill him.[1201] Edin Ganić also stated that Žigić, Lajić, Banović and others were undisguised and present the whole evening when committing a series of beatings, whereas Witness Y described the perpetrators as soldiers wearing masks and gloves.[1202] Žigić claims that Witness AE did not know who killed Tokmadžić.[1203] He submits that Edin Ganić's testimony cannot be trusted, as his evidence was fabricated. He points out that Ganić had already left the camp when Tokmadžić was killed, the exact date of Tokmadžić's death being confirmed by medical evidence.[1204]

545. Having regard to the Defence evidence presented at trial, the Prosecution argues that the Trial Chamber was entitled to prefer the evidence of Witness Y to that of all of the Defence witnesses, as "[i]t defies normal human experience that so many witnesses could recall the actual date of death of one particular prisoner at Keraterm, eight or nine years after the event, when dozens of others died in the same camp in the same period."[1205] The Prosecution further submits that Žigić has not shown that the finding that Edin Ganić was a credible witness was unreasonable[1206] or that there are other errors of law or fact in this regard.[1207] The Prosecution notes that if Žigić intended that the beating should end, Goran Lajić would not have continued with the brutal attack on Tokmadžić. The witness who observed the attack had been under no doubts that Žigić was telling Lajić to kill Drago Tokmadžić. Žigić failed to show that no reasonable trier of fact could have reached this conclusion.

546. The Appeals Chamber notes that the findings of the Trial Chamber with regard to the fatal beating of Drago Tokmadžić are based mainly on the evidence given by Edin Ganić. Although the relevant part of the Judgement begins with a quotation of Witness Y's testimony, Edin Ganić is the only eyewitness to the incident who testified before the Trial Chamber.[1208] The testimony of Witness Y corroborates and complements the testimony of Edin Ganić, as Witness Y was witness to

[1200] *Ibid.*, paras 218, 219.
[1201] *Ibid.*, para. 220.
[1202] *Ibid.,* paras 247, 249.
[1203] *Ibid.*, para. 228.
[1204] *Ibid.*, paras 229-248, especially paras 229, 239, 242.
[1205] Prosecution Respondent's Brief, paras 7.104-7.114, especially para. 7.113.
[1206] *Ibid.*, para. 7.115.
[1207] *Ibid.*, para. 7.118.

the death of Drago Tokmadžić fifteen minutes after the beating. The argument of Žigić that the Trial Chamber relied on hearsay evidence of a witness who had only seen the reflections of a car's headlights[1209] is therefore misconceived.

547. Contrary to Žigić's assertions, there are no major contradictions in the evidence given by Edin Ganić and Witness Y. Witness Y did not mention Edin Ganić's presence, but he was not an eyewitness to the actual beating of Drago Tokmadžić, so that he could not be aware of Edin Ganić's presence there. The fact that no other witness mentioned that Edin Ganić was beaten does not weaken the reliability of his evidence. No other witness heard by the Trial Chamber was present at the incident,[1210] which took place in a remote area of the camp.[1211] Žigić argues that, according to Witness Y, Drago Tokmadžić was taken out by soldiers wearing masks and gloves, and that this made it improbable that Žigić participated in the incident.[1212] However, Witness Y did not describe the perpetrators of the beating as men wearing masks and gloves. Witness Y mentioned only one person with such an attire; this person entered the room after the event and ordered four detainees to carry Drago Tokmadžić's body away.[1213] Edin Ganić, on the other hand, mentioned a large number of persons being present during the incident, several of whom he did not know.[1214] He was not questioned about their appearance.

548. Žigić argues that the testimony of Edin Ganić was unreliable, because he gave the date of the incident as the 29th or 30th of June, whereas Drago Tokmadžić had already died on the 21st, at a date when Edin Ganić was not yet detained in the camp. However, Žigić fails to demonstrate that this was the exact date of Drago Tokmadžić's death. He relies on the testimony of Dr Dusanka Andjelković, but this witness could in fact not remember the exact date. She concluded, nine years after the events and only on insecure assumptions that the date must have been the 21st. The transcript reads:

> Q. Can you tell us when did it happen?
>
> A. I believe I can. It was in the latter half of June and it was over the weekend, because on workdays, I was not at home, I worked. So it must have been either Saturday or Sunday. And now when I think back, in view of the duties that I had at the time, I usually did my shopping on Saturday mornings, and Sundays I spent at home preparing food for that day for my workdays, so I think that this call came on Sunday in the morning hours because Mr. Zivko Knezević found me at home.

[1208] Trial Judgement, paras 631-632.
[1209] Žigić Appeal Brief, para. 219.
[1210] The fact that Drago Tokmadžić was killed is not disputed by Žigić; he denies only his participation in the crime.
[1211] Edin Ganić, T. 5904.
[1212] Žigić Appeal Brief, para. 247.
[1213] Witness Y, T. 3609.
[1214] Edin Ganić, T. 5906.

> Q. And can you tell us if that was towards the end of the month or in the early part of the second half of the month?
>
> A. It was in the beginning of the second half of June.
>
> Q. Did you then go to Keraterm?
>
> A. I was about to explain why I'm so sure that it was the beginning of the latter half of June rather than the last week because the -- I spent the last week of June in Banja Luka as my daughter was about to deliver. I was to become a grandmother for the first time. So the last weekend in June I spent in Banja Luka, and the weekend before the last one, I was in Prijedor. So it must have been the first weekend in the second half of June.[1215]

The use of words such as "it must have been" or "usually" clearly indicates that the witness had no exact recollection of the date, but tried to reconstruct it from her recollection of her usual daily routine. This does not exclude the possibility of deviations from this routine, and renders her memory unsafe on this point, despite her affirmation that she was sure of the date. From the testimony of Witness Y, it can be only inferred that the incident took place a few days after his arrival in Keraterm on the 22nd.[1216] The exact date of the death of Drago Tokmadžić remains unknown and this left it open for the Trial Chamber to accept the testimony of Edin Ganić.

549. Žigić advances further argument in order to show that Edin Ganić was unreliable. He submits that the witness stated that he did not know Žigić before he came to Keraterm, whereas his father did;[1217] that he claimed to have seen how Drago Tokmadžić was called out, although he was kept in a room some distance away;[1218] and that he mentioned an abducted child who was not actually abducted.[1219] The Appeals Chamber finds that these alleged inconsistencies do not affect the core of the testimony and did not prevent a reasonable trier of fact from relying on the witness.

550. Žigić finally argues that the evidence was ambiguous and did not allow the conclusion that he participated in the fatal beating of Drago Tokmadžić, as the words "finish that off" could be understood in several ways, for example, to stop the beating.[1220] However, as the Trial Chamber found that Goran Lajić continued his beating of Drago Tokmadžić after these words, Goran Lajić at least understood the phrase in the sense of continued beating, and Žigić did nothing to stop him. Given the fact that the beating was so severe that Drago Tokmadžić died only a short time afterwards, and that Edin Ganić explicitly stated that he understood the meaning as "kill him",[1221]

[1215] Dr. Dusanka Andjelković, T. 10280.
[1216] The witness himself never mentioned a date: T. 3606.
[1217] Žigić Appeal Brief, para. 233.
[1218] *Ibid.*, para. 245.
[1219] *Ibid.*, para. 246.
[1220] *Ibid.*, para. 220.
[1221] Edin Ganić, T. 5909.

the Appeals Chamber finds that the Trial Chamber could have reasonably concluded that Žigić contributed to the fatal beating of Drago Tokmadžić.

(b) The Trial Chamber ignored the Defence witnesses

551. Žigić argues that the Defence witnesses were completely ignored by the Trial Chamber, and refers to the arguments in his final Trial Brief.[1222] These arguments were already heard and implicitly rejected by the Trial Chamber. The burden was on Žigić to explain why this decision of the Trial Chamber was erroneous. The mere reference to his Final Trial Brief is not sufficient: this sub-ground of appeal must fail.

2. The additional evidence: Witness KV1

552. By the decision of 16 February 2004, the Appeals Chamber admitted the testimony of Witness KV1 as additional evidence pursuant to Rule 115 with regard to the fatal beating of Drago Tokmadžić. This witness was heard as a Court witness by the Appeals Chamber on 23 March 2004.

553. Witness KV1 stated that he had been in room 4 when Drago Tokmadžić was called out with some others. After some time, he was thrown back into the room. Drago Tokmadžić was already dead when he was thrown back into the room.[1223] He heard the voices of several persons, but no particular words like "finish that off". Edin Ganić had not been in room 4, Žigić was not present. Witness KV1 could not see who was beating Drago Tokmadžić and the other victims; he knew the names of three persons participating in the beating, but there had been more than these three.[1224] He heard the sounds of the beating from a distance of perhaps three to four metres.

554. The Appeals Chamber is convinced that the additional evidence presented by Witness KV1 does not have any impact on the Trial Chamber's findings. Witness KV1 heard only voices and sounds and did not see the actual beating. His testimony that Žigić was not present is of little probative value. It is not even clear if the beating which the witness heard was actually the beating of Drago Tokmadžić; according to Edin Ganić, this beating took place in a remoter location. The testimony of Witness KV1 does not exclude the possibility that Drago Tokmadžić was beaten at this second, remoter location. The additional evidence, assessed in the light of the evidence on the trial record, does not raise any doubt undermining the Trial Chamber's findings.

[1222] Žigić Appeal Brief, para. 250-251.
[1223] AT. 125.
[1224] AT. 127-131.

3. Žigić's contribution to the fatal beating of Tokmadžić does not establish his responsibility as co-perpetrator in Tokmadžić's murder

555. Although he does not identify this as a separate ground of appeal, Žigić alleges that the Trial Chamber committed an error of law when it concluded that his participation in the fatal beating of Drago Tokmadžić made him responsible as co-perpetrator in Tokmadžić's murder.[1225] He argues that his contribution to the incident does not *per se* establish co-perpetration, as there may be contributions that do not incur criminal liability or incur criminal liability of a different kind, such as incitement or aiding and abetting.

556. The Trial Chamber found that "Žigić contributed to the fatal beating of Drago Tokmadžić" and explicitly qualified his liability as co-perpetration.[1226] It is well established in the jurisprudence of the Tribunal that Article 7(1) does not only cover the physical perpetration of the crime by the offender himself, but also encompasses participation in a common purpose or design.[1227] The Trial Chamber also considered the differences between co-perpetration and aiding and abetting: in an earlier part of the Judgement it stated that "a co-perpetrator shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise. An aider or abettor need not necessarily share the intent of the co-perpetrators."[1228] This definition is in accordance with the jurisprudence of this Tribunal.[1229]

557. Applying these principles to the killing of Drago Tokmadžić, the Trial Chamber found that Goran Lajić, who physically beat Drago Tokmadžić, and Žigić, who instructed him to do so, shared the intent to maltreat the victim with the knowledge that this beating might cause his death. Considering that Žigić, when he gave his instruction to Lajić, was present at the scene of the crime and himself continued to maltreat another prisoner (Edin Ganić), it was correct to qualify Žigić's participation in the crime as actively furthering it. The Trial Chamber's findings support the conviction of Žigić as co-perpetrator. This argument fails.

[1225] Žigić Appeal Brief, para. 222.
[1226] Trial Judgement, para. 633.
[1227] *Tadić* Appeal Judgement, para. 188; *Furundžija* Appeal Judgement, para. 119; *Vasiljević* Appeal Judgement, para. 95.
[1228] Trial Judgement, para. 284.
[1229] *Tadić* Appeal Judgement, para. 196; *Vasiljević* Appeal Judgement, para. 102.

4. The Trial Chamber was not impartial when totally ignoring the defence evidence as well as the prosecution evidence in favour of acquittal (ground of appeal 16)

558. Žigić claims that the defence evidence, plus part of the prosecution evidence, was "totally ignored in this case," and that this body of evidence came from nine witnesses. The witnesses testified about who killed Tokmadžić, and their evidence should have been given some attention.[1230]

559. Žigić has failed to establish why the Trial Chamber should have considered the evidence it allegedly ignored. He does not explain why this evidence was relevant to the Trial Chamber's findings and does not advance any independent basis for the alleged bias of the Trial Chamber. The Appeals Chamber finds this ground of appeal without merit.

5. The conditions were not indicated for Articles 3 and 5 of the Statute to apply to the murder (ground of appeal 17)

560. Žigić claims that the Trial Chamber failed to show how Articles 3 and 5 of the Statute were to be applied. He argues that Drago Tokmadžić, who was a half-Serb police officer and had declared loyalty to the Serbian authorities, could not possibly be treated as a prisoner of war in the Omarska camp. He submits that the Defence witnesses' testimony indicates that Drago Tokmadžić was murdered because he was a "sharp" policeman. Žigić claims that he had no motive to kill Tokmadžić and that the Trial Chamber failed to establish that he had any motive to do so.[1231] The Prosecution submits that the ethnicity of the victim is irrelevant to the charge based on a violation of the laws or customs of war once the Trial Chamber has found the necessary nexus between the armed conflict, the camps and mistreatment.[1232]

561. The Trial Chamber found Žigić guilty of persecution (count 1) as a crime against humanity and murder as a violation of the laws or customs of war (count 7) with respect to the fatal beating of Drago Tokmadžić.[1233] The ethnic background of Drago Tokmadžić is in fact irrelevant to Žigić's conviction of murder as a violation of the laws or customs of war. As he was detained in the camp, he belonged to the group of persons protected by the Common Article 3 of the Geneva Conventions. With regard to the conviction of persecution, the Appeals Chamber refers to the earlier discussion of this issue.[1234]

[1230] Žigić Appeal Brief, para. 250.
[1231] *Ibid.*, para. 252 - 253.
[1232] Prosecution Respondent's Brief, para. 7.130.
[1233] Trial Judgement, para. 691.
[1234] *See* paras 452-466.

F. Žigić's participation in the torture of Abdulah Brkić (ground of appeal 20)

562. The Trial Chamber found that Abdulah Brkić was beaten in the Omarska camp in the "white house" by Dušan Knežević. After the beating, Žigić took Abdulah Brkić to another room and asked him to write down the name of the SDA President in Puharska. In this room Emir Beganović was beaten.[1235] The Trial Chamber found Žigić guilty of persecution (count 1 of the Indictment) and torture (count 12) with respect to the beating of Abdulah Brkić.[1236]

563. Žigić contests the Trial Chamber's finding that he aided and abetted the beating of Abdulah Brkić on the basis that there was no reliable evidence proving that he participated in the beating and because his intent was to help Brkić by taking him to another room.[1237] Thus, he submits that the Trial Chamber erred on factual and legal issues in finding that he aided and abetted the beating of Abdulah Brkić.[1238] The Prosecution responds that the evidence did not support Žigić's contention that he stopped the beating, as the victim was merely moved from one place of torture to another.[1239] The Prosecution notes that after taking the victim to the second room, Žigić left the victim there, where soldiers were beating another prisoner.[1240] In addition, the Prosecution also submits that Žigić misunderstands the legal basis of the conviction. The legal basis is aiding and abetting[1241] and not direct participation. The Prosecution submits that Žigić has failed to demonstrate any error of law or fact in the Trial Judgement.[1242]

564. The Appeals Chamber notes that Žigić was not convicted for physically beating Abdulah Brkić, but for aiding and abetting his beating. The testimony of Abdulah Brkić that Žigić never touched him is therefore irrelevant to the Trial Chamber's finding. Some time after Žigić had brought Abdulah Brkić to the second room, Abdulah Brkić was asked if he had written down the name as Žigić had ordered him to do. When Abdulah Brkić answered that he did not know the name, the soldier who had been beating Emir Beganović turned round, called Abdulah Brkić a liar, grabbed his ear and held a knife to it as if he wanted to cut it off. He was prevented from doing so by another soldier.[1243] The Appeals Chamber finds that the whole incident – from the beating to the threatening with a knife – can be qualified as torture, cruel treatment and an inhumane act. Žigić has neither demonstrated any legal error committed by the Trial Chamber, nor has he shown that no

[1235] Trial Judgement, para. 593.
[1236] *Ibid.*, para. 691.
[1237] Žigić Appeal Brief, paras 274-276.
[1238] *Ibid.*, para. 278.
[1239] Prosecution Respondent's Brief, para. 7.141.
[1240] *Ibid.*, paras 7.142-7.143.
[1241] *Ibid.*, para. 7.139.
[1242] *Ibid.*, para. 7.148.
[1243] Abdulah Brkić, T. 4491.

reasonable trier of fact could arrive at the conclusion that he had at least the intention to facilitate the maltreatment of Abdulah Brkić. His conviction for aiding and abetting torture is accordingly upheld.

G. Žigić's conviction for the torture of Witnesses AK, AJ, Asef Kapetanović and Emir Beganović (grounds of appeal 24, 25, 26 and 27)

565. The Trial Chamber found that on 10 June 1992, Žigić called out several detainees including Witnesses AK, AJ and Asef Kapetanović. These detainees were severely beaten by Žigić and some guards. At the same time, Emir Beganović was maltreated in another room of the "white house", albeit not by Žigić. At some stage Witnesses AK, AJ, Asef Kapetanović and Emir Beganović were taken outside where Žigić made them drink and wash themselves with the water from a puddle on the "pista".[1244] This incident led the Trial Chamber to find Žigić guilty of persecution (count 1 of the Indictment) against Witnesses AK, AJ and Asef Kapetanović and torture (count 12) against Witnesses AK, AJ and Asef Kapetanović.[1245] With regard to Emir Beganović, the Trial Chamber found Žigić guilty of persecution (count 1) and cruel treatment (count 13).[1246]

566. Žigić admits to have committed the "main part of the crime", namely, the beating of Witness AK.[1247] However, he argues that Witness AK exaggerated his participation, and that he had no intent to discriminate against him as a Muslim. He submits he is only guilty of cruel treatment with regard to this victim.[1248] With regard to Witness AJ, Asef Kapetanović and Emir Beganović he submits that there was no reliable evidence to establish his participation.

567. The Appeals Chamber finds that there was sufficient evidence for the Trial Chamber to support its findings. Žigić's arguments seek merely to substitute his own evaluation of the evidence for that of the Trial Chamber, without demonstrating that it was not open for a reasonable trier of fact to come to the conclusions of the Trial Chamber. The Appeals Chamber therefore dismisses these grounds of appeal without detailed consideration of their merits.

H. Žigić's conviction for the torture of Fajzo Mujkanović (ground of appeal 28)

568. The Trial Chamber convicted Žigić for participation in the torture of Fajzo Mujkanović, who was beaten and threatened by a group of four persons, including Žigić and Dušan Knežević.

[1244] Trial Judgement, paras 585-593.
[1245] *Ibid.*, para. 691.
[1246] *Ibid.*
[1247] Žigić Appeal Brief, para. 283.
[1248] Žigić Additional Document, para. 35 (ground of appeal no 24).

Žigić challenges this conviction; the Appeals Chamber understands that Žigić submits that the Trial Chamber committed a factual and a legal error in this regard.

1. The legal error

569. The alleged legal error is based on two sub-grounds: (i) on the basis of the factual findings of the Trial Chamber, Žigić was not a co-perpetrator, but "at the worst" guilty of aiding and abetting;[1249] (ii) Fajzo Mujkanović was not maltreated because of his ethnicity as the motive for the maltreatment was extortion of information. Žigić argues that the Trial Judgement notes that the only witness of the event was Abdulah Brkić who testified that Duca Knezević beat Mujkanović and cut his neck.[1250] He asserts that the Trial Chamber itself noted that even presence at the crime scene alone is not conclusive of aiding or abetting, unless there is a significant, legitimizing, or encouraging effect on the principal.[1251] Regarding the second sub-ground, he submits that the beating was not carried out on the basis of ethnicity because the torture was intended to extract specific information.[1252]

570. The relevant paragraph of the Trial Judgement reads as follows:

> [A]round 1 June 1992, the door of the room suddenly opened and a black car stormed in at great speed. Žigić and other men, including Dušan Knežević, got out of the car and demanded that the detainees tell them where Fajzo Mujkanović was hiding or be killed. Then suddenly somebody shouted out that Fajzo Mujkanović was in room 1, so Žigić and his men left. Dušan Knežević demanded to know from Fajzo Mujkanović who had killed his brother. He then beat Fajzo Mujkanović and made an incision across his neck with a knife. Fajzo Mujkanović's wife and child were then brought in and Dušan Knežević threatened he would kill them if Fajzo Mujkanović refused to answer. Žigić, Dušan Knežević and the other men left, however, when one of the guards said, "They're coming."[1253]

From this finding it is evident that Fajzo Mujkanović was tortured by a group of four persons, the object being to elicit information. Brkić did not differentiate between the four perpetrators. The incident, especially the fact that Mujkanović's wife and child were brought into the room, required the participation of more than one person. A reasonable trier of fact could conclude that the torture was committed by this group as co-perpetrators, even if the actual physical abuse was committed only by one of the members of the group.

571. Regarding the second sub-ground, even if the information sought was about a family member of one of the perpetrators, the object was still to elicit information. The Appeals Chamber notes that in many cases of torture the objective of the perpetrators is to extract some information,

[1249] Žigić Appeal Brief, para. 314.
[1250] *Ibid.*, para. 311.
[1251] *Ibid.*, para. 316.
[1252] *Ibid.*, para. 318.

which does not prevent its qualification as an act of persecution, provided that the elements of the latter crime are also met. These sub-grounds of appeal fail.

2. The factual error

572. Žigić submits that the evidence does not place him at the scene of the beating of Mujkanović. Žigić recalls that Witnesses AN and DD/5 did not mention that Žigić participated in the beating of Mujkanović in any capacity.[1254] Witness DD/5 also testified that there was some "unsettled business" between Duca Knežević and Fajzo Mujkanović before the war, which was the reason that Knežević beat and killed Mujkanović.[1255] While testifying about this incident, Witness DD/9, a former guard at Keraterm, said that he did not see Žigić beating the victim.[1256]

573. The Appeals Chamber notes that all three witnesses whose evidence Žigić quotes gave only a very cursory account of the incident involving Fajzo Mujkanović and that it is unclear whether Witness DD/9 actually saw the incident.[1257] The Appeals Chamber finds that Žigić has failed to demonstrate that no reasonable trier of fact could have come to the Trial Chamber's conclusion. Ground of appeal 28 is therefore dismissed.

I. Žigić's conviction for the torture of Witness AE and Grabić (ground of appeal 30)

574. The Trial Chamber found that near the end of June 1992, Žigić called out a group of men, including Witness AE and Redo (Redžep) Grabić. He ordered them to kneel down and then beat them with a metal rod. Subsequently, Žigić ordered them "to fight amongst themselves, threatening that if they refused to do so, he would assault them. Witness AE was ordered to fight Redo Grabić."[1258] The Trial Chamber found Žigić guilty of torture and cruel treatment with regard to Witness AE and Redžep Grabić.[1259]

575. Žigić claims that there was only one witness to this incident, and that this witness was not able to recognise him in the courtroom. He argues that the conviction for this serious crime, which was based upon the testimony of one witness, was erroneous and "unheard of in the practice of the civilised states of the World".[1260] According to Žigić, the description of his uniform by the witness

[1253] Trial Judgement, para. 639.
[1254] Žigić Appeal Brief, paras 321, 325.
[1255] *Ibid.*, para. 324.
[1256] *Ibid.*, para. 327.
[1257] Witness DD/9, T. 10426.
[1258] Trial Judgement, para. 642.
[1259] *Ibid.*, para. 645.
[1260] Žigić Appeal Brief, paras 330, 332.

was also wrong, and he challenges the credibility of this witness.[1261] The Prosecution relies on paragraph 33 of the *Kupreškić et al.* Appeal Judgement in arguing that corroboration of a testimony of a sole witness is not required.[1262] The Prosecution also dismisses the argument about the colour of Žigić's uniform on the basis that the Trial Chamber neither made any finding nor commented on that detail.[1263]

576. Žigić has already raised these objections in his Final Trial Brief, and they were considered by the Trial Chamber.[1264] The Appeals Chamber recalls that the jurisprudence of the Tribunal does not require the corroboration of the testimony of a sole witness, and that the failure of courtroom identification does not necessarily destroy any case which might have been otherwise established in evidence.[1265] Witness AE had correctly described Žigić as a taxi-driver from Prijedor, whom he had known for several years.[1266] It was open for a reasonable Trial Chamber to attach more importance to the recognition of Žigić in the context of the event than to the uncertainty of the witness several years afterwards. This ground of appeal fails.

J. Žigić's conviction for the torture of Jasmin Ramadanović also known as "Sengin" (grounds of appeal 31 and 32)

577. The Trial Chamber found that Žigić had accused Jasmin Ramadanović nicknamed "Sengin" of being a "green beret" and subsequently beaten him,[1267] and found Žigić guilty of torture and cruel treatment.[1268]

578. Žigić argues that the testimony of the only eyewitness, Witness N, indicates he was not responsible for the serious injuries of Ramadanović. Žigić calls attention to Witness N's testimony that the beating causing the serious injuries leading to hospitalization occurred "later on" and did not indicate that Žigić took part in that beating.[1269] Žigić contests the Trial Chamber's conclusion that the evidence given by Witness DD/5, DD/7 and DD/9 did not preclude Žigić's conviction for the torture of Jasmin Ramadanović.[1270] The Prosecution responds that the evidence was capable of establishing the participation of Žigić in the beating of Ramadanović, regardless of whether his

[1261] *Ibid.*, paras 331, 333.
[1262] Prosecution Respondent's Brief, para. 7.195.
[1263] *Ibid.*, para. 7.198.
[1264] Trial Judgement, paras 643-644.
[1265] *See* above, para. 473.
[1266] Witness AE, T. 4280-4281.
[1267] Trial Judgement, para. 646.
[1268] *Ibid.*, para. 649.
[1269] Žigić Appeal Brief, para. 336.
[1270] *Ibid.*, para. 335.

blows resulted in the victim being hospitalised afterwards.[1271] Further, the Prosecution argues that the Trial Chamber had evidence of Žigić's severe beating of Ramadanović upon his arrival, which supports Counts 11 and 13.[1272]

579. The relevant part of Witness N's testimony reads as follows:

> Q. Did you see him being beaten while he was in the camp?
>
> A. Yes. He was called out by Zoran Žigić, and he told him, "Are you now going to wear a green beret for a hundred German marks?" Immediately after that, he hit him in his head. He was later on taken behind a corner of the building where he was beaten, badly beaten up, and he was then brought back with numerous wounds. His whole head was covered in blood.
>
> Q. Did you know that he was taken out of the camp thereafter?
>
> A. Yes. He was given medical help and taken to hospital.[1273]

The Appeals Chamber finds that it was open for a reasonable trier of fact to come to the conclusion that this testimony referred to one particular incident, beginning with Žigić calling out Jasmin Ramadanović, hitting him on the head, taking him to another place and beating him severely, so that in the end he suffered diverse head injuries. Nothing in this testimony or in the later evidence given by Witness N suggests that he was describing several incidents.[1274] It was therefore reasonable to find that Witness N had observed one beating of Jasmin Ramadanović in which Žigić participated, and which resulted in the hospitalization of Jasmin Ramadanović.

580. The objections of Žigić against the reliability of Witness N have been already considered by the Trial Chamber.[1275] In his Appeal Brief, Žigić repeats and elaborates his objections. In the view of the Appeals Chamber, he merely tries to substitute his own evaluation of the evidence for that of the Trial Chamber. These grounds of appeal must fail.

K. Žigić's conviction for beating Hasan Karabašić (grounds of appeal 33 and 34)

581. The Trial Chamber found Žigić guilty of beating Hasan Karabašić in the Trnopolje camp on 5 or 6 August 1992, constituting cruel treatment. It acquitted him of the same crime as torture.[1276] In its finding, the Trial Chamber relied on the testimony of Witnesses AD, N and V.

[1271] Prosecution Respondent's Brief, para. 7.209, having looked at the evidence before the Trial Chamber in paras 7.203-7.208.
[1272] *Ibid.*, para. 7.210.
[1273] Witness N, T. 3897-3898.
[1274] Also in his cross-examination, only one beating of Jasmin Ramadanović (nicknamed "Sengin") is mentioned: T. 3913.
[1275] Trial Judgement, para. 647.
[1276] *Ibid.*, paras 681, 692.

1. Ground of appeal 34: in assessing the evidence relating to this incident, the Trial Chamber was unfair in its approach

582. Žigić argues that the Trial Chamber erred in relying on the evidence of a witness it did not trust, and in ignoring the exculpatory evidence of others. He also claims that the Trial Chamber selected parts of his Final Trial Brief and turned the arguments therein against him. He submits that the Judgement was given without the input of the Defence and outlines the evidence supporting acquittal.[1277] The Prosecution responds that consistent and corroborative evidence that the Appellant attacked the victim at Trnopolje was provided by several witnesses,[1278] whom the Defence did not cross-examine at the trial.[1279] In the Prosecution's view, the Trial Chamber made the only finding of fact reasonably available to it and the Appellant has not demonstrated any error of fact or law.[1280]

583. To determine the merit of this ground of appeal, the Appeals Chamber deems it necessary to recall the relevant evidence:

- Witness AD recounted the incident as follows:

> Žigić found Hasan, threw him to the ground on the grass left of the toilet. He beat him, started to choke and strangle him, and he might have strangled him had he not been stopped by the other guards. I witnessed this at Trnopolje.[1281]

- Witness N:

> He was looking for kum Hasan Karabašić. When he found him, he started kicking him as if he were a ball. Then he caught him by the neck, and two Serb guards came up and dragged Zoran away, and Hasan got lost among the other people.[1282]

- Witness V:

> [Žigić] came near to Hasan Karabašić and he told him, "It seems you're still alive, pal," and he grabbed him by his neck and started to strangle him.
>
> Q. Did Hasan Karabašić say anything to him?
>
> A. He started to moan and to shout, "Please, don't do it, pal." Then two Serb soldiers came by and they took Žigić away from there, and Hasan Karabašić remained lying down.[1283]

- Safet Tać̀i:

[1277] Žigić Appeal Brief, paras 343-345.
[1278] Prosecution Respondent's Brief, para. 7.216.
[1279] *Ibid.*, para. 7.219.
[1280] *Ibid.*, para. 7.225.
[1281] Witness AD, T. 3838.
[1282] Witness N, T. 3900.
[1283] Witness V, T. 3714.

> We were standing in front of what used to be the cinema hall in Trnopolje. I was standing there with a group of friends and we heard groans and blows, that kind of thing. When I turned around, when we turned around, I saw that Žigić was hitting and throttling a man who was his kum, his best man. We understood this man to be his kum because he said, "Don't do that to me, kum," or godfather or best man, "What are you doing?"[1284]

Regarding Safet Taći, Žigić submits that the witness described the meeting of Žigić and Hasan Karabašić in the Keraterm camp as a "nice one".[1285] However, Žigić omits to mention the same witness's characterization of the incident in Trnopolje:

> Q. Mr. Taci, on cross-examination, Mr. Tosić asked you whether you had seen encounters between Zoran Žigić and his kum at the Keraterm camp and you described their encounter as a very nice one. What was the encounter like that you observed in Trnopolje between Mr. Žigić and his kum? How would you describe that encounter?
>
> A. Terrible.[1286]

All these witnesses agree that Žigić violently attacked Hasan Karabašić and attempted to strangle him. The attack took place on an outside area in the Trnopolje Camp where Hasan Karabašić was detained at this time. The Appeals Chamber cannot find any error in the Trial Chamber's disregard of Witness DD/9's rather confused account of the same incident, but notes that even this witness mentioned Žigić's attack on the victim's throat. This ground of appeal is dismissed.

2. Ground of appeal 33: the acts against the victim qualified as cruel treatment did not meet the conditions of Articles 3 and 5 of the Statute

584. Žigić submits that the incident involving Hasan Karabašić was provoked by family matters between Žigić and the victim (the former's best man or god-father) and did not cause the level of harm necessary for a finding of cruel treatment. Žigić argues that as the altercation was of a personal nature and Karabašić was not a prisoner of war, it did not fall within the competence of the Tribunal as a serious violation of international law. While citing the Trial Chamber's holding that "the degree of physical or mental suffering required to prove cruel treatment … must be at the same level as wilfully causing great suffering or serious injury to body or health," Žigić argues that the incident did not cause serious injury to Karabašić's body or health. [1287]

585. Considering the Trial Chamber's findings and the evidence recalled above, the Appeals Chamber finds this ground of appeal to be without merit.

[1284] Safet Taći, T. 3772.
[1285] Žigić Appeal Brief, para. 350.
[1286] Safet Taći, T. 3779.
[1287] Žigić Appeal Brief, paras 357-358.

L. Žigić's conviction for beating Edin Ganić (ground of appeal 37)

586. The Trial Chamber found that Žigić and several others severely beat Edin Ganić in order to extort money and a motorbike from him. Žigić was convicted of persecution arising from the cruel treatment of Edin Ganić.[1288]

587. Žigić claims that Edin Ganić's evidence was inconsistent with that of Witness Y on which the Trial Chamber relied primarily in establishing the event in question,[1289] and that Edin Ganić was not a reliable witness and should be charged with giving false testimony in describing an event as an eye-witness when he was not actually present during the event.[1290] The Prosecution responds that the issue was considered by the Trial Chamber,[1291] and that the attacks on the reliability of the two witnesses were peripheral.[1292] In reply, Žigić points out that it was clear that witness Husein Ganić falsely denied that he had signed a statement given to the Bosnian War Crimes Commission.[1293] He claims that, contrary to the witnesses' account, only two women were ever detained for long periods in the "white house" and neither of them had any limbs in plaster.[1294]

588. The Appeals Chamber notes that Žigić relies partially on the same arguments he submitted in support of his ground of appeal 24.[1295] The only argument the Appeals Chamber has not considered is his challenge to the reliability of Husein Ganić's testimony.

589. There is a discrepancy between the testimony of Edin Ganić and the testimony of his father Husein Ganić about the exact location in which they were maltreated. Edin Ganić stated that he was called out of the room where he was detained and brought to the other end of the camp, where he met several persons, some of them soldiers or guards, some of them victims. Žigić and others started to beat him there. Edin Ganić temporarily lost consciousness and was later taken to the room where his father was detained and there threatened with a knife.[1296] According to Husein Ganić, he was taken out and beaten.[1297] After some time, Žigić ordered Edin Ganić to be fetched. Husein Ganić was forced to watch how his son Edin Ganić was beaten; afterwards he was thrown in a

[1288] Trial Judgement, para. 690.
[1289] Žigić Appeal Brief, para. 367.
[1290] *Ibid.*, para. 368, referring to his discussion in paragraphs 229-249 of his brief where he discussed the killing of Tokmadžić.
[1291] Prosecution Respondent's Brief, para. 7.241.
[1292] *Ibid.*, paras 7.242-7.244.
[1293] Žigić Reply Brief, para. 41.
[1294] *Ibid.*, para. 41.2.
[1295] Žigić Additional Document, paras 24 and 48. Both refer to Žigić Appeal Brief, paras 229-249.
[1296] Edin Ganić, T. 5904-5914.
[1297] Husein Ganić, T. 5763-5765.

water barrel and later taken back to his room where he remained in a state of semi-consciousness until the next morning.[1298]

590. At trial, Žigić challenged the credibility and reliability of the two witnesses' testimony. The Trial Chamber was aware of the inconsistencies between the testimonies, but still found both witnesses credible and reliable.[1299] The Appeals Chamber has to determine whether it was unreasonable for the Trial Chamber to do so.

591. The Appeals Chamber acknowledges the discrepancies between the two accounts. On the other hand, there are several distinctive traits which appear in both witnesses' testimony. Both witnesses remembered the remark made by Žigić to Edin Ganić when his leg was broken, that he would never be able again to drive a motorcycle, the motorcycle being one of Žigić's main concerns.[1300] Another utterance both witnesses remembered clearly was Žigić's repeated demand for "a pot of gold".[1301] Both witnesses stated that Žigić threatened to kill Edin Ganić if his demands were not fulfilled.[1302] Both of them stated Husein Ganić was thrown near the end of the incident into a barrel of water.[1303] These distinctive characteristics of the incident strongly suggest that both witnesses recounted their recollections of a real incident. The Appeals Chamber further observes that Husein Ganić stated how, due to suffering heavy blows, he fell into a state of semi-consciousness after the incident.[1304] This is corroborated by Edin Ganić's remark that his father could hardly speak. It is more than likely that Husein Ganić's memory was partially affected by his maltreatment. This, together with his age and the time which has elapsed since the events, would account for the partial confusion of his account. It was therefore not unreasonable for the Trial Chamber to accept the substance of the evidence notwithstanding the differences between the two accounts.

592. The remaining inconsistencies in Husein Ganić's testimony do not affect the central issues of his testimony, that is to say, the beating of Edin Ganić. It is irrelevant whether Husein Ganić remembered a written statement he allegedly gave to the Bosnian State Commission.[1305] The same applies to his mention of a few female detainees in the "white house" about whose fate he had only

[1298] *Ibid.*, T. 5769-5771.
[1299] Trial Judgement, paras 661-662.
[1300] Edin Ganić, T. 5911; Husein Ganić, T. 5769.
[1301] Edin Ganić. T. 5907; Husein Ganić, T. 5763.
[1302] Edin Ganić, T. 5912; Husein Ganić, T. 5763.
[1303] Edin Ganić, T. 5914; Husein Ganić, T. 5770.
[1304] Husein Ganić, T. 5766, 5770; Edin Ganić, T. 5912.
[1305] The Appeals Chamber understands Žigić refers in para. 381 of his Appeal Brief to the same document mentioned T. 5792, although this document is said to consist of 45 pages, in contrast to the 37 pages of the document referred to in the Appeal Brief.

vague information.[1306] The Appeals Chamber observes that Žigić acknowledges the temporary presence of at least two female detainees in the "white house"[1307] and that there is no other evidence on the trial record which excludes the possibility that other women could have been detained in this location.[1308]

593. The Appeals Chamber finds that the existing contradictions between the testimony of Edin Ganić and the testimony of Husein Ganić can be easily explained by the mental and physical state of Husein Ganić, and that it was open to a reasonable Trial Chamber to rely on the evidence given by Edin Ganić, using the evidence of Husein Ganić as corroboration. This ground of appeal is therefore dismissed.

M. Žigić's conviction for crimes in the Omarska camp in general (grounds of appeal 1-3, 18, 19, 42 and 45)

594. Apart from the conviction for particular crimes, the Trial Chamber found Žigić responsible "for the crimes committed in the Omarska camp generally" with respect to persecution (count 1 of the Indictment), murder (count 7) and torture (count 12).[1309] Žigić challenges this conviction and advances various grounds in support of this challenge. He argues that the factual findings of the Trial Chamber do not support his conviction for all the crimes in the Omarska camp,[1310] and that the Trial Chamber erred in finding that his contribution to the functioning of the camp was significant.[1311] In addition, he claims that he was not properly charged for these crimes,[1312] that he was not put on adequate notice that he was accused of participating in a joint criminal enterprise,[1313] and that his Defence was seriously compromised by this charging failure.[1314]

595. The Trial Chamber found that Žigić committed the following crimes in the Omarska camp physically and directly:

[1306] Husein Ganić, T. 5778, 5795.
[1307] Žigić Reply Brief, para. 41.2: Hajra Hadjić and Safeta Medunjanin.
[1308] Witness K mentioned, in addition to Hajra Hadzić, Mina Cerić (T. 5023); Kerim Mesanović one "Jadranka" (T. 5229).
[1309] Trial Judgement, para. 691.
[1310] Grounds of appeal 1 and 2 (with respect to murder), Žigić Appeal Brief, para. 83; ground of appeal 18 (with respect to torture), Žigić Appeal Brief, para. 264.
[1311] Ground of appeal 42, Žigić Appeal Brief, para. 408.
[1312] Ground of appeal 3 (with respect to murder), Žigić Appeal Brief, para. 85; ground of appeal 19 (with respect to torture), Žigić Appeal Brief, para. 265.
[1313] Ground of appeal 42, Žigić Appeal Brief, para. 405.
[1314] Ground of appeal 45, Žigić Appeal Brief, para. 64.

(i) on 10 June 1992, he participated in the beating of Witnesses AK, AJ, and Asef Kapetanović, and aided and abetted the beating of Abdulah Brkić. In addition, he intentionally humiliated Emir Beganović on the same occasion;[1315]

(ii) on two days around 10 June 1992, Žigić participated in the beating of Bećir Medunjanin and Witness T; Bećir Medunjanin died as a result of these beatings.[1316]

In addition, the Trial Chamber found that Žigić "regularly entered Omarska camp for the specific purpose of abusing detainees."[1317] Unlike its findings with regard to the other Accused, the Trial Chamber did not limit Žigić's responsibility to a certain period of time, nor did it make any findings about the duration of Žigić's participation in the joint criminal enterprise.

596. The Trial Chamber based its finding on Žigić's participation in the Omarska camp, apart from its findings on particular crimes, on the evidence of Azedin Oklopčić and Ervin Ramić.[1318] Ervin Ramić stated that Žigić had mentioned once in Keraterm that he was on the way to Omarska, to kill the prominent Muslims there.[1319] Azedin Oklopčić gave his opinion about Žigić's role in Omarska as follows:

> Let me tell you one thing, all the guards in the camp, in the Omarska camp, it was an attraction for them all when Zigic, Timarac, and Duca turned up, because they knew that at that time when they turned up, they would see something that they couldn't even see on film. And when it happened that Zigic beat Rezak or Began or anybody else, all the other guards from the surrounding points would come up to watch, to experience those incidents.[1320]

In addition, he stated that Žigić entered Omarska camp once or twice a week, and that he had seen him in the camp at least ten times.

597. Ervin Ramić could provide evidence about only one of Žigić's visits to the Omarska camp. Azedin Oklopčić was detained in Omarska from 30 May[1321] until 5 August,[1322] so that his testimony does not cover all of the time the Omarska camp existed.[1323] Although Azedin Oklopčić considered Žigić one of the worst perpetrators in the Omarska camp, he recounted only one particular incident involving Žigić, when Žigić participated in the beating of Asef Kapetanović and others.[1324] The

[1315] Trial Judgement, paras 585, 597.
[1316] *Ibid.*, paras 599-609.
[1317] *Ibid.*, para. 610.
[1318] *Ibid.*, para. 584, footnote 929.
[1319] Ervin Ramić, T. 5624.
[1320] Azedin Oklopčić, T. 1901.
[1321] *Ibid.*, T. 1677, 1692.
[1322] *Ibid.*, T. 1765.
[1323] The first detainees arrived around the 27th of May; the camp was closed down late in August 1992: Trial Judgement, paras 17-18.
[1324] Azedin Oklopčić, T. 1740-1742.

Appeals Chamber acknowledges that Azedin Oklopčić's testimony suggests that Žigić's contribution to the overall effect of the Omarska camp was significant. However, in the absence of concrete facts supporting this evidence, it remains the personal opinion of the witness and is, as such, not a sufficient base to establish Žigić's responsibility as a participant in a joint criminal enterprise.

598. Žigić held no official position in the Omarska camp; he was not even a guard. His participation in the functioning of the camp, as it was established by the Trial Chamber, amounted to several – at most ten – visits to the camp. The evidence before the Trial Chamber allowed the conclusion that on two occasions Žigić participated in the maltreatment of detainees.

599. The Appeals Chamber is of the opinion that a person need not have any official function in the camp or belong to the camp personnel to be held responsible as a participant in the joint criminal enterprise. It might be argued that the possibility of "opportunistic visitors"[1325] entering the camp and maltreating the detainees at random added to the atmosphere of oppression and fear pervading the camp. In the view of the Appeals Chamber, it would not be appropriate to hold every visitor to the camp who committed a crime there responsible as a participant in the joint criminal enterprise. The Appeals Chamber maintains the general rule that a substantial contribution to the joint criminal enterprise is not required,[1326] but finds that, in the present case of "opportunistic visitors", a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine. The Appeals Chamber does not wish to minimize the gravity of the crimes Žigić committed in the camp; they are serious violations of international humanitarian law. On the other hand, the Trial Chamber found that a "regular stream of murders, tortures, and other forms of physical and mental violence" pervaded the camp,[1327] and that "[e]xtreme brutality was systematic in the camps".[1328] The violence was not confined to a small group of perpetrators; on the contrary,

> [c]amp personnel and participants in the camp's operation rarely attempted to alleviate the suffering of detainees. Indeed, most often those who participated in and contributed to the camp's operation made extensive efforts to ensure that the detainees were tormented relentlessly.[1329]

The incidents in which Žigić participated, despite their quality of grave crimes, formed only mosaic stones in the general picture of violence and oppression. The Appeals Chamber finds that, in the absence of further evidence of concrete crimes committed by Žigić, no reasonable trier of fact could

[1325] Trial Judgement, para. 708.
[1326] *See* above, para. 97.
[1327] Trial Judgement, para. 92.
[1328] *Ibid.*, para. 117.
[1329] *Ibid.*, para. 116.

conclude from the evidence before the Trial Chamber that Žigić participated in a significant way in the functioning of Omarska camp. He cannot be held responsible as a participant in this joint criminal enterprise; his conviction for the crimes committed in this camp "in general" has to be overturned.

600. In view of the preceding analysis, the Appeals Chamber does not consider that the remaining grounds of appeal regarding Žigić's conviction for the crimes in Omarska in general impact upon the outcome of the appeal. Accordingly, the Appeals Chamber declines to give them further consideration.

VI. SEPARATE GOUNDS OF APPEAL OF PRCAĆ

601. The Appeals Chamber understands that Prcać raises in his Appeal Brief six distinct grounds of appeal, one of them relating to his sentence.[1330]

A. The factual findings of the Trial Chamber

602. Prcać did not challenge the approach chosen by the Trial Chamber as to its factual findings. However, the Appeals Chamber deems it necessary to identify at the outset the factual findings underlying Prcać's conviction, consistent with its approach regarding the other Appellants.

603. Prcać was found guilty of persecution, murder and torture only in respect of selected incidents listed in Schedule E. A review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Prcać has been found guilty, pursuant to Article 7(1) of the Statute, of persecution under count 1 of the Indictment in respect of the following victims contained in Schedule E: Witness A,[1331] Witness B,[1332] Abdulah Brkić,[1333] Zlatan Beširević,[1334] Muhamed Čehajić,[1335] Witness F,[1336] Riza Hadžalić,[1337] Jasmin Hrnić,[1338] Zuhra Hrnić,[1339] Hase Ičić,[1340] Witness AK,[1341] Witness K,[1342] Asef Kapetanović,[1343] Gordan Kardum,[1344] Omer Mešan,[1345] Zijad Mahmuljin[1346] Sabit Murčehajić,[1347] Azedin Oklopčić,[1348] Witness AI,[1349] Nusret Sivac,[1350] Sifeta Sušić,[1351] Witness AJ,[1352] Witness Y,[1353] Witness AM[1354] and Witness T[1355] were

[1330] This ground will be discussed in Chapter VII, *see* paras 717-725.
[1331] Trial Judgement, para. 452.
[1332] *Ibid.*, paras 436, 437 and 444.
[1333] *Ibid.*, para. 437.
[1334] *Ibid.*, footnote 194.
[1335] *Ibid.*, para. 493.
[1336] *Ibid.*, paragraphs or respective footnotes of paras 435, 444, 452 and 454.
[1337] *Ibid.*, paragraphs 445 and 537.
[1338] *Ibid.*, paragraphs 534 and 538.
[1339] *Ibid.*, paragraphs 86 and 94.
[1340] *Ibid.*, paras. 63, 93, 542 and 665.
[1341] *Ibid.*, para. 444, footnote 740.
[1342] *Ibid.*, paragraphs or respective footnotes of paras 428 and 436.
[1343] *Ibid.*, paragraphs 483(a), 530, 585-6, 588-9, 593 and 597-8.
[1344] *Ibid.*, para. 445.
[1345] *Ibid.*, paragraphs or respective footnotes of paras 435, 437 and 454.
[1346] *Ibid.*, para. 74.
[1347] *Ibid.*, para. 493, footnote 809.
[1348] *Ibid.*, para. 436.
[1349] *Ibid.*, para. 444, footnote 740.
[1350] *Ibid.*, paragraphs 14, 74 and 82.
[1351] *Ibid.*, para. 436
[1352] *Ibid.*, para. 444, footnote 740.
[1353] *Ibid.*, paragraphs or respective footnotes of paras 60, 66, 72, 78, 79, 86 and 88.
[1354] *Ibid.*, paragraphs or respective footnotes of paras 49, 94-6 and 529.
[1355] *Ibid.*, paragraphs 599-609.

confined in inhumane conditions. The detainees Witness AJ,[1356] Muhamed Čehajić,[1357] Gordan Kardum,[1358] Riza Hadžalić,[1359] Jasmin Hrnić,[1360] Hase Ičić,[1361] Asef Kapetanović,[1362] Emir Beganović,[1363] Azedin Oklopčić,[1364] Witness T,[1365] and Witness Y[1366] were victims of beatings. Witness F,[1367] and Witness K[1368] were victims of sexual assault. Riza Hadžalić[1369] was detained in the camp and killed.

604. A review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Prcać was found guilty, pursuant to Article 7(1) of the Statute, of murder under count 5 of the Indictment in respect of only one victim contained in Schedule E: Rizah Hadžalić.[1370]

605. As to count 9 of the Indictment, a review of the factual findings made by the Trial Chamber throughout the Trial Judgement shows that Prcać has been found guilty, pursuant to Article 7(1) of the Statute, of torture under count 9 in respect of the following victims contained in Schedule E: Rizah Hadžalić,[1371] Hase Ičić,[1372] Emir Beganović,[1373] Muhamed Čehajić,[1374] Asef Kapetanović[1375] and Witness T.[1376]

606. No factual findings could be found in the Trial Judgement for the following victims contained in any of the Counts of Schedule E: Refik Begulić, Witness AV, Zlata Bilajac, Witness X, Husein Crnkić, Durat Dautović, Midhet Fazlić, Suljo Ganić, Mehmed Hadžić, Husein Hodžić, Ivan Hrvat, Sakib Jakupović, Mario Josić, Witness AU, Witness AF, Witness M, Eso Mehmedagić, Ferid Mujčić, Witness AL, Muharem Nezirević, Emir Ramić, Mevludin Sejmenović, Šefik Sivac and Reuf Travančić.

[1356] *Ibid.*, para. 444, footnote 740.
[1357] *Ibid.*, para. 493.
[1358] *Ibid.*, para. 445.
[1359] *Ibid.*, paragraphs 445 and 537.
[1360] *Ibid.*, paragraphs 534 and 538.
[1361] *Ibid.*, paras. 63, 93, 542 and 665.
[1362] *Ibid.*, paragraphs 483(a), 530, 585-6, 588-9, 593 and 597-8.
[1363] *Ibid.*, paragraphs 3, 14 and 56.
[1364] *Ibid.*, para. 436.
[1365] *Ibid.*, paragraphs 599-609.
[1366] *Ibid.*, para. 60.
[1367] *Ibid.*, paragraphs or respective footnotes of paras 435, 444, 452 and 454.
[1368] *Ibid.*, paragraphs or respective footnotes of paras 428 and 436.
[1369] *Ibid.*, paragraphs 445 and 537.
[1370] *Ibid.*, paragraphs 445 and 537.
[1371] *Ibid.*, paragraphs 445 and 537.
[1372] *Ibid.*, para. 535 and footnote 868.
[1373] *Ibid.*, paragraphs 598, 685, 691(d) and 692.
[1374] *Ibid.*, para. 493.
[1375] *Ibid.*, paragraphs 597-8, 685 and 691(c).
[1376] Trial Judgement, paragraphs 609 and 691(c).

B. The Trial Chamber accepted all arguments of Prcać (ground of appeal 1)

607. Under this ground of appeal, Prcać submits that the Trial Chamber effectively accepted all of his arguments, thus establishing that none of the allegations made in the Indictment or those contained in the Prosecution's opening statement were true. Prcać contends that, as a result, the Trial Chamber should have acquitted him of all charges.[1377] The Prosecution responds that Prcać is not correct in claiming that the Trial Chamber accepted all his arguments nor in claiming that the Trial Chamber found none of its allegations to be true.[1378] It argues that the inconsistencies between the facts alleged in the Indictment and the facts found by the Trial Chamber do not go to the essence of the crimes charged. As such, it contends that the inconsistencies neither invalidate the Indictment nor require the Indictment to be amended before a conviction may be entered.[1379] According to the Prosecution, the same is also true of inconsistencies between facts alleged in its opening statement and those found by the Trial Chamber.[1380]

608. Prior to addressing this submission, the Appeals Chamber deems it necessary to make a preliminary observation. Pursuant to Article 25 of the Statute of the International Tribunal, the Appeals Chamber hears appeals only concerning errors of fact or law. It falls to the appellant to specifically identify such errors in the Trial Judgement, if any, for the Appeals Chamber to consider.[1381] In the instant case, instead of identifying specific errors on the part of the Trial Chamber, Prcać chooses to advance the general argument that his contentions were adopted wholesale by the Trial Chamber at trial. Such an approach does not assist the Appeals Chamber in properly carrying out its function. The Appeals Chamber will thus review the following two specific points raised by Prcać in support of this ground of appeal.

1. Decision on Defence Motions for Acquittal

609. The submissions of Prcać, as set out above, are partly based on his interpretation of the Decision on the Defence Motions for Acquittal. Prcać submits that the Trial Chamber (i) ruled that he did not act in accordance with the common purpose of persecution of non-Serbs in the territory of the municipality of Prijedor, but founded his possible guilt only on the events in the Omarska camp; (ii) decided to acquit Prcać of responsibility in relation to events that took place in the camp before his arrival and after his departure; and (iii) limited Prcać's possible guilt not only to the

[1377] Prcać Appeal Brief, paras 13-14.
[1378] Prosecution Respondent's Brief, paras 8.13-8.14.
[1379] *Ibid.*, para. 8.15.
[1380] *Ibid.*, para. 8.16.
[1381] *See* above, paras 16 and 18.

Omarska camp but to the precise period in which he was there.[1382] In response, the Prosecution argues that Prcać's interpretation of the Decision on the Defence Motions for Acquittal is incorrect.[1383] It argues that the Trial Chamber did not limit Prcać's responsibility to the period in which he was present in the camp as the decision did not address his liability for crimes committed after his departure. Further, the Prosecution asserts that there is no indication to suggest that the Trial Chamber decided that the trial was to proceed only in relation to crimes personally committed by Prcać.[1384] The Prosecution emphasizes that nothing in the decision indicates that there was no case to answer in relation to the crimes based on a theory of joint criminal enterprise.[1385]

610. As far as Prcać's first submission is concerned, the Appeals Chamber notes that while the Trial Chamber limited Prcać's possible guilt to events pertaining to the Omarska camp, it did not limit the prosecution of Prcać to crimes personally committed by him. The Appeals Chamber considers that, even if Prcać's other submissions are correct, it does not follow from this that the Trial Chamber accepted all of Prcać's arguments. The Trial Chamber held in the Decision on the Defence Motions for Acquittal "that sufficient evidence has been presented to keep intact the allegations against Prcać".[1386] The Appeals Chamber therefore finds that the Decision on the Defence Motions for Acquittal does not support this ground of appeal.

2. Findings of the Trial Chamber in Prcać's favour

611. In support of Prcać's arguments as set out above, Prcać presents a list of the Trial Chamber's findings which he considers to be in his favour,[1387] and which he contends shows that none of the Prosecution's allegations contained in the Indictment and its opening statement are true. In response, the Prosecution submits that this list, allegedly gleaned from the Trial Judgement, does not accurately reflect the findings of the Trial Chamber.[1388]

612. The Appeals Chamber observes that the Trial Judgement expressly contains a list of findings that serves as the basis for its determination of Prcać's responsibility in connection with events at the Omarska camp.[1389] When this list is compared with the list of findings submitted by Prcać, it becomes apparent that Prcać has compiled a selective list of findings which are not altogether accurate. It is also evident from the list of findings contained in the Trial Judgement that the Trial

[1382] Prcać Appeal Brief, para. 11.
[1383] Prosecution Respondent's Brief, para. 8.6.
[1384] *Ibid.*, para. 8.6.
[1385] *Ibid.*, paras 8.7-8.8.
[1386] Decision on Defence Motions for Acquittal, para. 62.
[1387] Prcać Appeal Brief, para. 12 a-k.
[1388] Prosecution Respondent's Brief, paras 8.10-8.11.
[1389] Trial Judgement, para. 468.

Chamber simply did not accept all of Prcać's arguments at trial and did not find all the allegations of the Prosecution to be untrue.

613. For these reasons, the Appeals Chamber dismisses this ground of appeal.

C. The identity between the Indictment and the Trial Judgement (ground of appeal 2)

614. Prcać's second ground of appeal focuses on what he terms the "identity between the Indictment and the [Trial] Judgement". This ground appears to encompass a variety of overlapping issues from which the Appeals Chamber has distilled the following submissions.

1. Lack of correspondence between facts pleaded in the Indictment and findings in the Trial Judgement

615. Prcać submits that the "principle of the indictment" was not respected by the Trial Chamber,[1390] with the result that a number of findings of fact were made which were not pleaded in the Indictment. This, it is alleged, was in violation of the principle that a Chamber must "judge only what the prosecution is prosecuting"[1391] and the principle that the Trial Chamber does not have the right to indict an accused.[1392] Prcać further submits that the Prosecution should have amended the Indictment to reflect the new charges[1393] and that, in the absence of this being done, he was not obliged to address any "alternative indictment".[1394]

616. Prcać argues that the consequences of disregarding the "identity between the Indictment and the Judgement" are manifold.[1395] First, he was not able to "prepare a valid Defence case and respond to the allegations of the prosecution".[1396] Second, a number of facts essential to his eventual conviction by the Trial Chamber were not properly established.[1397] Finally, there was a violation of the right of the accused to a just and fair trial, as he was not given the opportunity to prepare a proper and comprehensive defence.[1398] In sum, Prcać appears to assert that because the

[1390] Prcać Appeal Brief, para. 40.
[1391] *Ibid.*, para. 26.
[1392] *Ibid.*, para. 53.
[1393] *Ibid.*, para. 35.
[1394] *Ibid.*, para. 34. Following this argument, Prcać submits that the "Trial Chamber should have either ordered the Prosecution to amend the Indictment, or the Trial Chamber itself should have ordered presentation of relevant evidence in order to establish facts which would in a clear and unambiguous manner determine the existence of a new function of the accused, its place in the organization of the camp, and competences which such a function covered" (para. 90).
[1395] *Ibid.*, para. 150.
[1396] *Ibid.*, para. 151.
[1397] *Ibid.*, paras 159-160. Prcać submits that the following were not established: 1) the duties of an administrative assistant; 2) how significantly the duties contributed to the proper functioning of the camp; 3) whether the post of administrative deputy existed in the Omarska camp; and 4) Prcać's real function and competences.
[1398] *Ibid.*, paras 162, 163.

facts alleged in the Indictment were different from those found in the Trial Judgement, he should be acquitted.[1399]

617. The Prosecution responds that the Indictment contained all of the requisite allegations to put the Appellants, including Prcać, properly on notice of both the crimes with which they were charged and the conduct underlying the respective charges.[1400] In addition, the Appellants "were provided with witnesses' statements, the successive indictments and the Prosecution's opening statement".[1401] The Prosecution submits that the Defence was not reduced to "a mere blanket denial", and argues that the time frame of the case was limited and specific and focused further by the Decision on the Defence Motions for Acquittal.[1402]

618. The Appeals Chamber notes that Prcać has not set out in detail the inconsistencies between the Indictment and the Trial Judgement that are subject to appeal, except for a reference to the finding that he was an administrative aide. The present sub-ground thus largely repeats sub-ground (2) considered below. The Appeals Chamber also considers that the first and third consequences of disregarding the identity between the Indictment and the Judgement, as alleged by Prcać, overlap. With respect to these alleged consequences, contrary to Prcać's arguments, the Trial Judgement clearly shows that he made submissions on his status, function, and competence in the Omarska camp.[1403] On these same issues, he engaged in the cross-examination of many of the Prosecution witnesses referred to in the Trial Judgement.[1404] The Appeals Chamber observes that the failure to plead the status of Prcać as an administrative aide in the Indictment has not been shown on appeal to have prejudiced Prcać's ability to mount an extensive defence in this regard. Furthermore, as will be considered in respect of sub-ground (b), below, the Trial Chamber analysed at length the evidence of many Prosecution witnesses concerning Prcać's position and function in the camp. This sub-ground is therefore dismissed.

2. Prcać's position in the camp

619. Prcać submits that he was convicted by the Trial Chamber on the basis of a finding that he held a function in the camp which was neither mentioned in the Indictment,[1405] nor subsequently

[1399] Prcać Reply Brief, paras 35-36.
[1400] Prosecution Respondent's Brief, para. 4.16.
[1401] *Ibid.*, para. 4.19.
[1402] *Ibid.*, para. 4.20.
[1403] Trial Judgement, paras 432-433. The reference in the Trial Judgement to Prcać's Pre-Trial Brief, paras 8, 9 and 16 is not helpful, as these paragraphs did not touch on whether Prcać should be deemed an administrative aide. But para. 26 of the Pre-Trial Brief has some description of his duties at the camp.
[1404] For instance, cross-examination of Zlata Cikota, T. 3384-3397; of Nusret Sivać, T. 4119-4126.
[1405] Prcać Appeal Brief, para. 18.

during trial.[1406] In the Indictment, Prcać was alleged to have arrived at the Omarska camp in June 1992 to replace Kvočka as deputy camp commander and therefore as a superior to all staff in the camp except for the commander.[1407] However, the Trial Chamber found that he did not arrive in June and was not deputy camp commander but was, in fact, an administrative assistant to the "security commander" of the camp.[1408] Prcać argues that by ignoring the parameters of the Indictment and finding that he had fulfilled the functions of an administrative assistant, the Trial Chamber improperly took on the role of the Prosecutor and convicted him on the basis of facts with which he was not charged.[1409]

620. The Prosecution responds that the Trial Chamber found that Prcać did not incur responsibility under Article 7(3) of the Statute, and that his position as deputy camp commander was immaterial to his liability under Article 7(1).[1410] Further, in the opinion of the Prosecution, the failure of the Indictment to mention Prcać as an "administrative aide" at the camp was not a failure to plead a material fact in relation to the charge under Article 7(1).[1411] The Prosecution also submits that Prcać was clearly on notice that his function was in issue in the proceedings, and that he presented evidence and argument relating to this.[1412] In addition, the Prosecution contends that, as Prcać has not established that the Trial Chamber returned convictions on the basis of material facts not pleaded in the Indictment, and that if the Trial Chamber did rely on such facts, the trial would have been rendered unfair, this ground of appeal should be dismissed.[1413] Prcać replies that the Trial Chamber established that he was an "administrative deputy commander of the camp" on the basis of his "supposed guilt".[1414]

621. The Appeals Chamber notes that Prcać was charged in the Indictment with superior responsibility under Article 7(3) of the Statute on the basis of his position as deputy commander of the Omarska camp,[1415] and was not charged as an administrative aide. However, on the basis of the evidence at trial, the Trial Chamber only found Prcać to be an administrative aide to the commander of the camp.[1416] The issue here is whether the finding that Prcać was an administrative assistant bears on his responsibility, as found by the Trial Chamber, for the crimes committed in the Omarska camp.

[1406] *Ibid.,* para. 22.
[1407] *Ibid.*, para. 20.
[1408] *Ibid.*, para. 21.
[1409] *Ibid.,* paras 23, 25.
[1410] Prosecution Respondent's Brief, para. 4.29.
[1411] *Ibid.*, para. 4.29.
[1412] *Ibid.*, para. 4.30.
[1413] *Ibid.*, para. 4.28.
[1414] *Ibid.*, paras 37 and 40.

622. The Appeals Chamber notes that, while the Trial Chamber found Prcać to have exercised authority in the camp, it acquitted him of superior responsibility pursuant to Article 7(3) of the Statute.[1417] Instead, the Trial Chamber found Prcać guilty under Article 7(1) as a co-perpetrator in a joint criminal enterprise at the camp, because he "contributed significantly to furthering the efforts of Omarska camp".[1418] Such contribution, the Trial Chamber found, was reflected in the fact that:

> Prcać accomplished his duties diligently. He on occasion took down particulars of newly arrived detainees, solved problems related to the accommodation of detainees or the absence of their names on lists, took care of the transfer of detainees from one camp to the other or from one place in the camp to another, either calling detainees out himself or asking guards to do so.[1419]

This description of Prcać's duties was not contradicted by the Defence at trial; rather, it was confirmed.[1420] Prcać even referred to himself as an "administrative worker" in his Final Trial Brief.[1421] Prcać has therefore failed to show that no reasonable trier of fact could have reached the finding of the Trial Chamber that he was an administrative aide at the camp. More importantly, the Appeals Chamber considers that the title of administrative aide used by the Trial Chamber to describe him is not material to the finding that he was a co-perpetrator in a joint criminal enterprise. The Trial Chamber did not consider the fact of being an administrative aide to be indicative of criminal responsibility. The title itself was given only to sum up his duties, which were different from those of the other guards or their superiors. The Trial Chamber correctly assigned responsibility on the basis of Prcać's actual duties rather than on the basis of a mere descriptive label. In this case, the finding of participation in a joint criminal enterprise requires that evidence be adduced to show that Prcać intended to contribute and did in fact contribute to furthering the criminal purpose of the camp.[1422] The Appeals Chamber considers that Prcać has also failed to show that no reasonable trier of fact could have reached the finding of the Trial Chamber that he contributed to the joint criminal enterprise at the Omarska camp in a significant way. Accordingly, this sub-ground is dismissed.

623. As a related submission, Prcać argues that the Trial Chamber established his function in the camp as an administrative assistant on the basis of the testimony of only one witness for the Prosecution, which ran counter to testimony from the Prosecution's 37 other witnesses.[1423] Since the Prosecution did not establish beyond reasonable doubt that he held the post of deputy

[1415] Indictment, paras 20 and 29.
[1416] Trial Judgement, para. 439.
[1417] *Ibid.*, para. 467.
[1418] *Ibid.*, para. 469. *See* also para. 468.
[1419] *Ibid.*, para. 438.
[1420] *Ibid.*, paras 432-433.
[1421] Para. 355.
[1422] *Cf.* above, para. 101.
[1423] Prcać Appeal Brief, para. 80.

commander of the camp, the Trial Chamber should not have concluded that he held the post of an administrative assistant, but should have applied "the principle *in dubio pro reo*".[1424] There is no specific response from the Prosecution in relation to this argument, except that both parties presented evidence and arguments in this respect and that it was open to the Trial Chamber to find that his function and duties were different from those alleged in the Indictment.[1425] Prcać replies that the Trial Chamber erred factually in this regard.[1426]

624. The Appeals Chamber notes that the Trial Chamber dismissed the allegation preferred by the Prosecution, namely, that Prcać was deputy commander of the Omarska camp, and that this dismissal was material to the determination of Prcać's overall responsibility for the crimes committed at the camp. The Appeals Chamber also notes that the Trial Chamber analysed at length the evidence of many prosecution witnesses concerning Prcać's function and position in the camp,[1427] and that it finally decided this matter in Prcać's favour. There was, therefore, no doubt as to Prcać's function in the camp. As has been stated above, the post of an administrative aide was not deemed criminal as such by the Trial Chamber.[1428] It was the duties Prcać discharged at the camp that convinced the Trial Chamber of his criminal responsibility. The Appeals Chamber considers that Prcać has failed to show that the finding that he was an administrative aide, which was a title not pleaded in his Indictment, is a factual error that has resulted in a miscarriage of justice. This sub-ground of appeal is dismissed.

D. Errors of fact and law on the part of the Trial Chamber (ground of appeal 3)

625. Prcać argues that the Trial Chamber's interpretation of the evidence and statements presented at trial was "completely erroneous". He submits that, had such errors not been committed, the Trial Chamber "would have certainly rendered a judgement of acquittal".[1429] Prcać points to a number of specific examples in support of his argument. These can usefully be divided into errors relating to Prcać's administrative function, errors regarding Prcać's role in the preparation and reading of lists of detainees, and other errors. Prcać also submits that there were still more errors in the Trial Judgement but that their impact was "not significant" on the verdict.[1430] Since Prcać has not made submissions on these alleged errors, the Appeals Chamber will not consider them.

[1424] *Ibid.*, para. 81.
[1425] Prosecution Respondent's Brief, para. 4.30.
[1426] Prcać Reply Brief, paras 40-41.
[1427] Trial Judgement, paras 435-437.
[1428] *See* above, para. 621.
[1429] Prcać Appeal Brief, paras 170-175. *See* also Prcać Reply Brief, para. 11.
[1430] *Ibid.*, paras 337-342.

1. Errors relating to Prcać's administrative function

(a) Prcać never admitted that he was an administrative assistant to Meakić

626. Prcać argues that the Trial Chamber erroneously ascertained from his Pre-Trial Brief that he was essentially claiming that he was merely an administrative aide to Željko Meakić in the Omarska camp.[1431] Prcać contends that he never claimed this, only that he performed administrative work on an *ad hoc* basis.[1432] Thus, according to Prcać, the Trial Chamber should have acquitted him in the absence of crucial proof.[1433] The Prosecution responds that the Trial Chamber never found that Prcać held the formal position of "administrative aide" to Željko Meakić at the camp, and that this term was only used by the Trial Chamber to sum up the nature of Prcać's duties.[1434]

627. The Appeals Chamber finds that Prcać's argument is unfounded. Paragraph 432 of the Trial Judgement reads, in relevant part, "[e]ssentially, the Defense claims that Prcać was merely an administrative aide to Željko Meakić in Omarska camp and that no evidence established that Prcać was a deputy commander".[1435] As a close reading of this paragraph demonstrates, the Trial Chamber never stated that Prcać claimed to have held a formal administrative position. In asserting that the Defence was, in essence, claiming that Prcać was merely an administrative aide, the Trial Chamber was simply summing up the nature of Prcać's duties at the camp on the basis of the evidence presented at trial, including Prcać's own submissions that he worked as an "administrative worker".[1436] The Trial Chamber's assessment of that evidence is entirely reasonable. Indeed, the Appeals Chamber observes that, even on appeal, Prcać notes that, in the Defence Motions for Acquittal, he stated that he *inter alia* "worked as an administrative clerk".[1437] This sub-ground of appeal is therefore dismissed.

(b) Prcać's administrative duties were not described in testimony at trial

628. Prcać argues that the Trial Chamber erroneously ascertained that "[m]any prosecution witnesses supported Prcać's description of his administrative duties in the camp".[1438] According to Prcać, none of those witnesses described his duties as being administrative, nor did anything in their trial testimony indicate that he was "in charge of administrative work" at the camp.[1439] Instead, they

[1431] *Ibid.*, paras 224-225 and 227.
[1432] *Ibid.*, paras 225, 226, 234 and 236.
[1433] *Ibid.*, paras 235 and 237.
[1434] Prosecution Respondent's Brief, paras 8.50-8.53.
[1435] Trial Judgement, para. 432 (footnote omitted).
[1436] *Ibid.*, para. 432, referring to Prcać's Pre-Trial Brief, paras 8, 9, 16.
[1437] Prcać Appeal Brief, para. 230.
[1438] *Ibid.*, paras 251-263, referring to para. 435 of the Trial Judgement.
[1439] *Ibid.*, paras 253, 258 and 260-261.

only testified to the effect that when they saw Prcać, which was rare, "he was usually carrying some papers or a notebook with him".[1440] The Prosecution responds that Prcać was never actually found to have been in charge of administrative work at the camp, and the fact that no witnesses support such a finding is therefore immaterial.[1441]

629. The Appeals Chamber agrees with the Prosecution that Prcać was never found by the Trial Chamber to have been in charge of administrative work at the camp. Thus, his argument that nothing in the testimony of Witness F, Nusret Sivać, Omer Mešan, Zlata Cikota and Witness J supports such a conclusion is without merit. Prcać's argument that the Trial Chamber erroneously ascertained that many witnesses described his duties in the camp as administrative is likewise unfounded. The Trial Chamber's finding that Prcać was an administrative aide was based on the nature of the tasks he performed in the camp, as described by numerous Prosecution witnesses, as well as by Prcać himself, and not on any label used to describe these tasks. Moreover, since Prcać was never found by the Trial Chamber to have held a *formal* position of "administrative aide", the Appeals Chamber is of the view that the lack of more explicit references in the evidence presented at trial to the administrative nature of Prcać's work at the camp is immaterial. This sub-ground of appeal is thus dismissed.

(c) The evidence of witness Omer Mešan

630. The Trial Chamber found that "[m]any Prosecution witnesses supported Prcać's description of his administrative duties in the camp and testified that they saw Prcać moving around the camp carrying lists. However, they also ascribed more responsibility or influence to Prcać than he acknowledged".[1442] Among these witnesses was Prosecution witness Omer Mešan who testified that "Prcać would act independently when he was calling out the names of detainees from his lists and make decisions related to the absence of detainees' names on lists."[1443]

631. According to Prcać, the Trial Chamber overlooked the fact that Omer Mešan could not identify him in court. Prcać thus considers the Trial Chamber to have erred in relying on the testimony of this witness in respect of its findings on Prcać's influence, authority and independence in decision-making at the camp.[1444]

[1440] *Ibid.*, para. 259.
[1441] Prosecution Respondent's Brief, para. 8.61-8.62.
[1442] Trial Judgement, para. 435.
[1443] *Ibid.*, para. 435(c) referring to T. 5279-5283 (Omer Mešan).
[1444] Prcać Appeal Brief, paras 215-222, referring to T. 5292 (Omer Mešan).

632. The Prosecution counters by raising three arguments. First, it contends that the Trial Chamber expressly stated that witness Omer Mešan failed to identify Prcać in court and that it can therefore be concluded that the Trial Chamber took this into account in determining the weight to be given to the evidence of this witness.[1445] Second, it argues that the identification of Prcać as the person who would always be handling and carrying around lists was based on the evidence of several witnesses of whom Omer Mešan was only one.[1446] Third, the Prosecution submits that in any case, the evidence of Omer Mešan relied upon by the Trial Chamber relates to the nature of Prcać's role and functions at the camp, and not to any crime with which Prcać was charged in the Indictment. As such, according to the Prosecution, the standard of proof is not that of "beyond reasonable doubt".[1447]

633. Prcać replies that the Trial Chamber concluded that he was able to make independent decisions and contribute "considerably" to the functioning of the camp based on the testimony of only two witnesses, namely Omer Mešan and Nusret Sivać.[1448] Further, Prcać submits that the description of him provided by witness Omer Mešan "could refer to half of the inhabitants of [the] village of Omarska".[1449]

634. The Appeals Chamber finds that Prcać has failed to demonstrate that the Trial Chamber erred in relying on the testimony of Prosecution witness Omer Mešan. The Trial Judgement expressly notes that "Omer Mešan could not identify Prcać in Court."[1450] It follows from this that the Trial Chamber took into account the failure to identify Prcać when considering the weight to be ascribed to Omer Mešan's evidence. In addition, the Appeals Chamber notes that the failure to identify an accused in court does not necessarily negate facts which may otherwise be established on the basis of the evidence presented at trial by the "identifying" witness.[1451] In any case, the Appeals Chamber finds that the Trial Chamber based its conclusion that Prcać had some influence in the camp on the totality of evidence, which included the evidence of Witness F, Nusret Sivać, Zlata Cikota, Witness J, Witness AN, Sifeta Susić, Azedin Oklopčić, Witness B, Witness K, Edin Mrkalj, Abdulah Brkić, Kerim Mesanović, Witness AT, and Witness U, in addition to the testimony of Omer Mešan. Accordingly, and without needing to deal with all of the Prosecution's points, this sub-ground of appeal is dismissed.

[1445] Prosecution Respondent's Brief, para. 8.34, referring to para. 435 of the Trial Judgement.
[1446] *Ibid.*, para. 8.36.
[1447] *Ibid.*, para. 8.40.
[1448] Prcać Reply Brief, para. 46.
[1449] *Ibid.*, para. 50.
[1450] Trial Judgement, footnote 707.
[1451] *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T& IT-96-23/1-T, Decision on Motion for Acquittal, 2 July 2000, para. 19; *see* also above, para. 473.

2. Prcać's role regarding the lists of detainees

(a) Prcać's role in compiling the lists of detainees

635. Prcać challenges the Trial Chamber's findings on his responsibility for the handling of lists of detainees who were to be interrogated, transferred, exchanged or released.[1452] According to Prcać, there were two types of lists at the camp: the first type consisted of names of newly arrived detainees for the purpose of record-keeping, and the second type contained names of detainees who, according to the evidence given at trial, were beaten, tortured or never seen again after being called out.[1453] Prcać claims that, in the absence of any concrete proof, the Trial Chamber erred in finding that he was in charge of the composition and reading out of lists of detainees[1454] and that, while he sometimes composed the first type of list,[1455] he was not in any way responsible for the composition of the second type of list.[1456]

636. The Prosecution responds that it is unnecessary for the Appeals Chamber to consider Prcać's submissions on this matter, since the Trial Chamber made no findings in this respect.[1457] Moreover, Prcać appears to be asking the Appeals Chamber to make *de novo* factual findings relating to the nature of the lists and who was responsible for composing them, which the Prosecution submits is "inconsistent with the appellate function".[1458] Finally, the Prosecution argues that the Trial Chamber never found that Prcać was in charge of the composition of such lists, but that it considered this matter, together with evidence of other tasks and functions performed by Prcać at the camp, to reach the general conclusion that Prcać's administrative duties contributed to the system of gross mistreatment at Omarska.[1459] Prcać replies that the Trial Chamber based its finding that he had decision-making power, authority and influence at the camp on the fact that he compiled lists of prisoners who were transferred, tortured or never seen again after having their names called out.[1460]

637. The Appeals Chamber cannot find any error on the part of the Trial Chamber with respect to its findings on Prcać's responsibility for the handling of lists of detainees at the camp. As the Trial Chamber never found Prcać to have been in charge of the composition and reading out of lists of detainees, Prcać's argument that the evidence presented at trial does not support such a conclusion

[1452] Prcać Appeal Brief, paras 264-312.
[1453] *Ibid.*, paras 272-281.
[1454] *Ibid.*, paras 283-284.
[1455] *Ibid.*, para. 275.
[1456] *Ibid.*, para. 294.
[1457] Prosecution Respondent's Brief, para. 8.65.
[1458] *Ibid.*, para. 8.65.
[1459] *Ibid.*, para. 8.66, referring to para. 460 of the Trial Judgement.

is irrelevant. Prcać's claim that the Trial Chamber found that he exercised authority at the camp solely on the basis that he compiled lists of detainees is likewise without merit. The Appeals Chamber points out that the handling of lists of detainees was found to have been *one* of Prcać's tasks at the camp which, together with the *other* tasks he was found to have performed, was indicative of the nature of his duties and position of authority at the camp. As such, the Appeals Chamber finds no reason to disturb the findings of the Trial Chamber on this matter. This sub-ground of appeal is dismissed.

(b) Prcać's reading out lists of detainees

638. Paragraph 433 of the Trial Judgement reads, in relevant part: "In the Defense brief, Prcać's tasks in the camp are described as follows. His job was: … (4) to read the list of the detainees who were to be transferred." Prcać challenges this paragraph and alleges the Trial Chamber misquoted his Final Trial Brief with respect to his duties at the camp.[1461]

639. Prcać argues that, whereas his Final Trial Brief refers to two specific occasions on which he read out lists of detainees who were to be transferred, paragraph 433 of the Trial Judgement implies that he claimed to have permanently performed this duty, that he was informed of the fate of the detainees, and that he was the only person performing that duty at the camp.[1462] Prcać asserts that the persons whose names he read out were transferred to other camps and that they are still alive.[1463] The Prosecution responds that paragraph 433 of the Trial Judgement was clearly intended to paraphrase the relevant paragraph of Prcać's Final Trial Brief and, as such, did not constitute a departure from the Defence's description of Prcać's duties at the camp.[1464] The Prosecution also argues that the Trial Chamber's findings with respect to the reading out of lists by Prcać were based on the evidence of various witnesses, not just that of Prcać, and that Prcać's conviction was not based solely on the Trial Chamber's finding that he carried around lists of detainees who were to be called out for interrogation, transfer, exchange, or release.[1465]

640. The Appeals Chamber finds Prcać's submissions to be without merit. It is evident that paragraph 433 of the Trial Judgement presents the Defence's submissions on Prcać's duties at the camp as set out in its Final Trial Brief, and does not depart in substance from those submissions. The Trial Chamber merely stated that, according to the Defence's Final Trial Brief, one of Prcać's

[1460] Prcać Reply Brief, paras 43-44.
[1461] Prcać Appeal Brief, paras 239 and 241-246.
[1462] *Ibid.*, para. 246.
[1463] *Ibid.*, para. 248.
[1464] *Ibid.*, paras 8.55, 8.58.
[1465] *Ibid.*, para. 8.59, referring to para. 453 of the Trial Judgement.

tasks was to read out the list of detainees to be transferred.[1466] The Trial Chamber then recalled in the next paragraph[1467] that, in his interview with the Prosecution, Prcać mentioned two particular occasions on which he had called out the names of detainees to be transferred to Trnopolje or to be exchanged. The Trial Chamber never stated that Prcać claimed to have performed that task on a frequent basis or that he was the only one doing so. Furthermore, the Appeals Chamber observes that the occasions on which Prcać was found to have read out lists of detainees were merely considered by the Trial Chamber to have provided evidence of the nature of his duties at the camp and in no way constituted a crime for which he was convicted. Thus, there would be no impact on Prcać's conviction or sentence even if the persons whose names Prcać read out were found to be alive. Accordingly, this sub-ground of appeal is dismissed.

(c) Prcać did not know the fate of the detainees who were called out and left the camp

641. Prcać claims that, as he had no knowledge of the fate of the detainees who, after being called out from the lists, were never seen again, the Trial Chamber erred in holding him criminally responsible for what happened to them.[1468] The Prosecution responds that this argument is immaterial to the Trial Chamber's findings on Prcać's criminal responsibility, since it was expressly found that he was not directly involved in committing specific crimes against detainees. Rather, his criminal responsibility was based on his participation in a joint criminal enterprise under Article 7(1) of the Statute and, as such, it is immaterial whether his acts or omissions were illegal in themselves.[1469]

642. The Appeals Chamber points out that Prcać was not found to have been accountable for any specific crimes against detainees. Rather, he was found to have participated in a joint criminal enterprise of persecution at the Omarska camp. Accordingly, whether or not Prcać was aware of the fate of the detainees who were never seen again is immaterial to his criminal responsibility under Article 7(1) of the Statute. This sub-ground of appeal, therefore, fails.

[1466] Trial Judgement, para. 433.
[1467] *Ibid.*, para. 434.
[1468] Prcać Appeal Brief, paras 298-306.
[1469] Prosecution Respondent's Brief, paras 8.67-8.68.

3. Other Errors

(a) The Trial Chamber refused to accept the submission that Prcać came to the camp against his will

643. At trial, Prcać argued that he went to the Omarska camp under duress. However, this allegation was not accepted by the Trial Chamber. Paragraph 427 of the Trial Judgement reads as follows:

> During trial [Prcać] insisted that he went to the camp "under duress". Some Defense witnesses testified to this effect. Prcać's son, Ljubisa Prcać, testified that his father told him that Simo Drljača threatened him "with the life of his children and the burning of his house". Obrad Popović, one of the porters at Omarska camp, testified that he saw Simo Drljača conversing with Prcać, who later told him that Drljača had threatened him. The Trial Chamber notes, however, that Prcać never mentioned any threats when he was interviewed by the Prosecution. The Trial Chamber is not convinced that these threats took place and does not accept his assertion that he worked at the camp under duress.[1470]

Prcać challenges the conclusion reached by the Trial Chamber and argues that his arrival at the Omarska camp under duress evidences his lack of will to participate in any joint criminal enterprise.[1471] According to Prcać, the Trial Chamber's conclusion is based on its finding that he "never mentioned any threats when he was interviewed by the Prosecution". He claims that this finding is erroneous.[1472] Prcać submits that he did state in his interview with the Prosecution that he went to the camp under threat,[1473] that he raised this again in his Pre-Trial Brief and opening statement, and that two witnesses corroborated his assertion.[1474]

644. The Prosecution responds that the Trial Chamber's finding that Prcać did not mention any threats in his interview with the Prosecution is not erroneous since the conclusion is to be read in the context of the direct threats made by Simo Drljača, as referred to by Defence witnesses Ljubisa Prcać and Obrad Popović. However, Prcać only referred to an indirect threat in his interview.[1475] The Prosecution also submits that the Trial Chamber's rejection of Prcać's argument was based on its consideration of the evidence as a whole, including the absence of any submissions of Prcać relating to "any genuine fear that he felt as result of any such threats that harm would come to him if he refused to work in the camp".[1476]

[1470] Trial Judgement, para. 427(footnotes omitted).
[1471] Prcać Appeal Brief, paras 176-214.
[1472] *Ibid.*, paras 178-180, 205-208, 210 and 212.
[1473] *Ibid.*, paras 182, 192.
[1474] *Ibid.*, paras 201-204, referring to T. 11365 (Ljubisa Prcać) and 11560-11561 (Obrad Popović), para. 3 of Prcać Pre-Trial Brief, and paras 43, 44 and 152 of the Defence Opening Statement. It is noted that Prcać did not file his opening statement, and that his opening statement was made in court: starting at T. 11318 (8 May 2001).
[1475] Prosecution Respondent's Brief, paras 8.22-8.23.
[1476] *Ibid.*, paras 8.23-8.24.

645. The Appeals Chamber considers that, even if Prcać's statement in his interview with the Prosecution provided evidence that he may have gone to the camp under duress, in the absence of any further evidence that Prcać continued to work at the camp as a result of such duress, the Trial Chamber's finding is entirely reasonable. This is especially so in light of its finding with respect to Radić, namely that "guards could come and go from their assignments in the camp without suffering repercussions."[1477] The Appeals Chamber also notes that the evidence presented at trial does not support such a conclusion. Moreover, the Trial Chamber based its finding on the evidence as a whole, including, in particular, the testimony of defence witnesses Ljubisa Prcać and Obrad Popović, in addition to the arguments contained in Prcać's Pre-Trial Brief and his opening statement. The assertion that Prcać never mentioned any threats in his interview with the Prosecution was only one of the factors relevant to the finding. In light of the totality of material available to the Trial Chamber, the Appeals Chamber is of the view that Prcać has not established that no reasonable trier of fact could have found that he did not work at the camp under duress. This sub-ground of appeal is, therefore, dismissed.

(b) Prcać's role in the moving of detainees between the rooms

646. Prcać challenges the Trial Chamber's findings that he "on occasion … took care of the transfer of detainees from one camp to the other or from one place in the camp to another",[1478] and that he was "responsible for managing the movement of detainees within the camp, under the orders of the investigators and Željko Meakić, and with the assistance of all guards".[1479] Prcać argues that the Trial Chamber erred in finding that he alone was responsible for the moving of detainees within the camp, claiming that this finding was based solely on the testimony of prosecution witness Nusret Sivać and disregarded the other evidence.[1480] According to Prcać, this witness testified that, in order to move from one room to another, it was necessary to obtain special permission from Prcać. Prcać argues that no special permission was necessary for detainees to move from room to room, and he points to the testimony of several witnesses, none of whom needed special permission to move within the camp.[1481]

647. The Prosecution argues that Prcać relies heavily on the testimony of witness Mirko Ješić to substantiate his arguments, but that, having thoroughly considered that testimony, the Trial Chamber was entitled to give Mirko Ješić's evidence little or no weight on this matter.[1482] In

[1477] Trial Judgement, para. 563.
[1478] *Ibid.*, para. 438.
[1479] *Ibid.*, para. 461.
[1480] *Ibid.*, paras 322-5, referring to T. 3997(Nusret Sivać).
[1481] *Ibid.*, paras 321-323 and 326-329.
[1482] Prosecution Respondent's Brief, paras 8.69-8.71.

addition, the Prosecution submits that the Trial Chamber never found that the authority to move detainees within the camp was solely vested in Prcać, or that Nusret Sivać ever testified to that effect.[1483]

648. The Appeals Chamber notes that the Trial Chamber never found that special permission was required for detainees to move within the camp, or that this permission could only be obtained from Prcać. Prcać's argument that, other than Nusret Sivać, no other witness supports such a finding is therefore irrelevant. The Appeals Chamber also points out that the Trial Chamber never found that it was *exclusively* within Prcać's competence to control the movement of detainees inside the camp. Rather, the Trial Chamber found that Prcać's duties with respect to the movement of detainees were carried out under the orders of the investigators, who did not form part of the "security service" of the camp,[1484] and Željko Meakić as well as with the assistance of guards.[1485] Prcać's argument that the Trial Chamber should have attributed more credibility and importance to the evidence of other witnesses than to that of Nusret Sivać is likewise without merit. Aside from merely asserting this proposition, Prcać does not explain why this should be so. The Appeals Chamber thus finds that Prcać has failed to establish that no reasonable trier of fact could have found that he was responsible for managing the movement of detainees within the camp. This sub-ground of appeal is dismissed.

649. For these reasons, this ground of appeal is dismissed.

E. Credibility of witnesses (ground of appeal 4)

1. Inconsistencies between testimony and witness statements

650. Prcać argues that, in the Trial Judgement, the Trial Chamber did not provide "a single explanation" as to the credibility of witnesses, or as to whether it accepted as credible, and if so to what degree, the testimony of a certain witness.[1486] He contends that many Prosecution witnesses "failed to answer the simplest questions",[1487] or gave testimony that was inconsistent with their depositions.[1488] As examples, Prcać submits that the testimony of Azedin Oklopčić and Witness K were inconsistent with their written statements, and that their testimony made a "considerable

[1483] *Ibid.*, para. 8.72.
[1484] Trial Judgement, para. 29.
[1485] *Ibid.*, para. 461.
[1486] Prcać Appeal Brief, para. 451.
[1487] *Ibid.*, para. 452.
[1488] *Ibid.*, para. 453.

contribution to the findings that the accused gave a more substantial contribution to the functioning of the camp than the ordinary guards and typists".[1489]

651. The Prosecution submits that it is unclear whether Prcać is asserting that the Trial Chamber erred in failing to consider these inconsistencies, or that the Trial Chamber erred by failing to refer to them in its Judgement. According to the Prosecution, the Trial Chamber did make numerous findings as to the credibility of witnesses.[1490] The Prosecution emphasizes that the evidence given by witness Oklopčić did not play any major role in the Trial Chamber's reasoning so as to establish prejudice.[1491] The testimony of Witness K provided evidence favourable to Prcać, namely that he arrived at the camp in mid-July, and this evidence was accepted by the Trial Chamber.[1492] Further, the credibility of this witness was examined in relation to the case of Radić, and the Trial Chamber could not be expected to repeat its analysis of a particular witness' testimony undertaken in another part of the Trial Judgement to prevent criticism.[1493] The Prosecution submits that, in his attempt to show that the finding of the Trial Chamber was unreasonable, Prcać has not put forward any argument that was not raised during the trial, but that he is seeking a *de novo* assessment by the Appeals Chamber.[1494]

652. In his reply, Prcać contends that Witness K claimed that Prcać had issued orders to the guards, but when cross-examined by the Defence, the witness admitted he had never heard Prcać give any order, and that it was the assumption of the witness that he had done so. Prcać points out that with respect to Witness J's testimony, even though the witness claimed that 30 prisoners had disappeared after Prcać called them out, during cross-examination the witness could not recall the name of a single one of those prisoners.[1495]

653. The Appeals Chamber begins by noting that, contrary to Prcać's argument, the Trial Judgement is full of references relating to the assessment of the credibility of witnesses.[1496] Turning to the specific examples raised by Prcać, the Appeals Chamber notes that Azedin Oklopčić's evidence was discussed by the Trial Chamber in support of its finding that Prcać was "assumed" by many witnesses to hold a position of authority at the Omarska camp.[1497] However, the alleged inconsistency between Azedin Oklopčić's testimony and his earlier statements relates to his failure

[1489] *Ibid.*, paras 459-469.
[1490] Prosecution Respondent's Brief, para. 8.103.
[1491] *Ibid.*, para. 8.105.
[1492] *Ibid.*, para. 8.107.
[1493] *Ibid.*, para. 8.112.
[1494] *Ibid.*, paras 8.110-8.111.
[1495] Prcać Reply Brief, para. 52.
[1496] With respect to the specific case of Prcać, *see e.g.* Trial Judgement, paras 445, 454.
[1497] Trial Judgement, para. 436.

to mention Prcać in the list of the most responsible persons in the camp which he compiled in January 1993, while in his testimony he considered Prcać to be a commander of the camp.[1498] The Appeals Chamber observes that this inconsistency, if deemed so, would have had no impact on Prcać's conviction given that the Trial Chamber did not find that he was deputy commander of the camp. The Appeals Chamber also considers that the fact that the witness in his testimony considered Prcać to be "one of the leaders" in the camp does not conflict with the fact that he did not include Prcać in his list of the most responsible persons in the camp. The witness did not include Prcać's name on his list because he saw him the least in the camp and, for him, Prcać was "not as important at the time as the others" who were named on the list.[1499] In addition, witness Oklopčić stated that his list was not exhaustive.[1500] The situation is thus not one in which the witness did not recognise the accused during the time the witness was detained in the camp.

654. Turning to Prcać's challenge to the evidence of Witness K, the Appeals Chamber notes that the credibility of this witness' evidence was tested during the cross-examination of the witness by the Defence.[1501] The Appeals Chamber further notes that the part of Witness K's evidence referred to by the Trial Chamber pertains to the fact that the witness saw Prcać giving assignments to the guards at the camp. This fact, however, does not bear on the list of names which, according to Prcać's submissions on appeal, the witness gave to the Prosecution, and which Prcać relies on in his appeal to impeach the credibility of the witness, as shown above by Prcać's arguments in this regard.[1502] With respect to the challenge to the evidence of Witness J, the Appeals Chamber recalls that Prcać was not found guilty of any crime relating to the reading out of lists of names. Rather, this was considered to indicate his status in the camp. As a result, the failure of Witness J to provide the name of one of those persons called out is not a determining factor. This is especially so given Prcać's admission that he read out lists of names. Prcać has therefore failed to identify a factual or legal error in terms of Article 25 of the Statute. Accordingly, this sub-ground is dismissed.

2. 'False testimony'

655. Prcać argues that the testimony of some witnesses was inconsistent with the "real situation" and contained "falsehoods".[1503] He refers in particular to a video-recording of the Omarska camp, presented at trial as exhibit D38/5, to show that the testimony of some prosecution witnesses was

[1498] T. 1879-1880.
[1499] T. 1879.
[1500] T. 1879.
[1501] Prcać Appeal Brief, para. 471.
[1502] *Ibid.*, para. 467.
[1503] *Ibid.*, paras 479-482.

not consistent with the "real situation", thus undermining their credibility.[1504] He also alleges that many of the female witnesses who testified at trial were receiving group therapy, leading over time to the creation of certain joint conclusions relating to persons present and events taking place in the Omarska camp.[1505] In addition, Prcać challenges the Trial Chamber's acceptance of witness testimony without appraising the credibility of the witnesses concerned, in particular that of witness Nusret Sivac.[1506]

656. The Prosecution submits that the Trial Chamber did not accept the entirety of the witnesses' evidence,[1507] and that the criticism of Prcać is not specific enough to establish that the Trial Chamber erred in law or in fact in its treatment of their testimony.[1508] In the view of the Prosecution, the assessment by the Trial Chamber of the evidence of witnesses in paragraphs 435-445 of the Trial Judgement was not unreasonable.[1509]

657. The Appeals Chamber considers that Prcać does not identify any particular finding of the Trial Chamber he is challenging through this sub-ground. If it is the finding that he was an administrative aide that is under appeal, as would seem to be the case from his Appeal Brief,[1510] Prcać has not shown the relevance of exhibit D38/5 to the allegedly differing testimony of certain witnesses in relation to that finding. If, however, Prcać intends to challenge the credibility of witnesses, the Appeals Chamber finds that he already did so at trial. Prcać himself has shown that the Trial Chamber was aware of this issue, and in fact rejected Witness A's evidence on the basis of its lack of credibility.[1511] The Appeals Chamber also considers that on appeal he has failed to identify the material fact with respect to which these witnesses gave false evidence. The reference to exhibit D38/5 and the group therapy sessions is insufficient to support this sub-ground. this sub-ground is therefore dismissed.

3. Defence witnesses

658. Prcać submits that all of the witnesses for the Defence were eyewitnesses,[1512] and also credible witnesses.[1513] He claims that the Trial Chamber erred in not explaining whether it believed

[1504] *Ibid.*, paras 478-481.
[1505] *Ibid.*, paras 485-490.
[1506] *Ibid.*, paras 491-506.
[1507] Prosecution Respondent's Brief, para. 8.119.
[1508] *Ibid.*, para. 8.117.
[1509] *Ibid.*, para. 8.120.
[1510] Prcać Appeal Brief, paras 495 and 498.
[1511] *Ibid.*, para. 502.
[1512] *Ibid.*, para. 515.
[1513] *Ibid.*, para. 512.

the testimony of witness Jesić and himself,[1514] and that it should have established the credibility of each particular witness for the Prosecution and for the Defence.[1515] The Prosecution responds that the Trial Chamber cannot be reasonably expected to map out in its Judgement its findings in relation to every single witness, that the Trial Chamber determined the relevance and probative value of the evidence given by many witnesses, and that, in this regard, evidence of witnesses can be procedural, substantive or crime-based.[1516]

659. The Appeals Chamber considers that the Trial Chamber was entitled to exercise discretion in its assessment of evidence presented by all parties to the case, in accordance with the relevant Rules of Procedure and Evidence. Whether all of the Defence or Prosecution witnesses were credible was a matter for the Trial Chamber to decide. The Trial Judgement need not contain findings as to the credibility of each and every witness heard.[1517] Determinations as to the credibility of witnesses are bound up in the weight afforded to their evidence, as is readily apparent from any Trial Judgement. The Appeals Chamber also notes that Prcać is not arguing that some or all of the Prosecution witnesses were not eye-witnesses or that they did not have first-hand knowledge about what they testified to before the Trial Chamber. Prcać has therefore failed to make out a factual or legal error under this sub-ground, and it is accordingly dismissed.

F. Fair trial and equality of parties (ground of appeal 5)

660. Prcać claims that there was a breach of his right to a fair trial since he was not given "even a minimum time and possibility to prepare for a proper cross-examination and presentation of evidence" of ten witnesses.[1518] Prcać raises three arguments under this ground relating to: (i) the principle of indictment and identity, (ii) the disclosure obligations of the Prosecution, and (iii) the motion by Prcać relating to the disclosure of evidence from the *Keraterm* case. In response, the Prosecution generally refers to the efforts undertaken by the Trial Chamber during the trial to rebut the arguments of Prcać. It also claims that Prcać's position is "inconsistent with the overtures and assurances he made to the Trial Chamber".[1519]

1. The principle of identity of the Indictment and the Judgement

661. The first argument of Prcać under this ground of appeal is that the Trial Chamber disregarded the "principle of indictment and identity" which was discussed in Part III of his Appeal

[1514] *Ibid.*, paras 516-521.
[1515] *Ibid.*, para. 525.
[1516] Prosecution Respondent's Brief, para. 8.122.
[1517] *See* above, para. 22.
[1518] Prcać Appeal Brief, para. 554.

Brief.[1520] The Appeals Chamber refers to its discussion under the relevant heading of this Judgement,[1521] and dismisses this argument.

2. Delay in disclosure and introduction of new witnesses

662. Prcać's second argument relates to the disclosure of evidence and the introduction of new witnesses.[1522] He claims that the Prosecution failed to disclose evidentiary material or did so with delay, and that it changed the list of witnesses and called witnesses who were not on the list.[1523] He uses the testimony of witness Azedin Oklopčić as an example, claiming that the evidence relevant to this witness was not disclosed to the Defence until the moment the witness completed his testimony.[1524] In addition, he submits that the Trial Chamber allowed the Prosecution to change the list of witnesses so that it could bring in eight new witnesses, among them Witness K and Nihad Haskić.[1525] Prcać submits that, as a result, the Defence was not able to prepare adequately for cross-examination.[1526]

663. The Prosecution responds that the issue of timely disclosure was raised during the trial proceedings, that Prcać agreed that the Prosecution had done all it was required to do, and that this issue cannot be raised on appeal.[1527] It further submits that the Trial Chamber was not one-sided in its approach to the issue of the evidence of witnesses, and it refers to requests from Prcać that were granted by the Trial Chamber.[1528] As to Azedin Oklopčić, the Prosecution asserts that Prcać's submission is not supported by the trial record, which reveals that Prcać, through his counsel and on behalf of the entire Defence, accepted to rectify the late disclosure of evidence through a three-day adjournment.[1529] The Prosecution submits that Prcać has not shown that the conclusion of the Trial Chamber as regards Witness K's testimony is unreasonable, or that his capacity to effectively cross-examine this witness was hampered in any way.[1530] The Prosecution also emphasizes that Prcać concedes that no harm was done to his case by the testimony of Nihad Haskić, and that there was therefore no prejudice to him since the evidence adduced did not incriminate Prcać.[1531]

[1519] Prosecution' Respondent's Brief, para. 8.126.
[1520] Prcać Appeal Brief, paras 530, 531.
[1521] *See* above, paras 615-618.
[1522] Prcać Appeal Brief, para. 537.
[1523] *Ibid.*, para. 535.
[1524] Prcać Appeal Brief, paras 537-540.
[1525] *Ibid.*, paras 547-548.
[1526] *Ibid.*, para. 545.
[1527] Prosecution Respondent's Brief, para. 8.130.
[1528] *Ibid.*, para. 8.131.
[1529] *Ibid.*, para. 8.133.
[1530] *Ibid.*, para. 8.134.
[1531] *Ibid.*, para. 8.135.

664. In addition, the Prosecution points out that during the proceedings the Trial Chamber ruled in its favour regarding the revision of the witness lists, and that the Appeals Chamber subsequently declined to consider the decision allowing the revision of the additional list of witnesses, noting the strictures imposed by the Trial Chamber on the Prosecution to guarantee fairness with regard to disclosure. [1532] The Prosecution argues that Prcać has not raised any new arguments which he did not raise at trial.[1533] The Prosecution submits that, according to the case-law of the Tribunal, any prejudice resulting from the revision of witness lists can be cured through the opportunity to cross-examine witnesses, and that in this case the opportunity was open to Prcać and indeed he seized it.[1534]

665. The Appeals Chamber considers that Prcać is bringing submissions which have already been dealt with either by the Trial Chamber or the Appeals Chamber during his trial.[1535] There is, furthermore, no merit in Prcać's submissions regarding delayed disclosure or the revision of witness lists. This sub-ground of appeal is dismissed.

3. The Trial Chamber failed to rule on a motion

666. Prcać argues that the Trial Chamber failed to rule on the motion of the Defence for access to trial transcripts from the *Sikirica* case.[1536] The Prosecution responds that the Trial Chamber specifically ruled on the oral motion (T. 12004-12006),[1537] and that Prcać has not demonstrated any prejudice or any error in law or in the exercise of the Trial Chamber's discretion.[1538] The Prosecution points out that the parties agreed in particular that only complex matters would be the subject of written decisions,[1539] and so the Trial Chamber exercised its discretion in a reasonable manner.[1540]

667. The Appeals Chamber notes that the oral motion of Prcać was raised in court on 28 May 2001, and that the Trial Chamber made an oral ruling on it immediately.[1541] Prcać has failed to show any error on the part of the Trial Chamber in connection with the oral motion in question. This sub-ground of appeal is therefore dismissed.

[1532] *Ibid.*, paras 8.137-8.138.
[1533] *Ibid.*, para. 8.143.
[1534] *Ibid.*, paras 8.144-8.150.
[1535] See Decision on Application for Leave to Appeal, 10 October 2000.
[1536] Prcać Appeal Brief, paras 551- 553.
[1537] Prosecution Respondent's Brief, para. 8.152.
[1538] *Ibid.*, para. 8.155.
[1539] Trial Judgement, para. 783.
[1540] Prosecution Respondent's Brief, para. 8.156.
[1541] T. 12003-12006.

VII. SENTENCING

A. General considerations

668. Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules contain general guidelines relating to sentencing. Trial Chambers are obliged to take these provisions into account when determining a sentence.[1542] However, they do not amount to "binding limitations on a Chamber's discretion to impose a sentence".[1543] While there is no definitive list of sentencing guidelines,[1544] the Appeals Chamber has previously noted:

> The combined effect of Article 24 of the Statute and Rule 101 of the Rules is that, in imposing a sentence, the Trial Chamber shall consider the following factors: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offences or totality of the conduct; (iii) the individual circumstances of the accused, including aggravating and mitigating circumstances; (iv) credit to be given for any time spent in detention pending transfer to the International Tribunal, trial, or appeal; and (v) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[1545]

669. Sentencing is essentially a discretionary process on the part of a Trial Chamber.[1546] The Appeals Chamber reiterates that "[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber".[1547] It also affirms that "[a]ppellate proceedings do not constitute a trial *de novo* and are, rather, of a 'corrective nature.'"[1548] It is for these reasons that the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless it can be shown that the Trial Chamber made a "discernible error",[1549] and, in so doing, ventured outside its discretionary framework.[1550] It is therefore incumbent upon the Appellants to establish such an error on the part of the Trial Chamber.

B. Kvočka Appeal against Sentence

670. The Trial Chamber sentenced Kvočka to seven years' imprisonment and Kvočka appeals this sentence. He puts forward three principal arguments. First, he challenges a number of the Trial

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[1542] *Čelebići* Appeal Judgement, para. 716; *Krstić* Appeal Judgement, para. 241; *Blaškić* Appeal Judgement, para. 678.
[1543] *Čelebići* Appeal Judgement, para. 780; *Krstić* Appeal Judgement, para. 241.
[1544] *Čelebići* Appeal Judgement, para. 715; *Furundžija* Appeal Judgement, para. 238; *Krstić* Appeal Judgement, para. 242.
[1545] *Blaškić* Appeal Judgement, para. 679 (footnotes omitted).
[1546] *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680.
[1547] *Tadić* Appeal Judgement, para. 64; *Čelebići* Appeal Judgement, para. 793.
[1548] *Kupreškić et al.* Appeal Judgement, para. 408.
[1549] *Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Čelebići* Appeal Judgement, para. 725; *Jelisić* Appeal Judgement, para. 99; *Krstić* Appeal Judgement, para. 242.
[1550] *Čelebići* Appeal Judgement, para. 725; *Blaškić* Appeal Judgement, para. 680.

Chamber's factual findings. Second, he argues that the Trial Chamber should have taken certain mitigating factors into account when it determined his sentence. Third, he considers that his sentence is disproportionate in comparison with others imposed by the Tribunal.

1. Factual inaccuracies in the Trial Judgement

671. Kvočka contends that there were inadequate facts to support the Trial Chamber's conclusion that Meakić was the commander of the camp and that he was the deputy commander. He further considers that these conclusions contradict others reached by the Trial Chamber.[1551] In addition, Kvočka contends that the Trial Chamber decided his sentence on the basis of these incorrect factual determinations.[1552] Kvočka submits that a re-evaluation of his conviction and sentence is also required in light of the Prosecution's admission that it did not prove certain murder, rape and sexual assault charges.[1553]

672. The Appeals Chamber considers that the issues raised relate primarily to Kvočka's conviction and not to the determination of his sentence, and notes at this stage that the arguments have already been considered and addressed elsewhere in this Judgement.[1554]

2. Failure to consider certain mitigating factors

673. Kvočka argues that he "did not pay much attention" to presenting mitigating circumstances at trial given that he was of the opinion that there was insufficient evidence on which he could be convicted.[1555] On appeal, he argues that the Appeals Chamber should "consider all extenuating circumstances" and "considerably mitigate" his sentence.[1556] He contends that insufficient weight was given *inter alia* to his "short stay in the camp … personality … actions, family and personal background".[1557] In response, the Prosecution contends that the decision not to present any mitigating evidence was Kvočka's litigation strategy and that his submission should be rejected.[1558]

674. The Appeals Chamber notes that mitigating evidence was in fact adduced before the Trial Chamber.[1559] As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such

[1551] Kvočka Appeal Brief, paras 167-170, 173-174, 179-181.
[1552] *Ibid.*, para. 170.
[1553] Kvočka Reply Brief, para. 115.
[1554] *See* above, paras 120-347.
[1555] Kvočka Appeal Brief, para. 175; Kvočka Reply Brief, para. 110.
[1556] Kvočka Appeal Brief, para. 178.
[1557] Kvočka Reply Brief, para. 116.
[1558] Prosecution Respondent's Brief, para. 9.6.
[1559] Trial Judgement, para. 697.

material should first be raised.[1560] Rule 85(A)(vi) provides that a Trial Chamber will consider "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more charges in the indictment". In this regard, the following passage from *Kupreškić* should be reiterated:

> If an accused fails to put forward any relevant information, the Appeals Chamber does not consider that, as a general rule, a Trial Chamber is under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time.[1561]

675. With respect to the weight to be afforded to mitigating circumstances, the jurisprudence of the International Tribunal is clear: the Trial Chamber has considerable discretion.[1562] It is incumbent upon the appellant to show that the Trial Chamber erred in exercising its discretion. Mere recital of mitigating factors without more does not suffice to discharge this burden.

676. Kvočka does raise three particular factors which he considers the Trial Chamber failed to take into account, namely, his character,[1563] his role as a conscientious and responsible police officer,[1564] and the reasons surrounding his dismissal from the camp.[1565]

(a) Character

677. The Trial Chamber clearly had Kvočka's personality in mind when sentencing him, since the Trial Judgement notes that "[t]he Trial Chamber is also persuaded that Kvočka is normally of good character."[1566] While no express reference is made to the Expert psychological reports, which Kvočka raises on appeal,[1567] the Appeals Chamber reiterates that detailed commentary on each and every piece of evidence taken into consideration is not required.[1568] The burden is on the appellant to show that the Trial Chamber made a discernible error; that burden has not been discharged. In the absence of such a showing, the Appeals Chamber will not intervene.

(b) Professional status

678. It is also evident from the Trial Judgement that the Trial Chamber took Kvočka's professional status into consideration in determining his sentence. The Trial Chamber notes that

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[1560] *Čelebići* Appeal Judgement, para. 790.
[1561] *Kupreškić et al.* Appeal Judgement, para. 414.
[1562] *Čelebići* Appeal Judgement, para. 777; *Kupreškić et al.* Appeal Judgement, para. 430; *Blaškić* Appeal Judgement, para. 685.
[1563] Kvočka Reply Brief, para. 114.
[1564] Kvočka Appeal Brief, para. 178.
[1565] *Ibid.*, para. 94.
[1566] Trial Judgement, para. 716.
[1567] Kvočka Reply Brief, para. 114.
[1568] *Kupreškić et al.* Appeal Judgement, para. 458.

Kvočka was described as "a competent, professional policeman" and states that "[h]is experience and integrity can be viewed as both mitigating and aggravating factors".[1569] The Trial Chamber, noting that Kvočka apparently did a fine job of maintaining law and order prior to working in the camp, evidently considered his previous integrity a mitigating circumstance, which it was entitled to do.[1570] The Trial Chamber, however, was also correct in considering this experience an aggravating factor, once Kvočka held a position of authority.[1571] Thus, the defendant has not shown any discernible error on the part of the Trial Chamber.

(c) Dismissal from the camp

679. Turning to Kvočka's dismissal from the camp, Kvočka alleges that the reason for his dismissal was his removing his two brothers-in-law from the camp, which, he argues, also subsequently gave rise to feelings of treachery.[1572] The Prosecution submits that this is not a mitigating factor. Indeed, it does not consider it to be of any relevance for sentencing purposes.[1573] In the view of the Appeals Chamber, the event underlying all of Kvočka's arguments is the assistance he rendered to his brothers-in-law. It is apparent that the Trial Judgement took this assistance into account, noting as it did that on a "few occasions he assisted detainees and attempted to prevent crimes", but that "the vast majority of these instances involved relatives or friends."[1574] No discernible error on the part of the Trial Chamber has thus been shown.

3. Comparison with other sentences

680. Kvočka submits that a comparison with other sentences imposed by the Tribunal leads to the conclusion that his sentence should be significantly reduced.[1575] In particular, mention is made of the *Čelebići* case, the *Aleksovski* case, and the *Krnojelac* case,[1576] and the length of time these individuals spent at the camps, the specific counts on which they were convicted and the corresponding sentences imposed on them.

681. Sentences of like individuals in like cases should be comparable and, in this regard, the Appeals Chamber "does not discount the assistance that may be drawn from previous decisions rendered".[1577] Indeed, the Appeals Chamber has observed that a sentence may be considered

[1569] Trial Judgement, para. 716.
[1570] *Cf. Erdemović* Sentencing Judgement II, para. 16(i).
[1571] *Jokić* Sentencing Judgement, paras 61-62.
[1572] Trial Judgement, para. 350; Kvočka Appeal Brief, para. 94.
[1573] Prosecution Respondent's Brief, para. 9.9.
[1574] Trial Judgement, para. 715.
[1575] *Kvočka* Reply Brief, para. 113.
[1576] *Kvočka* Reply Brief, footnote 56.
[1577] *Čelebići* Appeal Judgement, para. 721.

"capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences".[1578] The underlying question is whether the particular offences, the circumstances in which they were committed, and the individuals concerned can truly be considered "like". Any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual. Often, too many variables exist to be able to transpose the sentence in one case *mutatis mutandis* to another. Hence the Appeals Chamber has previously stated that:

> While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant that the similarities, and the mitigating and aggravating factors dictate different results.[1579]

Thus, while comparison with other sentences may be of assistance, such assistance is often limited.[1580] For these reasons, previous sentences imposed by the Tribunal and the ICTR are but one factor to be taken into account when determining the sentence.[1581]

682. Kvočka is under the impression that there are only two variables to be taken into account when determining the length of the sentence in so-called camp cases, namely, the length of time spent at the camp and the specific counts on which the individual was convicted. Kvočka is mistaken. While these are certainly two important factors to be considered in the determination of the sentence, a host of others also needs to be taken into account. Indeed, the very cases he cites emphasize the principle that the task of the Trial Chamber is to individualise the sentence so as to appropriately reflect the particular facts of the case and the circumstances of the individual perpetrator.[1582] It is the view of the Appeals Chamber that the cases Kvočka cites as similar to his own differ in significant ways such that the sentences handed down in those cases do not prove instructive. For example, in the *Aleksovski* case, in sentencing the accused to seven years' imprisonment, the Appeals Chamber stated that, had it not been for an element of double jeopardy in his case, and his being detained for a second time after a period of release, his sentence "would have been considerably longer".[1583] An element of double jeopardy was also present with respect to Mucić in the *Čelebići* case. Taking this into account, the Appeals Chamber recommended a sentence of ten years' imprisonment, suggesting that, in its absence, the sentence would have been

[1578] *Jelisić* Appeal Judgement, para. 96.
[1579] *Čelebići* Appeal Judgement, para. 719. *See* also *Furundžija* Appeal Judgement, para. 250.
[1580] *Čelebići* Appeal Judgement, para. 721.
[1581] *Krstić* Appeal Judgement, para. 248.
[1582] *Aleksovski* Trial Judgement, para. 242; *Čelebići* Appeal Judgement, paras 717, 821; *Krnojelac* Trial Judgement, para. 507. *See* also *Jelisić* Appeal Judgement, para. 101.
[1583] *Aleksovski,* Appeal Judgement, para. 190.

longer.[1584] The Trial Chamber subsequently sentenced Mucić to nine years.[1585] Further, with respect to the case of *Krnojelac*, the Appeals Chamber notes that, subsequent to the filing of briefs in the present case, Krnojelac's sentence was revised to fifteen years on appeal.[1586]

683. Since no discernible error on the part of the Trial Chamber has been detected, this ground of appeal must fail.

4. Implications of the findings of the Appeals Chamber

684. The Appeals Chamber has allowed in part some of Kvočka's grounds of appeal. However, the Appeal was not accepted in relation to counts in their entirety, but rather limited to certain incidents only. The overall picture of criminal conduct has not changed so substantially that an intervention of the Appeals Chamber is justified or warranted, in particular in the light of the gravity of the offences and Kvočka's important role in supporting and furthering the joint criminal enterprise.

C. Radić Appeal against Sentence

685. Radić received a sentence of imprisonment of twenty years. He appeals this sentence, and, in so doing, sets out five principal lines of argument. First, he argues that there is insufficient reasoning to justify his sentence. Second, he alleges factual inaccuracies on the part of the Trial Chamber. Third, he submits that the Trial Chamber erroneously considered certain factors as aggravating when determining the length of his sentence. Fourth, he contends that insufficient weight was afforded to certain mitigating factors. Finally, he considers that, comparing his sentence to previous sentences imposed by the Tribunal, his sentence should be reduced.

1. Insufficient reasoning on the part of the Trial Chamber

686. Radić argues that the Trial Chamber did not adequately explain the reasons for his being sentenced to a term of twenty years in prison.[1587] The Prosecution responds that the Trial Chamber gave a well-reasoned basis for Radić's sentence, that Radić has not shown that the Trial Chamber applied incorrect criteria, and that Radić failed to identify any discernible error on the part of the Trial Chamber.[1588]

[1584] *Čelebići* Appeal Judgement, para. 853.
[1585] *Čelebići* Sentencing Judgement, para. 44.
[1586] *Krnojelac* Appeal Judgement, para. 264.
[1587] Radić Appeal Brief, para. 340.
[1588] Prosecution Respondent's Brief, para. 9.45.

687. The Appeals Chamber observes that Radić simply asserts that the Trial Chamber failed to provide sufficient reasoning for his sentence. Save for the particular arguments raised by Radić which are considered below, this global ground of appeal will not be considered for lack of serious argument.

2. Factual inaccuracies

688. Radić contends that there was no evidence upon which the Trial Chamber could conclude that he regarded the abuses as entertainment.[1589] He further contends that, if he committed sexual crimes "for his own pathetic gain", as found to be the case by the Trial Chamber,[1590] this was not a reason for holding him liable.[1591] To these contentions, the Prosecution counters that it was reasonable for the Trial Chamber to reach such a conclusion,[1592] and that Radić's argument confuses motive with intent.[1593]

689. The Appeals Chamber considers that the arguments raised relate to Radić's conviction and not his sentence. Nevertheless, since the matter impacts upon sentencing, it notes in passing that it was open to the Trial Chamber, on the basis of the evidence it heard, to draw the inference that Radić "relished" the criminal activity and regarded the abuses as "entertainment".[1594] The former inference may be drawn from the circumstances surrounding Radić's personal involvement in various crimes involving sexual violence as described in paragraphs 546-561 of the Trial Judgement. The latter may be inferred from the instances in which Radić was said to have laughed at, or otherwise enjoyed, abuses that were being committed.[1595] The Appeals Chamber further notes that the jurisprudence of the Tribunal is clear that "crimes against humanity can be committed for purely personal reasons".[1596]

3. Erroneous consideration of aggravating factors

690. Radić questions the reasoning behind the inclusion of certain facts within the sentencing section of the Trial Judgement. He argues that, if it is true that the Trial Chamber regarded them as crucial only for the verdict and not as aggravating factors in the determination of his sentence, then the reason for their being placed within the portion of the judgement devoted to sentencing is

[1589] Radić Appeal Brief, para. 338.
[1590] Trial Judgement, para. 740.
[1591] Radić Appeal Brief, para. 337.
[1592] Prosecution Respondent's Brief, para. 9.40.
[1593] *Ibid.*, para. 9.39.
[1594] Trial Judgement, para. 741.
[1595] Witness AN, T. 4407-4408; Omer Mešan, T. 5328.
[1596] *Tadić* Appeal Judgement, para. 255.

unclear.[1597] The Prosecution considers Radić to be raising an argument of "double-punishment" and submits that he "misunderstands the import of these facts".[1598] It argues that the Trial Chamber did not punish Radić twice but merely took his role into account when determining the gravity of his crimes.[1599]

691. The Appeals Chamber considers Radić to be misreading the relevant paragraphs. Paragraph 707 of the Trial Judgement commences:

> The Trial Chamber takes account of the fact that most of the crimes were committed within the context of participating in a joint criminal enterprise. Several aspects of this case were critical to our decision that the five defendants did participate significantly and unlawfully in a persecutory system against non-Serb detainees, and these aspects deserve recalling, even though *they will not be considered as aggravating circumstances*.[1600]

The Trial Chamber explicitly states that the circumstances recalled will not be treated as aggravating factors. As such, the question of "double-punishment" does not arise. The Trial Chamber is doing no more than applying the sentencing principles it earlier identified to the shared characteristics of the defendants before considering each of them individually.

4. Insufficient weight afforded to mitigating factors

692. Radić contends that the Trial Chamber gave inadequate weight to the assistance he rendered to "a large number of people".[1601] In response, the Prosecution argues that the Trial Chamber did consider these acts as mitigating factors, but also found that they were limited to people from his village and that they were sometimes made conditional on sexual favours.[1602] Radić argues that the significance of his acts should not be diminished by reason of the fact that a great number of the people he assisted came from the place in which he worked.[1603]

693. The Appeals Chamber reiterates that, while a Trial Chamber is obliged to take account of mitigating circumstances when determining the sentence, the weight to be afforded to those circumstances is a matter within its discretion.[1604] The Trial Chamber noted the "few occasions" on which Radić "assisted detainees and attempted to prevent crimes", but also noted that "the vast majority of these instances involved detainees from the town where he had worked as a policeman

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[1597] Radić Appeal Brief, paras 323-325.
[1598] Prosecution Respondent's Brief, para. 9.35.
[1599] *Ibid.*
[1600] Trial Judgement, para. 707 (emphasis added).
[1601] Radić Appeal Brief, paras 332-335, 342-343.
[1602] Prosecution Respondent's Brief, paras 9.42-9.44.
[1603] Radić Appeal Brief, para. 335.
[1604] *Čelebići* Appeal Judgement, para. 777; *Kupreškić et al.* Appeal Judgement, para. 430.

for 20 years".[1605] It is thus clear that the Trial Chamber took this mitigating factor into consideration when determining the length of Radić's sentence. In so considering, the Trial Chamber was entitled to afford as much, or as little, weight to this mitigating factor as it deemed appropriate. This is particularly so given its latter finding. As has been noted previously, selective assistance is "less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes".[1606] It is less decisive still when those victims are assisted because they are known to the accused or they share similar characteristics with the accused. This suggests that they are being helped, not because they are innocent victims, but because the accused considers them to be "like" himself. The thrust of Radić's argument is that he helped many detainees as opposed to just a few as found by the Trial Chamber. He does not offer any evidence in support of his argument and fails to identify any instance in which the Trial Chamber ignored the help he offered to a detainee. In the absence of such supporting facts, Radić's argument is without substance.

5. Comparison of sentences

694. Radić contends that his sentence is disproportionate to others imposed by the Tribunal in cases he considers to be similar to his. He argues that the Trial Chamber found him to be a guard shift leader engaged in a joint criminal enterprise and that such a determination should lead to a sentence of five to seven years.[1607] He further argues that the difference between his sentence and those of his co-defendants is excessive.[1608] To this, the Prosecution responds that the Trial Chamber was not under an obligation to compare sentences in other cases and, in any event, numerous differences exist between the case of Radić and others he cites.[1609]

695. The particular cases Radić cites are the *Čelebići* case in which he notes that Delić and Landžo were sentenced to 20 and 15 years respectively for murders,[1610] the *Furundžija* case where he observes the accused was sentenced to eight years for a violation of the laws or customs of war,[1611] the *Aleksovski* case, in which he states that the Trial Chamber pronounced seven years for command responsibility,[1612] and the *Erdemović* case, in which he contends that a sentence of five

[1605] Trial Judgement, para. 739.
[1606] *Čelebići* Appeal Judgement, para. 776 citing *Blaškić* Trial Judgement, para. 781.
[1607] Radić Appeal Brief, para. 329.
[1608] *Ibid.*, paras 352-353.
[1609] Prosecution Respondent's Brief, paras 9.48-9.49.
[1610] Radić Appeal Brief, para. 356. Delić's sentence was subsequently reduced to 18 years: *Čelebići* Sentencing Judgement, para. 44.
[1611] Radić Appeal Brief, para. 357. Furundžija was also sentenced to 10 years for torture as a violation of the laws or customs of war: *Furundžija* Trial Judgement, Disposition.
[1612] Radić Appeal Brief, para. 358.

years was meted out for the murder of between 70 and 100 people.[1613] In addition, Radić compares the sentences imposed in the *Tadić* case,[1614] the *Todorović* case,[1615] the *Krnojelac* case,[1616] and the *Sikirica* case.[1617] To further buttress his argument, Radić refers to the sentences of his co-accused. He compares his sentence to that of Kos who was sentenced to six years' imprisonment, Kvočka who was sentenced to seven years and Prcać who was sentenced to five years.[1618]

696. As was stated in the case of Kvočka, any given case contains a multitude of variables.[1619] However, instead of considering the host of variables at play in each of the cases he cites, Radić concentrates only on those variables that are similar to his case. In doing so, he neglects the numerous variables that differ. To focus on one or two variables that are similar to the exclusion of numerous others that differ will not suffice to make the cases or the sentences analogous. The Appeals Chamber does not propose to provide a detailed analysis of the similarities and differences between Radić's case and each of the other cases he mentions. As illustrations, it is enough to note that the mitigating circumstance of duress makes the case of *Erdemović* easily distinguishable,[1620] and that in the *Todorović* and *Sikirica* cases, all individuals concerned pleaded guilty to one count of crimes against humanity.[1621] The significant differences between the cases Radić cites and his own sufficiently distinguish each of them and therefore their sentences.

697. The same reasoning applies to a comparison with the sentences imposed on Radić's co-defendants. Although he argues that the difference of thirteen and fourteen years between his own sentence and those of Kvočka and Kos respectively due to his role in rape and sexual violence is excessive,[1622] other significant differences exist. One of the most significant is the fact that Kvočka, Kos and Prcać were not convicted of personally committing any of the crimes themselves. Radić, however, was convicted of personally "committing rape and other forms of sexual violence against several women detained in the camp".[1623] Furthermore, the Trial Chamber observed:

> By contrast to his colleagues Kvočka and Prcać, professional policemen like him who were asked to serve in the camp and who ignored and tolerated the crimes, by all indications Radić relished

[1613] *Ibid.*, para. 348.
[1614] *Ibid.*, paras 349-350, 355.
[1615] *Ibid.*, para. 347.
[1616] *Ibid.*, para. 359.
[1617] *Ibid.*, paras 330, 354, 359.
[1618] *Ibid.*, paras 352, 359.
[1619] *See* above, paras 681-682.
[1620] *Erdemović* Sentencing Judgement II, para. 17.
[1621] *Todorović* Sentencing Judgement, para. 4; *Sikirica et al.* Sentencing Judgement, paras 12, 14.
[1622] Radić Appeal Brief, paras 352-353.
[1623] Trial Judgement, para. 740.

> and actively encouraged criminal activity in the camp. He appeared to regard the abuses as entertainment.[1624]

The jurisprudence of this Tribunal and that of the ICTR is clear that "the informed, willing or enthusiastic participation in crime" as well as "the sexual, violent, and humiliating nature of the acts" may be considered aggravating factors.[1625] As such, the cases of Kvočka, Kos and Prcać cannot be treated as alike for the purposes of sentencing.

698. Given that the Trial Chamber did not err in its determination of Radić's sentence, this ground of appeal is dismissed.

6. Implications of the findings of the Appeals Chamber

699. Given the fact that the Appeals Chamber did not allow any of Radić's grounds of appeal, his sentence is affirmed.

D. Žigić Appeal against Sentence

700. Žigić argues that the Trial Chamber erred in sentencing him to 25 years' imprisonment. He challenges a number of the Trial Chamber's factual holdings and argues that it failed to take a number of mitigating circumstances into account.

1. Factual inaccuracies

701. Žigić challenges the basis on which he is described in the Trial Judgement as "a petty criminal". He argues that such a description is groundless.[1626] The Appeals Chamber observes that the reference to Žigić's prior record was introduced simply by way of background. It was in no way considered an aggravating factor in sentencing. This is evident from a comparison of the relevant passage with the corresponding passages for each of the other defendants as well as the subsequent reasoning of the Trial Chamber with regard to the existence of and weight to be given to any aggravating factors in Žigić's case.[1627]

702. Further, Žigić submits that he never used his weapon, showing that he did not possess the direct intent to kill anyone. He thus claims his *mens rea* was not established.[1628] In the view of the

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[1624] *Ibid.*, para. 741.
[1625] *Blaškić* Appeal Judgement, para. 686. *See* also *Čelebići* Trial Judgement, para. 1264: "The most disturbing, serious and thus, an aggravating aspect of these acts, is that Mr. Delić apparently enjoyed using this device upon his helpless victims" (upheld on appeal, *Čelebići* Appeal Judgement, para. 825); *Kayishema and Ruzindana* Appeal Judgement, para. 351.
[1626] Žigić Appeal Brief, para. 421, referring to Trial Judgement, para. 746.
[1627] Trial Judgement, paras 712 (Kvočka), 719 (Prcać), 727(Kos), 736 (Radić).
[1628] Žigić Appeal Brief, para. 426.

Prosecution, this is a challenge to Žigić's conviction rather than his sentence.[1629] The Appeals Chamber finds the argument of Žigić to be without merit both as a matter of fact and as a matter of law. As a matter of fact, the Trial Chamber found that, at least on one occasion, Žigić used his gun to beat a detainee, wounding him critically when the gun went off.[1630] As a matter of law, Žigić confuses intent to commit with means of commission. The Trial Chamber found that, even when Žigić did not use his gun, he had the necessary *mens rea* for murder in a number of cases. No discernible error in the reasoning of the Trial Chamber has been identified.

2. Failure to consider certain mitigating factors

(a) Role in the commission of crimes

703. Žigić argues that since he was not the sole perpetrator in any of the crimes, save for the beating of Hasan Karabasić, this should be treated as a mitigating factor.[1631] In the view of the Appeals Chamber, however, the commission of a crime together with other persons in most cases will not be considered less serious than the commission of a crime on one's own. This does not necessarily mean that participation in a multi-perpetrator offence is an aggravating circumstance, but it can in no way be considered a mitigating factor.

(b) Medical condition and intoxication

704. Žigić also submits that the injury to, and amputation of, his forefinger should be considered a mitigating circumstance. He argues that an expert-witness described it as a "serious injury" and that, as a result of a complication, his life was in danger and he was hospitalized for a period of six days.[1632] Žigić asserts that the injury was at its peak during the time-period covered by the Indictment.[1633] He contends that his resulting physical and mental states "directly influenced" the commission of the crimes and were the source of his criminal motives.[1634] It was allegedly the pain resulting from his injury, together with his previous addiction, that also caused him to consume extreme amounts of alcohol.[1635]

705. In response, the Prosecution submits that the Trial Chamber heard overwhelming evidence that Žigić severely beat, tortured, and killed detainees even after his injury, and that he has not

[1629] Prosecution Respondent's Brief, para. 9.57.
[1630] Trial Judgement, para. 650.
[1631] Žigić Appeal Brief, para. 425.
[1632] *Ibid.*, paras 412-413.
[1633] *Ibid.*, para. 416.
[1634] *Ibid.*, para. 418.
[1635] *Ibid.*, para. 419.

shown a discernible error on the part of the Trial Chamber.[1636] With respect to the intoxication argument, the Prosecution recalls the finding of the Trial Chamber that Žigić did not plead intoxication with sufficient specificity,[1637] and submits that he has not discharged his burden of proving intoxication as a mitigating circumstance.[1638]

706. It is the opinion of the Appeals Chamber that the Trial Chamber did not err in its consideration of this matter. The Trial Chamber expressly noted Žigić's submissions on this ground,[1639] *prima facie* proof they were therefore taken into account in determining his sentence.[1640] Žigić has not shown the Appeals Chamber anything that would lead it to disturb this presumption. For example, there is no evidence to support the proposition that any pain resulting from Žigić's injury led to an impairment of his mental state. Further, according to Žigić, the initial injury and amputation occurred on 29 May 1992 and "re-amputation" on 21 June 1992.[1641] Yet Žigić has been convicted of offences taking place as late as 5-6 August 1992.[1642] Thus, the injury to his finger would not seem to bear any relation to his activities in the camps.

707. The Appeals Chamber now turns to Žigić's submission that his extreme consumption of alcohol should be considered a mitigating circumstance. The jurisprudence of this Tribunal is clear that voluntary intoxication is not a mitigating factor.[1643] In this regard, the Trial Chamber correctly stated:

> [W]hen mental capacity is diminished due to use of alcohol or drugs, account must be taken of whether the person subjected himself voluntarily or consciously to such a diminished mental state. While a state of intoxication could constitute a mitigating circumstance if it is forced or coerced, the Trial Chamber cannot accept Zigic's contention that an intentionally procured diminished mental state could result in a mitigated sentence.[1644]

708. On appeal, the argument of Žigić seems to be that his intoxication was in fact involuntary. He claims that the pain resulting from his injury coupled with his previous addiction "caused" his "extreme consumption of alcohol".[1645] The Appeals Chamber notes that Žigić did not plead involuntary intoxication at trial. In any event, as a potential mitigating circumstance, it is incumbent upon the defendant to prove, on the balance of probabilities, that the consumption of alcohol was indeed involuntary. Žigić did not specify the particular incidents at which he had been under the

[1636] Prosecution Respondent's Brief, para. 9.60.
[1637] *Ibid.*, para. 9.61.
[1638] *Ibid.*
[1639] Trial Judgement, para. 697.
[1640] *Kupreškić et al.* Appeal Judgement, para. 430.
[1641] Žigić Appeal Brief, para. 412.
[1642] Trial Judgement, paras 677-681.
[1643] *Simić* Sentencing Judgement, para. 74; *Todorović* Sentencing Judgement, para. 94, footnote 98.
[1644] Trial Judgement, para. 706.
[1645] Žigić Appeal Brief, para. 419.

influence of alcohol either at trial[1646] or in his Appeal Brief. He argues neither that he was permanently under the influence of alcohol, nor that his mental powers were impaired by its chronic abuse. Further, the Appeals Chamber notes that he has not presented any evidence to show that his intoxication was in fact involuntary. Žigić has not, therefore, succeeded in discharging his burden.

(c) Voluntary surrender

709. Žigić contends that his surrender to the Tribunal while in prison in Banja Luka should be considered a mitigating factor. He argues that the authorities of the Republika Srpska would not have extradited him to the Tribunal and that the indictment against him might have been withdrawn.[1647] The Prosecution considers such arguments to be mere speculation on the part of Žigić and thus holds that they cannot form the basis of any appeal.[1648]

710. Voluntary surrender may constitute a mitigating circumstance.[1649] However, the Trial Chamber did not consider Žigić's surrender to be a mitigating circumstance "[d]ue to the fact that Žigić was imprisoned in Banja Luka at the time he surrendered to the Tribunal".[1650] The issue that is raised on these facts is whether, in light of Žigić's incarcerated state, his surrender really can be described as voluntary.

711. The Appeals Chamber considers Žigić's argument that the indictment against him might have been withdrawn to be purely speculative. As a potential mitigating factor, it is incumbent upon the defendant to establish on the balance of probabilities that such an act would have happened. The defendant has not satisfied this burden.

712. Nevertheless, the Appeals Chamber notes that the issue of the withdrawal of the indictment by the Tribunal is distinct from the argument that the authorities of Republika Srpska would not have extradited Žigić to the Tribunal. The lack of cooperation between the authorities of Republika Srpska and the Tribunal during the period under consideration is well known.[1651] In *Simić,* the Trial Chamber recognized that:

[1646] Trial Judgement, para. 616.
[1647] Žigić Appeal Brief, para. 422.
[1648] Prosecution Respondent's Brief, para. 9.63.
[1649] *Kunarac et al.* Trial Judgement, para. 868; *Kupreškić* Appeal Judgement, para. 430; *Blaškić* Appeal Judgement, para. 702.
[1650] Trial Judgement, para. 746.
[1651] *See e.g.*, Fourth Annual Report of the Tribunal, U.N. Doc. A/52/375-S/1997/729, covering the period 1 August 1996 to 31 July 1997, para. 184: "there are the two entities of Bosnia and Herzegovina – the Federation of Bosnia and Herzegovina and Republika Srpska – and the Federal Republic of Yugoslavia that have done little or nothing to cooperate with the Tribunal – they have neither enacted legislation nor arrested any indictees. Indeed Republika Srpska and the Federal Republic of Yugoslavia do not admit their duty to arrest and deliver accused persons to The Hague.

> Milan Simić's surrender may have had an impact on the manner in which the Tribunal was viewed by officials and ordinary citizens in the Republika Srpska, at a time when relations between the Tribunal and the Republika Srpska were beginning to move from non-cooperation to limited co-operation.[1652]

The Appeals Chamber notes that Žigić's surrender to the Tribunal took place just some two months later than Milan Simić's surrender.[1653] Further, although the authorities of Republika Srpska might have co-operated in the transfer of Žigić from Banja Luka to the Tribunal, there is a vast difference between facilitating the transfer of detained individuals to the Tribunal and initiating the transfer of indictees who were never detained locally. The Appeals Chamber thus considers that Žigić has satisfied his burden.

713. For these reasons, the Appeals Chamber finds that the Trial Chamber committed an error when it declined to consider Žigić's voluntary surrender to the Tribunal a mitigating factor. However, given the fact that Žigić was in prison at the time of his surrender,[1654] the Appeals Chamber does not consider that significant weight should be given to this mitigating circumstance.

(d) Remorse

714. Žigić states that he confessed to certain crimes and "publicly expressed [his] regret and apology" to the victims of those crimes.[1655] He asserts that the Trial Chamber failed to take this "significant" mitigating factor into account when determining the length of his sentence.[1656] The Prosecution counters that Žigić's confession was "overwhelmingly contradicted" by testimony from victims and witnesses and that his expression of remorse was "significantly limited".[1657] It further responds that Žigić has not shown that the Trial Chamber made a discernible error by failing to consider his confession a mitigating circumstance.[1658] In his reply, Žigić submits that by giving little weight to his confession, the message being sent out is that no one should confess since a confession only facilitates conviction.[1659]

They flatly deny all cooperation in delivering indictees." This should be compared with the Fifth Annual Report of the Tribunal, U.N. Doc. A/53/219-S/1998/737, covering the period 1 August 1997 to 27 July 1998, para. 216: "following the political changes in Republika Srpska and the appointment of a new Prime Minister, the authorities of that entity have shown a willingness to cooperate with the Tribunal. Prime Minister Dodik has urged indicted individuals to surrender to the Tribunal, while law enforcement agencies within the entity have assisted the Prosecutor in carrying out her work."

[1652] *Simić* Sentencing Judgement, para. 107.

[1653] Simić voluntarily surrendered to the Tribunal on 14 February 1998 (*Simić* Sentencing Judgement, para. 2); Žigić was transferred to the Tribunal on 16 April 1998 (Trial Judgement, para. 749).

[1654] Trial Judgement, para. 746.

[1655] Žigić Appeal Brief, paras 428, 429.

[1656] *Ibid.*

[1657] Prosecution Respondent's Brief, para. 9.62.

[1658] *Ibid.*

[1659] Žigić Brief in Reply, para. 50.

715. The Appeals Chamber observes that acts or expressions evidencing real and sincere remorse may be treated as a mitigating circumstance.[1660] It also notes that the Trial Chamber did not mention remorse as a mitigating circumstance it took into account when deciding upon the sentence. However, the Trial Chamber has discretion as regards the factors it considers in mitigation,[1661] the weight it attaches to a particular mitigating factor,[1662] and the discounting of a particular mitigating factor.[1663] A discernible error on the part of the Trial Chamber has to be demonstrated in order for the Appeals Chamber to intervene. The Appeals Chamber notes the limited and qualified nature of Žigić's remorse. Žigić confessed that he kicked Sead Jusufagić once,[1664] and that he hit Witness AK once for which he expressed some remorse.[1665] This expression of remorse covers only a fraction of the crimes for which Žigić has been convicted. As such, the Appeals Chamber considers that it was within the Trial Chamber's discretion not to consider Žigić's remorse as a mitigating circumstance.

3. Implications of the findings of the Appeals Chamber

716. The Appeals Chamber has overturned Žigić's conviction for the crimes committed in the Omarska camp in general, and has found that the Trial Chamber erred in not considering Žigić's voluntary surrender as a mitigating circumstance. However, the Appeals Chamber recalls that the latter factor should be given little weight, because Žigić was actually in prison in the Republika Srpska at the time of his surrender.[1666] With regard to the reversed conviction for the crimes committed in the Omarska camp generally, the Appeals Chamber notes that no conviction for crimes against individual victims under the relevant counts has been reversed. It appears to the Appeals Chamber that the Trial Chamber gave only little weight to Žigić's conviction for crimes committed in the Omarska camp generally. In particular, the Trial Chamber did not refer to any particular incident supporting this conviction; rather, it stressed the crimes physically committed by Žigić.[1667] The Appeals Chamber notes that Žigić, of all the Appellants, was the one who physically committed the highest number of crimes. The Appeals Chamber further notes that Žigić, apart from a minor function in the Keraterm camp, held no official function in the camps, but entered the camps for the sole purpose of abusing detainees.[1668] The Appeals Chamber especially wishes to

[1660] *Blaškić* Appeal Judgement, para. 705; *Erdemović* Sentencing Judgement II, para. 16(iii); *Todorović* Sentencing Judgement, para. 89; *Simić* Sentencing Judgement, para. 92; *Obrenović* Sentencing Judgement, para. 121.
[1661] *Čelebići* Appeal Judgement, para. 780.
[1662] *Ibid.*, para. 777; *Kupreškić et al.* Appeal Judgement, para. 430.
[1663] *Krstić* Appeal Judgement, para. 258 (in the context of aggravating factors).
[1664] Trial Judgement, para. 618.
[1665] *Ibid.*, para. 594.
[1666] *See* above, para. 711.
[1667] *Cf.* Trial Judgement, paras 689-692, 747-748.
[1668] Trial Judgement, para. 747.

emphasize the seriousness and gravity of the crimes committed by Žigić, and thus affirms the sentence imposed by the Trial Chamber.

E. Prcać Appeal against Sentence

717. Prcać was sentenced to five years in prison by the Trial Chamber. In appealing this sentence, Prcać challenges certain factual holdings of the Trial Chamber and argues that it failed to take a number of mitigating circumstances into account when determining his sentence. He asserts that, as a result, the sentence imposed by the Trial Chamber was too severe.[1669]

1. Factual challenges

718. Prcać submits that there is no proof that he held the post of administrative assistant to the camp commander and that there is no evidence to show he was responsible for participation in a joint criminal enterprise. The Appeals Chamber considers that the issue raised is one relating to conviction and not sentence. As such, it refers to its earlier discussion of the matter.[1670]

2. Failure to consider certain mitigating factors

(a) Personal circumstances

719. Prcać contends that, in determining his sentence, the Trial Chamber did not take into account his personal circumstances, namely, his age, health problems, family circumstances, past history and assistance to "many detainees" in the Omarska camp.[1671] For its part, the Prosecution submits that the Trial Chamber did consider the personal circumstances of the accused and that Prcać has not shown a discernible error on the part of the Trial Chamber.[1672]

720. The Appeals Chamber observes that the Trial Judgement expressly refers to the assistance provided by Prcać. Paragraph 723 of the Trial Judgement states, "On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved former colleagues or friends." The Trial Judgement also refers to the personal circumstances of the defendant, paragraph 724 taking note of the fact that "Prcać is the oldest of the defendants, he is in ill health, and he has two disabled children."[1673] It is therefore clear that the Trial Chamber took into account the personal circumstances raised by Prcać on appeal.

[1669] Prcać Appeal Brief, paras 561-564.
[1670] *See* above, paras 601-667.
[1671] Prcać Appeal Brief, para. 562.
[1672] Prosecution Respondent's Brief, para. 9.22-9.23.
[1673] Trial Judgement, para. 724.

(b) Co-operation

721. Prcać further argues that his co-operation with the Prosecution and the Tribunal was not properly taken into account by the Trial Chamber. In particular, he mentions the renunciation of his right to be present at his hearings when he was ill so as not to postpone his trial, his interview with the Prosecution before it had disclosed all its evidence, his early submission of evidence, his truthfulness with the Tribunal and his inability to testify not by choice but "for reasons of health".[1674] The response of the Prosecution is to challenge all of Prcać's arguments. It submits that the issue of the renunciation of the right to be present during all trial proceedings was not raised as a mitigating factor at trial and therefore cannot be raised on appeal,[1675] that the Trial Chamber did take Prcać's voluntary interview into consideration,[1676] and that simply meeting one's disclosure obligations earlier than required should not be considered in mitigation.[1677] The Prosecution also submits that Prcać is asking the Appeals Chamber to speculate that it was his health that prevented him from testifying at trial and that, in any event, being so prevented from testifying in one's own defence does not amount to substantial co-operation.[1678]

722. Rule 101(B) of the Rules provides that in determining the sentence, the Trial Chamber shall take into account *inter alia* "any mitigating circumstances including the *substantial* cooperation with the Prosecutor by the convicted person before or after conviction".[1679] It is for the Trial Chamber to assess whether the co-operation of the defendant is substantial,[1680] and the conclusion of the Trial Chamber will only be disturbed if it made a discernible error thereby stepping outside the bounds of its discretion.

723. The Appeals Chamber observes that the Trial Judgement explicitly took "note of the fact that Prcać voluntarily gave a statement to the Prosecution".[1681] It further referred to Prcać's submission on co-operation,[1682] thus constituting "*prima facie* evidence that [it was] taken into account".[1683] No reasoned arguments have been adduced in support of the proposition that insufficient weight was attached to these considerations. Further, it is clear that the Trial Chamber could not have erred in failing to consider the factors being raised by Prcać here for the first time.

[1674] Prcać Appeal Brief, para. 563.
[1675] Prosecution Respondent's Brief, para. 9.27.
[1676] *Ibid.*, para. 9.28.
[1677] *Ibid.*, para. 9.29.
[1678] *Ibid.*, para. 9.30.
[1679] Emphasis added.
[1680] *Jelisić* Appeal Judgement, para. 121.
[1681] Trial Judgement, para. 722.
[1682] *Ibid.*, para. 697.
[1683] *Kupreškić et al.* Appeal Judgement, para. 430.

Since Prcać has not shown the Appeals Chamber any reason to displace the findings of the Trial Chamber, this argument must be rejected.

724. For these reasons, it has been found that the Trial Chamber did not err in sentencing Prcać to five years' imprisonment. As a result, this ground of appeal must be dismissed.

3. Implications of the findings of the Appeals Chamber

725. Given the fact that the Appeals Chamber did not allow any of Prcać's grounds of appeal, his sentence is affirmed.

VIII. DISPOSITION

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

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

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

SITTING in open session;

UNANIMOUSLY

WITH RESPECT TO KVOČKA'S GROUNDS OF APPEAL:

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

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

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

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

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

WITH RESPECT TO RADIĆ'S GROUNDS OF APPEAL:

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

WITH RESPECT TO ŽIGIĆ'S GROUNDS OF APPEAL:

ALLOWS Žigić's grounds of appeal concerning his responsibility for crimes committed in the Omarska camp generally, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 1 (persecution as a crime against humanity) in so far as this conviction relates to the crimes committed in the Omarska camp generally, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 7 (murder as a violation of the laws or customs of war) in so far as this conviction relates to the crimes committed in the Omarska camp generally, **REVERSES** his conviction pursuant to Article 7(1) of the Statute under count 12 torture as a violation of the laws or customs of war) in so far as this conviction relates to the crimes committed in the Omarska camp generally, and **AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 1 in so far as his conviction relates to the crimes committed against Bećir Medunjanin, Asef Kapetanović, Witnesses AK, AJ, T, Abdulah Brkić, Emir Beganović, Fajzo Mujkanović, Witness AE, Redžep Grabić, Jasmin Ramadonović, Witness V, Edin Ganić, Emsud Bahonjić, Drago Tokmadžić and Sead Jusufagić, **AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 7 in so far as his conviction relates to the crimes committed against Bećir Medunjanin, Drago Tokmadžić, Sead Jusufagić and Emsud Bahonjić and **AFFIRMS** his conviction pursuant to Article 7(1) of the Statute under count 12 in so far as his conviction relates to the crimes committed against Abdulah Brkić, Witnesses T, AK, AJ, Asef Kapetanović, Fajzo Mujkanović, Witness AE, Redžep Grabić and Jasmin Ramadanović;

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

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

WITH RESPECT TO PRCAĆ'S GROUNDS OF APPEAL:

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

and finally,

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

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

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

Mohamed Shahabuddeen Presiding	Fausto Pocar	Florence Ndepele Mwachande Mumba
Mehmet Güney	Inés Mónica Weinberg de Roca	

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

Dated this twenty-eighth day of February 2005,
At The Hague,
The Netherlands

[Seal of the International Tribunal]

IX. SEPARATE OPINION OF JUDGE WEINBERG DE ROCA

1. I dissented in part from the *Blaškić* Appeal Judgement because I considered that the Appeals Chamber reformulated the standard of appellate review employed in all previous cases and developed a novel methodology which limited the Appeals Chamber's access to the totality of the evidence in the Record on Appeal.[1684] In the *Kordić and Čerkez* Appeal Judgement, the Appeals Chamber reiterated the standard and methodology articulated in the *Blaškić* Appeal Judgement, but, as I pointed out in my separate opinion,[1685] failed to apply them. In the instant case, the Appeals Chamber again invokes the *Blaškić* standard,[1686] yet it appears to renege on that standard thereafter[1687] and does not implement the *Blaškić* standard in reaching its findings.[1688]

2. While I appreciate that, in the end, the Appeals Chamber does not apply the *Blaškić* standard in the present case, it should not have been reasserted at paragraph 426 of the Judgement. The *Blaškić* Appeal Judgement is a singular departure from well-established judicial precedent.[1689]

[1684] *Blaškić* Appeal Judgement, Partial Dissenting Opinion of Judge Weinberg de Roca ("Partially Dissenting Opinion in the *Blaškić* Appeal").

[1685] *Kordić and Čerkez* Appeal Judgement, Separate Opinion of Judge Weinberg de Roca ("Separate Opinion in the *Kordić and Čerkez* Appeal").

[1686] Judgement, para. 426.

[1687] Judgement, para. 428:

> Therefore, the Appeals Chamber will uphold a conviction on the basis that a reasonable trier of fact could have arrived at a conviction on the evidence on the trial record in two cases:
>
> (i) if there is no additional evidence admitted;
>
> (ii) if additional evidence is admitted, but upon further review is found to be not credible or irrelevant, so that it could not have been a decisive factor in reaching the decision at trial.[Footnote omitted]

Paragraph 428(ii) thus suggests a more deferential approach to the Trial Chamber's findings of fact than the approach outlined at para. 24(c)(ii) of the *Blaškić* Appeal Judgement and apparently endorsed at para. 426 of the present Judgement.

[1688] Judgement, paras. 494-499.

[1689] At paragraph 426 of the present Judgement, the majority attempts to show that there is no contradiction between the *Blaškić* Appeal Judgement and the *Kupreškić et al.* Appeal Judgement because "the Appeals Chamber in *Kupreškić* was not faced with the question of what test to apply where the outcome would be that in light of the trial evidence considered together with the additional evidence admitted on appeal, 'a reasonable trier of fact could have reached a conclusion of guilt beyond a reasonable doubt.' [Referring to *Blaškić* Appeal Judgement, para. 23]" However, this ignores the fact that, in the *Kupreškić et al.* Appeal Judgement, the Appeals Chamber considered additional evidence adduced in support of Drago Josipović's appeal and found that (at para. 438) :

> In the Appeals Chamber's view, therefore, Josipović has failed to established [sic] that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.

The majority's attempt at footnote **Error! Bookmark not defined.** of the present judgement to reconcile this with its explanation at paragraph 426 is unconvincing. The fact remains that, in *Kupreškić*, the Appeals Chamber considered whether, taking into account the evidence before the Trial Chamber and the additional evidence admitted on appeal, a reasonable trier of fact could have reached a conclusion of guilt; the Appeals Chamber never said that it itself had to be convinced beyond reasonable doubt. As explained below (*see* paras. 6-7), the majority also ignores that, in later cases, the Appeals Chamber understood the *Kupreškić* standard as a reasonable trier of fact standard. For these reasons and as eloquently explained by Judge Shahabuddeen in his separate opinion in the present case (paras. 16-45), the *Blaškić* standard is in conflict with the standard previously applied at the ICTY and at the ICTR.

Rather than attempting to pay lip-service to the *Blaškić* case, while simultaneously applying the established standards and methodology, the Appeals Chamber should restore the clear position that governed appellate proceedings prior to the *Blaškić* Appeal Judgement.

3. As explained in my Partially Dissenting Opinion in the *Blaškić* Appeal and in my Separate Opinion in the *Kordić and Čerkez* Appeal, the *Blaškić* standard of appellate review differs from the established precedent in three significant areas: the standard of appellate review of alleged errors of fact when additional evidence is admitted, the non-deferential approach to appellate factual findings after an error of law has been identified and corrected, and the methodology of appellate review.

A. Errors of Fact and Additional Evidence

4. The standard of appellate review with respect to alleged errors of fact firmly established by the jurisprudence of the International Tribunal is a "reasonableness" standard.[1690] Under this standard, the Appeals Chamber assesses whether a finding of fact made by the Trial Chamber was one that no reasonable trier of fact could have reached. In all cases prior to the *Blaškić* Appeal Judgement, this standard was applied when assessing all errors of fact, regardless of whether additional evidence was adduced on appeal.

5. In the *Kupreškić et al.* Appeal Judgement, the Appeals Chamber established the basic principle that:

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.[1691]

6. This approach has been followed in all other recent cases involving additional evidence, except the *Blaškić* Appeal Judgement. In the *Krstić* Appeal Judgement, decided a few months before the *Blaškić* Appeal Judgement, the Appeals Chamber applied the *Kupreškić* approach in its treatment of additional evidence. The Appeals Chamber found that "[t]he Trial Chamber's rejection of the Defence's Argument as to the parallel chain of command, even when examined in

[1690] *Krstić* Appeal Judgement, para. 40; *Vasiljević* Appeal Judgement, paras. 7-8; *Krnojelac* Appeal Judgement, paras. 11-12; *Kunarac et al.* Appeal Judgement, paras. 37-48, footnote 243; *Čelebići* Appeal Judgement, para. 434; *Kupreškić et al.* Appeal Judgement, para. 30; *Furundžija* Appeal Judgement, paras. 37, 40; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.
[1691] *Kupreškić et al.* Appeal Judgement, para. 75.

light of the Defence's additional evidence, is not one that no reasonable trier of fact could have made."[1692]

7. This standard has also been applied by the Appeals Chamber in recent ICTR appeals. In the *Rutaganda* Appeal Judgement, for example, the Appeals Chamber specifically addressed the standard to be applied to alleged errors of fact involving additional evidence at the ICTR and explained:

> In accordance with Rule 118(A) of the Rules and the relevant jurisprudence, the test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings? Where the Appeals Chamber finds that a reasonable trier of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence, it must uphold the Trial Chamber decision.[1693]

8. In the *Blaškić* Appeal Judgement, the Appeals Chamber departed from this well-established approach without articulating any cogent reasons for doing so.[1694] According to the *Blaškić* Appeal Judgement, when additional evidence is introduced on appeal, "the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt."[1695] For the reasons I have already expressed in my Partially Dissenting Opinion in the *Blaškić* Appeal, I cannot agree with this approach, which accords no deference to the Trial Chamber and usurps the role of the trier of fact. The admission of additional evidence does not turn the Appeals Chamber into a Trial Chamber: our proper role is limited to assessing whether there has been an error of fact in the trial judgement occasioning a miscarriage of justice and does not extend to making independent factual findings beyond a reasonable doubt.

B. Errors of Law

9. In the present case, the Appeals Chamber also endorses the *Blaškić* Appeal Judgement approach to revision of factual findings after the Appeals Chamber has corrected an error of law.[1696] As I explained in my Separate Opinion in the *Kordić and Čerkez* Appeal, I do not think that this approach is theoretically sound.[1697]

[1692] *Krstić* Appeal Judgement, para. 63.
[1693] *Rutaganda* Appeal Judgement, para. 473 (footnotes omitted). *See* also *Musema* Appeal Judgement, paras. 185-186.
[1694] *Aleksovski* Appeal Judgement, para. 107.
[1695] *Blaškić* Appeal Judgement, para. 24(c)(ii).
[1696] Judgement, para. 17, referring to *Blaškić* Appeal Judgement (para. 15) and the *Kordić and Čerkez* Appeal Judgement (para. 17).
[1697] Separate Opinion in the *Kordić and Čerkez* Appeal, para. 3.

10. The standard of review of errors of law set out by the Appeals Chamber in the present Judgement suggests that, whenever the Appeals Chamber corrects an error of law, it must apply the new standard to the evidence contained in the trial record in order to "determine whether it is itself convinced beyond reasonable doubt as to the factual findings challenged by the Defence, before that finding is confirmed on Appeal."[1698] This approach accords no deference to the factual findings made by the Trial Chamber. When applying a corrected legal standard, the Appeals Chamber should first look to the findings made by the Trial Chamber because in many instances the Trial Chamber will already have made the factual findings necessary to satisfy the corrected legal standard. The Appeals Chamber should only determine whether it is satisfied beyond a reasonable doubt as to the Appellant's guilt on the basis of a corrected legal standard when the Trial Chamber has not already made sufficient findings to apply this corrected legal standard. In reviewing the record, the Appeals Chamber should also rely, to the extent possible, on the Trial Chamber's findings on related matters such as the credibility and reliability of evidence. Again, the majority misconceives the role of the Appeals Chamber, which should be deferential to the reasonable findings of fact already made by the Trial Chamber.

C. Methodology of Review

11. The *Blaškić* Appeal Judgement also developed a novel method of appellate review, which requires the Appeals Chamber to assess the Trial Chamber's judgement "in principle only taking into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal."[1699] In the *Kordić and Čerkez* Appeal Judgement, the Appeals Chamber explained that to look at further evidence contained in the record would subvert the adversarial process and would be *ultra vires* the appellate role.[1700] In that case, although appearing to agree with the *Blaškić* methodology,[1701] the Appeals Chamber nevertheless decided to go beyond this methodology and admitted that it had "to reassess a plethora of evidence in order to find out whether or not all constituent elements of the crimes were established during trial."[1702]

[1698] Judgement, para. 17.
[1699] *Blaškić* Appeal Judgement, para. 13. *See also Kordić and Čerkez* Appeal Judgement, para. 21.
[1700] *Kordić and Čerkez* Appeal Judgement, footnote 12.
[1701] *Kordić and Čerkez* Appeal Judgement, para. 21.
[1702] *Kordić and Čerkez* Appeal Judgement, para. 387.

12. I have already explained why, in my view, the Appeals Chamber errs in imposing this limitation on itself.[1703] In light of the fact that this constraining methodology does not seem to have been reiterated in the present case, I need not expand again on this point.

D. Conclusion

13. While I can agree with the disposition in the Judgement of the Appeals Chamber, I am of the view that the Appeals Chamber should not have endorsed the standard articulated in the *Blaškić* Appeal Judgement; rather, it should have reasserted in unambiguous terms the standard outlined in the *Kupreškić et al.* Appeal Judgement.

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

Dated this 28th day of February 2005,
At The Hague,
The Netherlands.

Inés Mónica Weinberg de Roca

[Seal of the International Tribunal]

[1703] *See* my Partially Dissenting Opinion in the *Blaškić* Appeal, paras. 10-14, and my Separate Opinion in the *Kordić and Čerkez* Appeal, paras. 5-10.

X. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I. INTRODUCTION

1. I support today's judgement, but have difficulty in accepting a view which it expresses in the course of its discussion of the appellate standard for evaluating additional evidence. That view[1704] was adopted from *Blaškić*.[1705] It is to the effect that, in an appeal from a conviction based on an alleged error of fact in which additional evidence is admitted, the Appeals Chamber must, in certain circumstances, be "itself convinced" that guilt has been proved beyond reasonable doubt by the additional evidence taken together with the trial evidence ("totality of the evidence") before it affirms the conviction. That is not the same thing as saying that the function of the Appeals Chamber is to determine whether the verdict of the Trial Chamber was safe in the light of the totality of the evidence. This, in my respectful view, is the right proposition of law. The case of an appeal by the prosecution may or may not involve different considerations. On that, I say nothing. On the present matter, I shall explain my position in this opinion.

2. At the beginning, however, I should like to say that I am conscious of the fact that I shall be citing cases from domestic jurisdictions, and more particularly from adversarial ones. This is so because of my view of the nature of the Appeals Chamber. Though the subject of additional evidence[1706] is dealt with only in the Rules of Procedure and Evidence of the Tribunal, the administration of the subject is of course a matter for the Appeals Chamber, which has been established by the Statute. Consequently, it is necessary to attend to the nature of the Appeals Chamber as it has been so established.

3. There are statements in the case law of the Tribunal to the effect that the Tribunal is a hybrid institution.[1707] That, however, is consistent with the view that there could be an aspect on which the Statute of the Tribunal has been fashioned on a particular model. I think this is so with respect to

[1704] As to whether that view was applied to the facts of this case, see paras. 426, 428, 496 and 554 of the judgement of the Appeals Chamber.
[1705] IT-95-14-A, of 29 July 2004, para. 24(c), later referred to as "*Blaškić*" Except on one point, which was without practical effect (see the President's order of 29 July 2004 granting early release with effect from 2 August 2004), the verdict of the Trial Chamber, which was rendered on 3 March 2000 (IT-95-14-T), was reversed on appeal. The writer considers it proper to declare that he was a member of the Trial Chamber. The other members of the Trial Chamber were Judge Claude Jorda, presiding, and Judge Almiro Rodrigues.
[1706] Additional evidence is not referred to in the Statute. Evidence of a new fact is referred to both in the Statute and in the Rules.
[1707] *Blaškić,* IT-95-14-T, *Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability*, of 21 January 1998, para. 5.

appeals. In my view, the Statute visualised an appellate process as understood in adversarial systems. This is the reason for recourse to the jurisprudence of those systems.

A. The issue

4. The issue, which arises out of paragraph 426 of today's judgement, is this: Where additional evidence is admitted in an appeal from a conviction based on an alleged error of fact, is the Appeals Chamber always to ask whether the appellant has "established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon" the totality of the evidence (the "reasonable tribunal test" or the "*Kupreškić*[1708] test")? Or, where a reasonable tribunal of fact could have reached a conclusion of guilt beyond reasonable doubt on the totality of the evidence, is the Appeals Chamber to go on and ask "whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt" before affirming the conviction (the "guilt determination test" or the "*Blaškić*" test)?

B. The adoption of the reasonable tribunal test

5. The reasonable tribunal test was adopted by the Appeals Chamber in *Kupreškić*. In paragraphs 42-76 of the judgement in that case, the Appeals Chamber dealt with the general subject of "Reconsideration of factual findings where additional evidence has been admitted under Rule 115" of the Rules of Procedure and Evidence of the Tribunal. In paragraphs 48-69, it considered the principles relating to the particular subject of *admission* of additional evidence. In paragraph 76, it summed up its finding on this branch by saying that, in "determining whether to admit the evidence in the first instance, the relevant question is whether the additional evidence could have had an impact on the trial verdict."

6. In paragraphs 70-76 of its judgement in *Kupreškić*, the Appeals Chamber then considered the value to be given to additional evidence once it has been admitted. It did so in the course of its treatment of the subject: "Testing the admitted evidence." After examining some of the world's legal systems, in paragraph 75 of its unanimous judgement, it said:

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.

7. The Appeals Chamber repeated the test in virtually the same words in the next paragraph of its judgement in *Kupreškić,* stating:

> In deciding whether to uphold a conviction where additional evidence has been admitted, the relevant question is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.

8. It will be seen that *Kupreškić* means that –

(a) if the appellant has established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the totality of the evidence, the conviction is quashed;

(b) correspondingly, if the appellant has not established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the totality of the evidence, the conviction is affirmed;

(c) these principles deal exhaustively with all possible cases in which additional evidence has been admitted.

9. The *Kupreškić* test was in due course adopted by the ICTR Appeals Chamber in *Musema*[1709] and in *Rutaganda*.[1710] In my view, that test became part of the accepted jurisprudence of both Tribunals.

C. The adoption of the guilt determination test

10. A little less than three years after its decision in *Kupreškić*, a largely recomposed bench of the Appeals Chamber returned to the matter in *Blaškić*. Paragraph 8 of the judgement in *Blaškić* stated that "the Appeals Chamber considers that this appeal necessitates a further examination of the existing standards" of appellate review. And so there was a further re-examination. In the judgement in *Blaškić*, the re-examination was set out in a "summary concerning the standard of review to be applied on appeal by the International Tribunal in relation to findings challenged only by the Defence, in the absence of a Prosecution appeal" – as in this case. As it will not be correct to focus on the substance of the summary, the relevant text is reproduced *in extenso*:

> 19. The Appeals Chamber considers that there are no reasons to depart from the standard set out [in *Kupreškić*], in relation to grounds of appeal alleging pure errors of fact and when no additional evidence has been admitted on appeal. That standard shall be applied where appropriate in the present Judgement.
>
> 20. When factual errors are alleged on the basis of additional evidence proffered during the appellate proceedings, Rule 117 of the Rules provides that the Appeals Chamber shall pronounce judgement "on the basis of the record on appeal together with such additional evidence as has been presented to it."

[1708] IT-95-16-A, of 23 October 2001, later referred to as "*Kupreškić*."
[1709] ICTR-96-13-A, of 16 November 2001, paras. 185-186, 193-194.
[1710] ICTR-96-3-A, of 26 May 2003, para. 473.

21. The Appeals Chamber in *Kupreškić* established the standard of review when additional evidence has been admitted on appeal, and held:

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.

22. The standard of review employed by the Appeals Chamber in that context was whether a reasonable trier of fact could have been satisfied beyond reasonable doubt as to the finding in question, a deferential standard. In that situation, the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself*,[1711] beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt.

23. However, if in a given case, the outcome were that a reasonable trier of fact could reach a conclusion of guilt beyond reasonable doubt, the Appeals Chamber considers that, when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal. The Appeals Chamber underscores that in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt.

24. In light of the foregoing, the Appeals Chamber sets out the following summary concerning the standard of review to be applied on appeal by the International Tribunal in relation to findings challenged only by the Defence, in the absence of a Prosecution appeal, as in the present case.

(a) The Appeals Chamber is confronted with an alleged error of fact, but the Appeals Chamber has found no error in the legal standard applied in relation to the factual finding. No additional evidence has been admitted on appeal in relation to that finding. The Appeals Chamber will determine whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If a reasonable trier of fact could have reached such a conclusion, then the Appeals Chamber will affirm the finding of guilt.

(b) The Appeals Chamber is confronted with an error in the legal standard applied in relation to a factual finding, and an error of fact has been alleged in relation to that finding. No additional evidence has been admitted on appeal in relation to that finding. The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt.

(c) The Appeals Chamber is confronted with an alleged error of fact, and – contrary to the scenario described in (a) – additional evidence has been admitted on appeal. There is no error in the legal standard applied in relation to the factual finding. There are two steps involved.

> (i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.
>
> (ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.

[1711] Emphasis as in the original.

> (d) The Appeals Chamber is confronted with an error in the legal standard applied in relation to the factual finding and an alleged error of fact, and – contrary to the scenario described in (b) – additional evidence has been admitted on appeal. There are two steps involved.
>
> > (i) The Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law.
> >
> > (ii) If, however, the Appeals Chamber, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt.

Subparagraph (ii) of paragraph 24(c) of *Blaškić* put forward the guilt determination test, with a dissent.[1712] That subparagraph has been reproduced in paragraph 426 of today's judgement.

D. Two different holdings

11. I read paragraph 24(c) of *Blaškić*, as interpreted by paragraph 426 of today's judgement, to mean that if, on the totality of the evidence,[1713] "no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt", the conviction is quashed. However, if, on that same totality of the evidence, "a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt", the conclusion of guilt is not automatically affirmed. In that event, the Appeals Chamber would need to go on to ask whether it is "itself convinced beyond reasonable doubt as to the finding of guilt" on the basis of that same totality of the evidence; only if the Appeals Chamber is "itself convinced" of guilt will the finding of guilt be affirmed.

12. By contrast, I understand *Kupreškic* to mean that the reasonable tribunal test would suffice in all circumstances to determine whether the totality of the evidence shows that the finding of guilt

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[1712] *Blaškić*, "Partial Dissenting Opinion of Judge Weinberg de Roca".

[1713] In its footnote number **Error! Bookmark not defined.** to paragraph 24(c)(i) of *Blaškić* (as set out in paragraph 426 of today's judgement), the Appeals Chamber argues that, although that provision spoke – *expressly,* I would think – of the Appeals Chamber determining "on the basis of the trial record alone, whether no reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt", those words are to be "obviously considered" as contemplating that "such a determination is also reached on the basis of the trial record *taken together* with the evidence admitted on appeal …". The Appeals Chamber's appeal to "the entire context" is in order, but the context can produce a different result from that for which the Appeals Chamber argues. Paragraph 19 of *Blaškić* stated "that there are no reasons to depart from the standard set out" in *Kupreškić;* it also added that that "standard shall be applied where appropriate in the present Judgement." These statements occurred in a passage which referred to cases in which "no additional evidence has been admitted on appeal". Paragraph 22 drew attention to certain alleged shortcomings of that standard in cases in which "additional evidence has been admitted on appeal". Accordingly, paragraph 24 then stated that in "the light of the foregoing, the Appeals Chamber sets out the following summary concerning the standard of review to be applied on appeal…". Though referred to as a "summary", the "summary" was an ample one intentionally designed as a comprehensive restatement of the whole position; for ease of consultation, it is reproduced above. It happens that paragraph 24(c)(i) of the "summary" nowhere speaks of a determination being "also reached on the basis of the trial record *taken together* with the evidence admitted on appeal"; that wider meaning contradicts the express limitation in the provision to "the trial record alone" and cannot be fairly implied. Paragraph 24(d)(i) continues the exclusive reference to "the trial record". Argument for the wider meaning is attractive, but not convincing.

is to be affirmed or quashed. That test meant that the Appeals Chamber would affirm the conviction only if it was not the case that "no reasonable tribunal of fact could have reached a conclusion of guilt": that is to say, the Appeals Chamber would affirm the conviction if a reasonable tribunal of fact could have reached a conclusion of guilt. On the present approach of the Appeals Chamber, the views of a reasonable tribunal of fact are excluded from the final judgement as to guilt based on the totality of the evidence; a finding of guilt is made by the Appeals Chamber, and then only if it is "itself convinced" of guilt.

13. The guilt determination test came without accompanying Tribunal or non-Tribunal authority. There is no reliable jurisprudence for holding that in an adversarial system it is ordinarily the business of an appellate court to make a finding of guilt on the totality of the evidence in an appeal from a conviction based on error of fact. As a result, the Appeals Chamber is now faced with two different holdings on the subject by what were in large part differently composed[1714] benches of itself – one holding in *Blaškić* and another in *Kupreškić*. The question is which holding is to be followed.

14. The point may be taken that it is sterile to consider the relationship between the old and the new tests. I do not think so. The relationship between the two tests bears on the foundation of the judgement of the Appeals Chamber. Under one test, the conviction of the Appeals Chamber "itself" as to guilt is not material; under the other, it is the only thing that matters. The end result may be the same in many cases, but it need not be.

E. Proposed inquiry

15. I propose to show that the *Blaškić* test is not a further development of the *Kupreškić* test but changes it, and indeed abolishes it so far as additional evidence leading to an affirmation of a finding of guilt is concerned; that the two tests are in conflict with each other; and that it is necessary to choose between them.[1715] Alternatively, the jurisprudence allows for a departure by the Appeals Chamber from a holding previously made by it "where cogent reasons in the interests of justice require a departure;"[1716] I shall be suggesting that a departure has to be made from the *Blaškić* test. On either approach, the outcome will favour the maintenance of the *Kupreškić* test.

[1714] The judges in the *Kupreškić* Appeals Chamber were Judge Wald, presiding, and Judges Vohrah, Nieto-Navia, Pocar and Liu Daqun; those in the *Blaškić* Appeals Chamber were Judge Pocar, presiding, and Judges Mumba, Güney, Schomburg and Weinberg de Roca. No member of the *Blaškić* Trial Chamber sat on the bench of the Appeals Chamber in *Kupreškić*.
[1715] *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, of 24 March 2000, para. 111.
[1716] Ibid., para. 108.

II. *BLAŠKIĆ* IS IN CONFLICT WITH *KUPREŠKIĆ*

A. Changes in the reasonable tribunal test made by the guilt determination test

16. *Blaškić* makes changes in the rules laid down by *Kupreškić*. Those changes fall into two categories: (i) additional evidence (taken together with trial evidence), and (ii) trial evidence standing alone.

17. As to (i), paragraph 75 of *Kupreškić* stated that the reasonable tribunal test was to apply "in deciding *whether or not*[1717] to uphold a conviction where additional evidence has been admitted before the [Appeals] Chamber". That test could result either in the quashing or in the affirming of the conviction. No exception whatever was visualised. An exception has been later instituted in so far as the appellate outcome is to affirm the conviction of guilt; what could be done before can not be done now. That is not a development; it is an abolition of the old system and its substitution by a new one.

18. As to (ii), paragraph 44 of *Kupreškić* made it clear that "where an appellant establishes that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the Appeals Chamber will allow the appeal and enter a judgement of acquittal"; the substance of the same idea was also expressed in paragraph 30 of that case. Thus, under *Kupreškić* the reasonable tribunal test was to apply to all cases in which trial evidence stood alone.

19. However, it appears that there is a situation in which the guilt determination test applies even though trial evidence alone is concerned. It is said in paragraph 24(b) of *Blaškić* that where the "Appeals Chamber is confronted with an error in the legal standard[1718] applied in relation to a factual finding, and an error of fact has been alleged in relation to that finding" and "[n]o additional evidence has been admitted on appeal in relation to that finding," the "Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt." Thus, on the basis of the trial evidence alone (no additional evidence having been admitted), the Appeals Chamber will ask "whether it is itself convinced beyond reasonable doubt as to the finding of guilt." A similar approach is taken in paragraph 17 of today's judgement.

[1717] Emphasis added.

[1718] To avoid possible misunderstanding, it should be pointed out that the reference to "an error in the legal standard" was not intended to mean that the *Blaškić* Appeals Chamber considered that the *Blaškić* Trial Chamber adopted the wrong standard of proof, say, proof on a balance of probabilities. The Trial Chamber referred to, and adopted, the standard of proof beyond reasonable doubt in paras. 410, 425, 590, 592, 678, 715, 720, 733, 743 and 750 of its judgement in IT-95-14-T, of 3 March 2000. It gave the benefit of the doubt to the accused in paragraphs 678 and 715.

20. Nothing prevents the Appeals Chamber from asking whether no reasonable tribunal of fact could, on the trial evidence and applying the correct legal standard, have reached a conclusion of guilt beyond reasonable doubt. The fact that the Appeals Chamber finds fault with the Trial Chamber's view of the correct legal standard does not logically give the Appeals Chamber "itself" the right to find guilt on the trial evidence. It is both possible and sensible for the Appeals Chamber to ask whether no reasonable tribunal of fact, properly directed on the law, could have found guilt on the trial evidence. The concept of a reasonable tribunal of fact (however described) being properly directed on the law is a familiar one in the jurisprudence of appellate courts.[1719] Indeed, a reasonable tribunal of fact would not act except on the basis of a correct view of the law.

21. The conclusion is that, both with respect to additional evidence and to trial evidence, *Blaškić* makes substantial changes to *Kupreškić.* In fact, in respect of additional evidence, *Blaškić* abolishes *Kupreškić* where the appellate outcome will be the affirmation of the finding of guilt.

B. Whether the guilt determination test is a further development of the reasonable tribunal test or whether the former departs from the latter

22. Contrary to the foregoing conclusion, it is possible to argue that the *Blaškić* test is merely a further development of the *Kupreškić* test, and is not a separate test. Consideration has to be given to this important view.

23. First, that way of looking at the matter raises a preliminary issue as to whether it is open to question whether there is such a further development. On this, it appears to me that argument is not needed to oppose any suggestion that *Blaškić*, and any case which followed it, could in law compulsorily require this bench of the Appeals Chamber to proceed on the footing that *Blaškić* was merely a further development of the *Kupreškić* test or to withdraw from the competence of this bench the issue whether it was merely such a development.

24. There is no *vinculum juris* between one bench of the Appeals Chamber and another bench of that Chamber which can compulsorily require a later bench to follow the legal holdings of an earlier bench. It is not possible for a person to give himself a lift by tugging at his own bootstraps. If a bench for any reason decides not to follow a decision of a previous bench (including a decision purporting as a matter of law to require a later bench to follow the rulings of a previous bench), there is no identifiable legal reason in international law for saying that the later decision is invalid.

[1719] In *Haddy* (1944) 29 Cr.App. R. 182 at 191, C.C.A., the appellate court said: "In this case we are satisfied that no reasonable jury properly directed throughout would, or could, have come to any other conclusion, and that no miscarriage of justice has actually occurred." In *Sheldon* [1996] 2 Cr. App. R. 50 at 54, the appellate court said: "The jury, had they been directed on the issue, must inevitably have reached that same conclusion."

As a matter of good sense, one bench will follow the decisions of another bench save in exceptional circumstances, but this, in my view, depends on the practice of the Tribunal.

25. Second, as to the merits of the further development argument. The ample articulation in *Blaškić* does not suggest that its test is merely a further development of the *Kupreškić* test. Judge Weinberg de Roca did not understand it that way;[1720] she was right. A development presupposes consistency with that which is being developed; in this case, I fear that there is an inconsistency, if not a contradiction. The changes, as explained above, illustrate this.

26. To show consistency with *Kupreškić* and therefore to promote the argument for further development, it may be said that the new test does not make the Appeals Chamber "itself" the finder of guilt in the circumstances mentioned. However, the references in paragraph 24 of the judgement in *Blaškić* to the Appeals Chamber being "itself convinced beyond reasonable doubt as to the finding of guilt" cannot credibly be distinguished from saying that the Appeals Chamber will "itself" be making a finding as to whether the appellant is guilty: they mean the same thing. If sameness is not intended, there will be puzzlement as to what is the difference; if none, there will be difficulty in appreciating the need for a new formulation. The Appeals Chamber cannot be "itself convinced beyond reasonable doubt as to the *finding* of guilt" made by the Trial Chamber unless the Appeals Chamber is "itself convinced beyond reasonable doubt" as to the guilt of the appellant and then compares its own finding of guilt with the finding of guilt made by the Trial Chamber. So the Appeals Chamber will "itself" be making a finding as to whether the appellant is guilty. With courtesy, possible argument that the new formulation does not mean this is not convincing.

27. The view that on the guilt determination test the Appeals Chamber will be making its own finding as to whether the appellant is guilty is in keeping with the first sentence in paragraph 23 of *Blaškić* to the effect that the Appeals Chamber "should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to *the guilt of the accused,* before confirming a conviction on appeal."[1721] The remainder of that paragraph supports this view, stating:

> The Appeals Chamber underscores that in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a *conclusion of guilt* based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt. [1722]

[1720] See "Partial Dissenting Opinion of Judge Weinberg de Roca" in *Blaškić.*
[1721] Emphasis added.
[1722] Emphasis added.

Hence, where additional evidence has been admitted, a finding as to whether the appellant is guilty beyond reasonable doubt will be made by the Appeals Chamber "itself". Paragraph 426 of today's judgement is in keeping with this view.

28. For these reasons, an argument that *Blaškić* is merely a further development of *Kupreškić*, though interesting, is not persuasive: the first is a departure from the second, and not an elaboration of it. In consequence of the departure, Judge Weinberg de Roca has observed that "the Appeals Chamber announces a new standard of review" and "has introduced an innovative standard of review."[1723] Her observations were founded.

C. The guilt determination test does not give any satisfactory reason for the changes which it makes to the reasonable tribunal test

29. The Appeals Chamber can depart from its previous holding, but, in the accepted view of the Tribunal, it can only do so "where cogent reasons in the interests of justice require a departure" and "after the most careful consideration has been given to [the previous holding], both as to the law, including the authorities cited, and the facts."[1724]

30. *Blaškić* does not accept[1725] that it is a departure from *Kupreškić*; it is therefore not surprising that it gives no reasons for a departure. Alternatively, if it gives reasons for a departure, these fall short of satisfying the recognised standard, both as to the substance and as to the kind of jurisprudential inquiry to be expected if a previous decision of the Appeals Chamber is to be departed from. There are difficulties presented by the guilt determination test and these have not been overcome.

31. First, the guilt determination test is unnecessarily involved. In fact, two tests would apply. The reasonable tribunal test would apply where consideration of the totality of the evidence results in quashing of the conviction. If, however, "the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt" on the totality of the evidence, the conviction is not automatically affirmed: the Appeals Chamber would have to apply the guilt determination test in order to determine whether the conviction should be affirmed. Presumably, however, if the application of the guilt determination test does not result in an affirmation of the conviction, the conviction is *quashed*. But this result contradicts the result

[1723] *Blaškić*, "Partial Dissenting Opinion of Judge Weinberg de Roca", paras. 2 and 4.
[1724] *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, of 24 March 2000, paras. 108 and 109, respectively.
[1725] See para. 19 of *Blaškić, supra.*

reached by the reasonable tribunal test at the beginning of the exercise, for it is only if this test results in the conviction *not being quashed* that the case reaches the guilt determination test.

32. Second, the Appeals Chamber's rationale is that, if the Appeals Chamber were not to be "itself convinced" that guilt was proved beyond reasonable doubt, "the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt". This, however, overlooks the fact that, in the case of trial evidence alone, the result (whether it is to quash or to affirm the verdict) depends solely on the assessment imputed to a reasonable tribunal of fact although of course it has not heard that evidence; it should not matter if it has not heard additional evidence where this is admitted. If the Appeals Chamber does not have to be "itself convinced" of guilt in the first case, it should not need to be "itself convinced" in the second case.

33. Third, the guilt determination test overlooks the fact that, as later more fully explained, the object of additional evidence is not to prove guilt but to cast doubt on a conviction which has already been made and in this way to achieve the quashing of the conviction.

34. Fourth, paragraph 75 of *Kupreškić* used the words "whether or not to uphold a conviction"; and paragraph 76 likewise used the words "whether to uphold a conviction". So *Kupreškić* meant that the reasonable tribunal test would apply regardless of whether the appellate outcome was to quash or to affirm the conviction on the totality of the evidence. The guilt determination test would restrict *Kupreškić* to cases in which the appellate outcome was to quash the conviction in the light of the totality of the evidence.

35. Explaining the reasons for this apparent restriction, paragraph 22 of *Blaškić* states that "the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself*, beyond reasonable doubt, as to the conclusion reached, and indeed, it did not need to do so, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt." And paragraph 426 of today's judgement likewise adds that "the Appeals Chamber in *Kupreškić* was not faced with the question of what test to apply where the outcome would be that in light of the trial evidence considered with the additional evidence admitted on appeal, 'a reasonable trier of fact could reach a conclusion of guilt beyond a reasonable doubt'".[1726] Contrary to that suggestion, *Kupreškić* was faced with that situation: the Appeals Chamber affirmed a conviction on the basis of the totality of the evidence being assessed by the reasonable tribunal test.

[1726] *Blaskic* Appeal Judgement, para. 23.

36. In Kupreškić, the Appeals Chamber admitted additional evidence from Witness AT in support of a challenge by co-appellant Drago Josipović to a finding of guilt made against him. However, in the view of the Appeals Chamber, Drago Josipović "failed to established [sic] that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence admitted during the appellate proceedings."[1727] That ground of appeal was therefore dismissed.[1728] Correspondingly, the judgement of the Appeals Chamber[1729] reads, "Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Drago Josipović on" counts which included the incident to which Witness AT testified. Hence, in this instance, the Kupreškić Trial Chamber's finding of guilt was upheld by the Appeals Chamber on the ground that the appellant had failed to establish "that no reasonable trier of fact could have reached a finding of guilt." Whatever arguments there might be about the possibility of that decision being based on another ground, the fact is that the Appeals Chamber did use the reasonable tribunal of fact test in considering whether it would affirm a conviction where additional evidence was led;[1730] nowhere did it speak of a necessity for the Appeals Chamber to be "itself convinced" of guilt.

37. Therefore, contrary to what is suggested in paragraph 22 of *Blaškić* and in paragraph 426 of today's judgement, the outcome of the particular situation did not matter in *Kupreškić* to the application of the reasonable tribunal test. The reasonable tribunal test applied regardless of the outcome, as indeed *Kupreškić* made clear by expressly stating, in paragraph 75 of the judgement in that case, that it was "to be applied by the Appeals Chamber in deciding *whether or not to uphold a conviction* where additional evidence has been admitted …".[1731] Contrary to what is stated in paragraph 426 of today's judgement, no question was "left open" in *Kupreškić* as to how to deal with a case in which the appellate outcome would be to affirm the conviction.

[1727] *Kupreškić*., para.348.
[1728] Ibid., p. 170, reading, "DISMISSES all other grounds of appeal raised by Drago Josipović's *[sic]* against his conviction."
[1729] Ibid., p. 170.
[1730] The fact that a court decides on an alternative ground does not necessarily mean that its remarks on the alternative ground are *obiter*; a decision could be well supported by more than one *ratio*. See Rupert Cross and J. W. Harris, *Precedent in English Law*, 4th ed. (Oxford, 1991), pp. 81ff, and *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Reports 1980*, p. 125, separate opinion of Judge Mosler, stating that it was the duty of a court to define the legal position "in its essential reasoning, even if some of that reasoning contains alternatives each of which, even if incompatible with others, forms part of a logical concatenation that leads to common conclusions". Additionally, this being an international court, the question in any case is whether the point in issue was judicially considered and judicially pronounced upon. Paragraph 347 of *Kupreškić* opened with the words, "Even if Witness AT were a reliable witness…". On the basis that he was reliable, the Appeals Chamber considered the matter, speaking of the "safety" of Josipović's conviction and of his assertion that the "Witness AT's evidence casts doubt on the Trial Chamber's finding", and then concluding, in paragraph 348, with a pronouncement of the Appeals Chamber's finding expressed in the words quoted above.
[1731] Emphasis added.

38. The outcome of the appeal concerns the result. The substantive problem is the same, and so is the methodological approach to it as prescribed by *Kupreškić*. In brief, under the reasonable tribunal test, in no case does the Appeals Chamber make its own finding of guilt; under the guilt determination test, it does so in some circumstances. It seems strange that there should be different tests depending on whether the appellate outcome is to quash or to affirm the conviction.

39. Further, as on the facts *Kupreškić* dealt with a situation in which the conviction was being affirmed as well as a situation in which it was being quashed, there is no room for importing the precedential procedure of confining a case to its own facts so as to restrict *Kupreškić* to the latter situation.

40. In my view, *Kupreškić* both enunciated and applied the reasonable tribunal test as being applicable wherever additional evidence is admitted on appeal and regardless of whether the Trial Chamber's finding of guilt was being quashed or affirmed. Where the appellate outcome is to affirm the finding of guilt, the present judgement of the Appeals Chamber, following *Blaškić,* purports to abolish *Kupreškić* and to make a departure. There is no discernible justification for doing that.

D. The guilt determination test is not consistent with ICTR jurisprudence

41. Though the ICTY Appeals Chamber is legally distinct from the ICTR Appeals Chamber, the membership of the two Appeals Chambers is the same. For this and other reasons, decisions of one Appeals Chamber are highly persuasive with the other.

42. In *Musema*,[1732] the ICTR Appeals Chamber admitted additional evidence relating to a challenged rape conviction. In the course of its deliberations, it reproduced certain passages from *Kupreškić*, including that relating to the reasonable tribunal test.[1733] In paragraph 193 of its judgement, it proceeded to apply *Kupreškić* when it said:

> Having considered the additional evidence admitted into the record on appeal, the Appeals Chamber finds that if the testimonies of Witnesses N, CB and EB had been presented before a reasonable tribunal of fact, it would have reached the conclusion that there was a reasonable doubt as to the guilt of Musema in respect of Count 7 of the Amended Indictment. Consequently, the Trial Chamber's factual and legal findings in relation to the rape of Nyiramusugi are incorrect and occasioned a miscarriage of justice.

In paragraph 194 of its judgement in *Musema*, the ICTR Appeals Chamber then concluded that the conviction for rape had to be quashed in "accordance with the standard laid down in *Kupreškić*."

[1732] ICTR-96-13-A, of 16 November 2001.
[1733] Ibid., para. 185.

43. In *Rutaganda*,[1734] the challenged conviction was upheld. In that case, the ICTR Appeals Chamber admitted additional evidence which the appellant contended supported his alibi. The Appeals Chamber rejected the argument, holding that the additional evidence was not sufficiently probative. For this reason, said the Appeals Chamber, "the appellant has failed to prove that, based on the evidence presented at trial, together with the additional evidence, no reasonable tribunal of fact could have found the Appellant guilty of participation in the [indicted crimes]. This ground of appeal is accordingly dismissed."[1735] Earlier, referring to the *Kupreškić* test, it said:[1736]

> In accordance with Rule 118(A) of the Rules and the relevant jurisprudence,[1737] the test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings?[1738] Where the Appeals Chamber finds that a reasonable trier of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber *together with* the additional evidence, it must uphold the Trial Chamber decision.

44. Thus, in *Musema* and *Rutaganda* the ICTR Appeals Chamber applied the reasonable tribunal test; in one case the finding of guilt was quashed, in the other case the finding of guilt was affirmed.

E. Finding on this part

45. I conclude that *Kupreškić* and *Blaškić* are in conflict and that *Kupreškić* is to be preferred. Additional reasons for the preference are given below.

III. *BLAŠKIĆ* IS NOT CORRECT; *KUPREŠKIĆ* SHOULD BE RESTORED

A. The nature of the Appeals Chamber

46. Apart from the question of conflict of decisions, there are reasons for holding that the *Kupreškić* test is sound. These arise from the nature of the Appeals Chamber as an appellate body. The Tribunal is to apply international humanitarian law. But the establishment of the Tribunal is a matter preliminary to the question what law it should apply once it has been established. The principle on which the Tribunal was established is to be sought in its organic instrument, namely, the Statute.

[1734] ICTR-96-3-A, of 26 May 2003.
[1735] Ibid., para. 489.
[1736] Ibid., para. 473 (emphasis as in the original).
[1737] See mainly *Kupreškić* and *Musema* Appeal Judgements.
[1738] *Musema* Appeal Judgement, paras. 185 and 186; *Kupreškić* Appeal Judgement, paras.75 and 76.

47. The question, which may affect this case, is whether the Statute conceived of the Appeals Chamber of the Tribunal as a court of rehearing or as a court of review as understood in national systems. More particularly, in a case of this kind does the Statute require the Appeals Chamber "itself" to find guilt? Or, does it require the Appeals Chamber to find whether the Trial Chamber's finding of guilt was correct, the correctness of that finding being challenged on specified grounds? It is possible that different answers could be given in different legal systems. A consideration of the position under these systems is therefore apposite.

B. Main appellate models

48. Paragraphs 45 to 46 of *Kupreškić* and other material suggest that, broadly speaking, there are two types of appeal.[1739] Sometimes elements of one are mixed up with elements of the other; but, in principle, it is possible to identify two main categories. They are both meritorious. The question is which was the model on which the appellate procedures of the Tribunal were constructed. Leaving aside particular variations, these models show a distinction[1740] between an appeal by way of review and an appeal by way of rehearing. In my opinion, an appeal from a conviction by a Trial Chamber to the Appeals Chamber lies closer to a review than to a rehearing; if so, that helps to provide an answer to the central question whether, in the situation of the Tribunal, it is the reasonable tribunal test or the guilt determination test which applies.

49. First, then, there are appeals which take the form of a new hearing in a higher court.[1741] The new hearing may be based on live evidence or on recorded trial evidence or on additional evidence or on all three; it may extend to the whole case, or to part of it; it may, or may not, take account of the thinking of the trial court. The question before the higher court is whether, in its own opinion, the evidence proves that the appellant is guilty beyond reasonable doubt; the higher court does not answer that question by focusing on whether the trial court made an error in the conviction which it made. The trial conviction is simply left aside in favour of a right given to the appellant by law to have his case reheard by a higher court; in exercise of that right, he appeals to the higher court to hear the case afresh. By the controlling statute, the decision of the higher court then replaces the decision of the trial court on matters under appeal.

[1739] Sometimes the literature may be interpreted to mean that it is only possible to speak of an "appeal" where there is a rehearing. The term is used in this opinion to include review.
[1740] For the distinction, see *inter alia R. v. McIlkenny* [1991] LRC (Crim) 196 at 206, mentioned below, and, a civil case, *Audergon v. La Baguette Ltd*, [2002] EWCA Civ 10. See also, and compare, *Halsbury's Laws of England*, 4th ed., Vol. 37, para. 696; Charles Platto (ed.), *Civil Appeal Procedures Worldwide* (London, 1992), article by Julian M. Wilson and others, pp. 143-144; and *Civil Procedure*, Vol. 1 (London, 2004), p. 1447, Order 52.11.1.
[1741] As in the German system of *Berufung*, which involves a trial *de novo*. It applies in relation to the district court, whose sentencing power is limited to imprisonment for four years.

50. Accordingly, the question before the higher court is whether, in its own judgement, the appellant is guilty or not guilty, as if the higher court were a trial court. That makes sense: a new judgement on the facts is being given by another judicial body; so a new finding of guilt has to be made by that other judicial body. There may be a three-tier system providing for a further right of appeal to a supreme court, but this is generally limited to issues of law. Such a further right of appeal is really a restricted right of review of an intermediate appellate judgement which has been given by way of rehearing.

51. Second, there are appeals in which the question before the appellate court is a narrower one: it is whether the impugned decision was correct (the permitted grounds of challenge being specified), not whether the appellate court "itself" finds that guilt was proved beyond reasonable doubt. It is on this model (usual in adversarial systems) that appeals by a convicted appellant within the Tribunal were established.

52. To be sure, there are criminal cases in adversarial systems in which the view was taken that the appeal concerned was in the nature of a rehearing in the course of which the appellate court could itself determine guilt. But, generally speaking, those were, if I may cite a case from one jurisdiction, instances in which appellate courts "exercised a much closer supervision over the lower criminal courts than the High Court or Court of Criminal Appeal in England …"[1742]; they were cases in which the appellate court had some supervisory jurisdiction over a truly subordinate court.

53. A Trial Chamber is not a subordinate court of the Appeals Chamber. A Trial Chamber consists of three judges of the same standing as the judges of the Appeals Chamber. Judges of the Chambers rotate; in fact, judges are elected by the General Assembly to the Tribunal (or sometimes appointed to it by the Secretary General) but are only assigned by the President to a Chamber of the Tribunal, whether to a Trial Chamber or to the Appeals Chamber. A Trial Chamber hears very serious cases with the maximum penal powers allowed under the Statute; the Appeals Chamber has no greater power of punishment. The work of the Trial Chamber is not intended to be subject to the detailed supervision of a superior court; it is only the result which it reaches that is intended to be corrected on appeal on specified grounds of appeal. Consequently, a case before it is not meant to be "reheard" on appeal as if there was a second trial.

[1742] *Director of Public Prosecutions v. Sabapathee* [1997] 2 LRC 221, PC, at 226.

54. Rehearing cases in criminal appellate matters in the adversarial system might be due to the fact that the enabling law spoke of the appellate court "interfering"[1743] with the proceedings of the trial court, or of the appellate court having power to "supervise" [1744] the proceedings of a trial court consisting of less qualified judges, or of the "whole case"[1745] being referred to an appellate court consisting of more qualified judges. In other cases, an appeal may exceptionally entail a *de novo* hearing, as under section 822(4) of the Canadian Criminal Code. However, the general rule in adversarial systems[1746] is that an appeal court may not re-assess the facts or the weight to be attached to the evidence, as found by the trial judge.

55. Normally, then, a court of criminal appeal in an adversarial system would be a court of review. The Court of Appeal (Criminal Division) of England and Wales thought so, stating that "the Criminal Division [of the Court of Appeal] is perhaps more accurately described as a court of review."[1747] By contrast, it considered that a civil appeal in the Civil Division of the Court of Appeal of England and Wales proceeds by way of "rehearing" in which the Court of Appeal "may take a different view of the facts from the court below."[1748]

56. Thus, there is to be no second trial in the appellate court leading to a fresh finding of guilt. As Lord Bingham stated in the House of Lords, "Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second."[1749] The historical and constitutional origins of the English jury are often stressed in English jurisprudence, but, it is submitted, this aspect, while interesting, need not detain inquiry by an international criminal tribunal: the Trial Chamber finds guilt, and so does a jury. What is important is that the case law of

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[1743] *Sokomanu v. Public Prosecutor* [1989] LRC (Crim) 389 at 404.
[1744] *Director of Public Prosecutions v. Sabapathee* [1997] 2 LRC 221, PC, at 226.
[1745] *Mickelberg v. R.* [1990] LRC (Crim) 70.
[1746] As illustrated by *R. v. Wright*, (1984) 3 O.A.C. 293 (C. A.). The power of the appeal court to order a *de novo* hearing "for any other reason" is construed restrictively. See *Martin's Annual Criminal Code 2005* (Aurora, 2005), p. CC/1496.
[1747] *R. v. McIlkenny* [1991] LRC (Crim) 196 at 206. See also reference to the Court of Appeal (Criminal Division) being a "court of review" in *R. v. Hanratty* [2002] EWCA Crim 1141, para. 82. And see *R. v. Maguire* (1992) 94 Cr. App. R. 133 at 142, and *R. v. Pendleton* [2002] 1 All ER 524, HL, at para. 28 per Lord Bingham.
[1748] See too *Cross on Evidence*, 6th Australian edition (Sydney, 2000), p. 314. It is, however, useful to note that Rule 52.11(1) of the Civil Procedure Rules of England and Wales reads: "Every appeal will be limited to a review of the decision of the lower court unless (a) a practice direction makes different provision for a particular category of appeal; or (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing". It would therefore appear that, even in civil cases, the primary rule in the English jurisdiction is that an appeal is by way of review. This view finds support in *Audergon v. La Baguette Ltd.* [2002] EWCA Civ. 10.
[1749] *R. v. Pendleton*, [2002] 1 All ER 524, HL, para. 17.

the Tribunal shows that the Appeals Chamber is really concerned with the question of the safety of the conviction;[1750] that does not require the Appeals Chamber to make a finding as to guilt.

57. This explains why in *R. v. Clark*, also concerning additional evidence, the Court of Appeal (Criminal Division) of England and Wales recently said that it "is not to decide for itself what impact evidence might have had on the jury's deliberations and 'must not intrude into territory which properly belongs to the jury.'"[1751] As it has also been remarked, it is "not the role of the Court [of Appeal] to usurp the role of the jury."[1752] In the High Court of Australia it was likewise said that the "test is not whether the court [of appeal] itself entertains a reasonable doubt, although that will very often amount to the same thing, but whether a reasonable jury was bound to do so."[1753]

58. Under article 25 of the Statute, the exertions of the Appeals Chamber are directed, not to finding guilt, but to the question whether or not the conviction made by the Trial Chamber was correct, the correctness of the conviction being specifically challenged for certain alleged errors of law or of fact. The remedial powers of the Appeals Chamber, though wide, are intended to put right a defect in the decision on which the conviction rests; the Appeals Chamber does not hold a new trial. As the Appeals Chamber said in *Furundžija*:[1754]

> This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice.

59. In *Kupreškić*, the Appeals Chamber likewise said that "[a]ppellate proceedings do not constitute a trial *de novo* and are, rather, of a 'corrective nature.'"[1755] The internationally recognized right of appeal would not be satisfied by undue restrictions,[1756] but there has not been any suggestion that article 25 of the Statute of the Tribunal, construed in accordance with *Furundžija* and *Kupreškić*, would not be compatible with that right.

[1750] See *Kupreškić*, paras. 52-53, 61 and 346. See also *Martinović*, IT-98-34-A, of 20 October 2004, 8th para., and *Naletilić*, IT-98-34-A, of 20 October 2004, para. 11.
[1751] [2003] EWCA 1020, para. 126.
[1752] *R.v. Mills* [2003] All ER (D) 221 (Jun), para. 63.
[1753] *Chidiac v. R.* [1991] LRC (Crim) 360 at 375.
[1754] *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, of 21 July 2000, para. 40. And see *Kupreškić*, IT-95-16-A, of 23 October 2001, paras. 22 and 408; *Kunarac*, IT-96-23, 12 June 2002, para. 36; *Krnojelac*, IT-97-25-A, of 17 September 2003, para. 5; *Vasiljević*, IT-98-32-A, of 25 February 2004, para. 5; and *Dragan Nikolić*, IT-94-2-A, of 4 February 2005, paras. 8 and 19.
[1755] IT-95-16-A, of 23 October 2001, para. 408. See also the first sentence of paragraph 21 of *Kordić*, IT-95-14/2-A, of 17 December 2004.
[1756] *Cf. Lumley v. Jamaica*, 662/95; *Rogerson v. Australia*, 802/98; and *Juma v. Australia*, 984/01, in Sarah Joseph and others, *The International Covenant on Civil and Political Rights*, 2nd ed. (Oxford, 2004), at pp. 454-455

60. In sum, under the Statute of the Tribunal, the function of the Appeals Chamber is corrective of the decision on which the trial conviction is based: it is to correct any error of law invalidating the decision or any error of fact which has occasioned a miscarriage of justice. The appellant is attacking that conviction; he is not exercising a right given to him by law to have the case retried in a higher court irrespective of whether or not the trial conviction was correct. It is common sense that a higher court which is hearing the case afresh should "itself" make a finding as to guilt. Correspondingly, where there is no hearing of the case afresh, there is no sense in a finding as to guilt being made by the appellate court "itself" since the issue before it is only whether the trial conviction was correct.

61. Further, a finding against guilt made by the appellate court does not necessarily prove that a finding of guilt made be the trial court was incorrect. This is so for the reason that, as has been repeatedly remarked in the Tribunal, two reasonable triers of fact may reach opposed but perfectly reasonable conclusions based on the same facts. To attack the trial conviction, the appellant has to satisfy an objective criterion that can go to the correctness of the trial conviction. Where the appeal on error of fact is based on trial evidence alone, the appellant needs to show that no reasonable tribunal of fact could have found guilt on that evidence, with the consequence that the trial conviction is incorrect. Where additional evidence is admitted, he needs to show the same thing on that evidence taken together with the trial evidence. In both cases, the notional arbiter is a reasonable tribunal of fact; the criterion is an objective one. The Appeals Chamber may be reasonable enough, but that is not determinative.

62. In my view, the Appeals Chamber acts on the basis of the review model, as understood in the adversarial system; accordingly, in a case of this kind it is not competent for the Appeals Chamber "itself" to make a finding as to whether the appellant was guilty.

C. The Tribunal's legislation does not authorise the guilt determination test

63. First, the position directly under the Statute of the Tribunal may be considered. The powers given to the Appeals Chamber by article 25(2) of the Statute are to "affirm, reverse or revise the decisions taken by the Trial Chambers." For the reasons mentioned elsewhere in this opinion, I do not think the power to "affirm" or to "reverse" encompasses a power to make a finding as to guilt. The power to "revise" is wide. In one case, it was held that it embraced a power to find guilt; but the case was one in which the appellate court derived from a system in which, as has been previously observed, appellate courts "exercised a much closer supervision over the lower criminal

courts than the High Court or Court of Criminal Appeal in England ….".[1757] For the reasons given above, such a general supervisory relationship is not appropriate to the relationship between a Trial Chamber and the Appeals Chamber.

64. Speaking of the normal criminal appellate court, it has been said, in keeping with the previous analysis, that the "function of an appellate court is not to try but to review … ."[1758] That limitation would be transgressed if the Appeals Chamber were "itself" to make a finding as to whether the appellant was guilty. Guilt can only be found if there is a trial leading to a finding of guilt: the Appeals Chamber does not hold trials for crimes referred to in the Statute. Article 20 and other provisions of the Statute of the Tribunal make it plain that trials for crimes referred to in the Statute are to be conducted by Trial Chambers and not by the Appeals Chamber.

65. Second, the position under the Rules of Procedure and Evidence of the Tribunal may be consulted. Rule 115 (B) says:

> If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

This provision does say that, in arriving at a final judgement, "the Appeals Chamber will consider the additional evidence …". It may therefore be argued that the provision is sufficiently wide to encompass the right of the Appeals Chamber to make its own finding of guilt. But that seems doubtful.

66. Of course, the Appeals Chamber has to "consider" the additional evidence. However, there is a distinction between power to consider and the basis on which the consideration is made. To adopt and adapt the language of Lord Devlin, the question is what the court has to consider. It has to consider whether the verdict of the Trial Chamber is satisfactory, not how the Appeals Chamber would by "itself" decide whether guilt has been proved beyond reasonable doubt.[1759] Referring to the circumstance that the Court of Appeal (Criminal Division) of England and Wales was, by statute, given power to act if "they think", he remarked:

[1757] *Director of Public Prosecutions v. Sabapathee* [1997] 2 LRC 221, PC, at 226.
[1758] Patrick Devlin, *The Judge* (Oxford, 1979), p. 149. And see *R. v. Pendleton* [2002] 1 Cr. App. R. 34, HL, para.17 of Lord Bingham's speech.
[1759] Patrick Devlin, *op. cit.*, p. 157.

> It is certainly true that it is what *they think* that counts. The question is what they have to think about. They have to think about whether the verdict of the jury is satisfactory, not about how they themselves would decide the case.[1760]

The excerpt comes from a work of criticism which has in turn been criticised, but I think that the particular excerpt can stand.

67. Also, it can be asked how does one court think about how another court can react to additional evidence which the latter has not heard. The matter is not insoluble: a court of appeal may have to do just that. As Lord Chief Justice Parker said in a 1971 unreported case, "one has to *imagine* a jury who heard their evidence [i.e., the additional evidence] together with all the other evidence in the case, and ask oneself whether nevertheless the jury must have come to the same conclusion."[1761]

68. Rule 115 does not enter into the question what the Appeals Chamber is to "think about" within the meaning of Lord Devlin's statement. The answer has to flow from a consideration of the principles regulating the hearing of a criminal appeal. Those principles are considered towards the end of this part of this opinion.

69. Finally, there is Rule 117(A). This says that the "Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it". The Rule does not stipulate the particular juridical criterion on which the Appeals Chamber shall pronounce judgement on the basis of the trial evidence taken together with the additional evidence. In particular, it does not say that the Appeals Chamber is to determine whether it is "itself convinced", on that total evidence, as to the finding of guilt. That left it open for the Appeals Chamber, in paragraph 75 of *Kupreškić,* to say:

> The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.

D. The guilt determination test is not consistent with the principle that an appellate court is only concerned with the safety of the conviction and not with the question whether the appellant is guilty

70. The two tests – the reasonable tribunal test and the guilt determination test – are separated by a point of significance which has often attracted attention in the jurisprudence and which has

[1760] Ibid.
[1761] Ibid., p. 154, italics added.

already been alluded to.[1762] The question before an appellate court in an appeal by way of review, as is the situation here, is not whether a convicted appellant is guilty on the facts. The question is whether the verdict of the trial court declaring him to be guilty is safe. The Court of Appeal (Criminal Division) of England and Wales put the point this way:

> [W]e start by asking ourselves what sort of impact the fresh evidence would have had on the trial, as a step towards answering the essential question, whether we think that in all the circumstances the convictions are unsafe or unsatisfactory.[1763]

71. Subject of course to the overall requirement of fairness,[1764] the safety of a verdict is a recognised concept in the jurisprudence of the Tribunal, at least in relation to conviction.[1765] This may well mean that, on the totality of the evidence, the Appeals Chamber may have to quash a conviction even though, left to "itself," it might have found guilt. A test which turns on the Appeals Chamber being "itself convinced" as to the finding of guilt breaches the established principle that an appeals court "is not and should never become the primary decision-maker."[1766] The appellate concern is to ensure that the verdict is safe; if it is, it should stand. In the words of the Court of Appeal (Criminal Division) of England and Wales:

> [W]e have no power to conduct an open-ended investigation into an alleged miscarriage of justice, even if we were equipped to do so. Our function is to hear criminal appeals, neither more nor less….The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand.[1767]

E. The guilt determination test is not consistent with the fact-finding mission of the Trial Chamber or with the deference due to its findings of fact

72. If, as stated in subparagraph (ii) of paragraph 24(c) of *Blaškić*, "the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt," it looks as if there is no sense in which deference is being paid to the findings of fact made by the Trial Chamber on the trial evidence: the trial evidence is being considered on the same basis as the additional evidence.

[1762] Thus, in paragraph 19 of his leading speech in *R. v. Pendleton* [2002] 1 Cr. App. R. 34, Lord Bingham said that the Court of Appeal should bear "very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty." See too *R. v. Mills* [2004] 1 Cr. App. R. 78, para. 58 of the judgment by Auld L.J.

[1763] *R. v. McIlkenny*, [1991] LRC (Crim) 190 at 212.

[1764] *Condron v. United Kingdom* [2000] (Appln. 35718/97) 31 EHRR 1; *R. v. Togher* [2001] 3 All ER 463; and *R. v. Francom* [2001] 1 Cr App R 237, in which, at para. 43, the court, said, "The test of unsafeness of a conviction applied by the Court of Appeal is not identical to the issue of unfairness before the ECHR …". On the other hand, it may be argued that a verdict which is not fair is not safe.

[1765] See *Kupreškić*, paras. 52-53, 61 and 346. See also, *Martinović*, IT-98-34-A, *Decision on Martinović's Request for Presentation of Additional Evidence*, of 20 October 2004, 8th para., and *Naletilić*, IT-98-34-A, *Decision on Naletilić's Consolidated Motion to Present Additional Evidence*, of 20 October 2004, para. 11.

[1766] *R. v Pendleton, supra*, para. 19.

73. This consideration is of special importance where the case is of some size. The Trial Chamber in this case heard a total of 139 witnesses in 113 days. This is apart from 409 exhibits and various affidavits which it admitted. The Trial Chamber had the opportunity to listen to and to consider all of this material. The Appeals Chamber heard evidence from four witnesses over a period of four days, and it admitted 16 exhibits.

74. The Appeals Chamber may adopt procedures for focusing on relevant portions of the recorded material, but these are in cold form; try as it may, it can not place itself in the same position as the Trial Chamber. The duty of the former to defer to the factual findings of the latter seems clear.

F. The guilt determination test runs against the mainstream of domestic jurisprudence

75. In the ICTY *Blaškić* was followed in *Kordić*,[1768] a recently concluded case. In *Krstić*[1769] the ICTY Appeals Chamber did itself determine the significance of various pieces of additional evidence on the verdict. However, it seems that it had in mind that the ultimate test should be made by a reasonable trier of fact. Thus, paragraph 63 of the judgement in that case states:

> The Trial Chamber's rejection of the Defence's argument as to the parallel chain of command, even when examined in the light of the Defence's additional evidence, is not one that no reasonable trier of fact could have made.

76. There are cases in which the appellate court held that, where the additional evidence is conclusive, it may dispose of the case itself,[1770] without remitting the case for retrial. But that does not touch the criterion by which the appellate court has to be satisfied that the additional evidence is "conclusive". In particular, there seems to be nothing which suggests a criterion of the appellate court making a determination that it is "itself convinced beyond reasonable doubt as to the finding of guilt."

77. *Stafford v. Director of Public Prosecutions* [1771] is a case from which it may be thought that the guilt determination test derives support. The case was decided by the House of Lords in 1974. The Appeals Chamber in *Kupreškić* was not unaware of it.[1772] It seems distinguishable.

[1767] *R. v. McIlkenny*, [1991] LRC (Crim)196 at 205; emphasis added.
[1768] IT-95-14/2-A, of 17 December 2004, para. 17.
[1769] IT-98-33-A, of 19 April 2004, paras. 73, 93, 94, 119, 120, 183, 184, 185 and 186.
[1770] *The State v. Sankar Sudama* (1970) 16 WIR 475 at 484 E to F, per Luckhoo, C. And see *Stolar v. Her Majesty the Queen*, (1988) 52 Man. R (2d) 46 at 60.
[1771] (1974) 58 Cr. App. R. 256.
[1772] *Prosecutor v. Kupreškić*, IT-95-16-A, of 23 October 2001, para. 74, footnote 127, where *Stafford's* case is mentioned.

78. First, the House of Lords, after making a careful review of a complicated course of legislation over many years, emphasised that the appellate court was acting pursuant to a later legislative grant which empowered it to "allow an appeal against conviction if they think (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory …".[1773] So, the words "if they think" were material, and they were stressed. Similar words do not occur in article 25 of the Statute of the Tribunal, wide as is the latter.

79. Second, *Stafford* was later considered by the House of Lords in *R. v. Pendleton,*[1774] decided in 2001. In the words of Lord Bingham, giving the leading speech in *Pendleton*:

> I am not persuaded that the House laid down any incorrect principle in *Stafford*, so long as the Court of Appeal bears very clearly in mind that *the question for its consideration is whether the conviction is safe* and *not whether the accused is guilty*. But the test advocated by counsel in *Stafford* and by Mr Mansfield [counsel for Mr Pendleton] in this appeal does have a dual virtue to which the speeches I have quoted [from the Lords in *Stafford*] perhaps gave *somewhat inadequate recognition.* First, *it reminds the Court of Appeal that it is not and should never become the primary decision-maker*. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. [1775]

80. Thus, as *Stafford* was later interpreted in the House of Lords, the case did not lay down any principle that it is for an appellate court "itself" to make a finding as to guilt on the basis of additional evidence taken with trial evidence; the function of an appellate court was to be confined to saying whether the conviction was safe. Some of "the speeches … [from the House of Lords in *Stafford*] perhaps gave somewhat inadequate recognition" to that point – a point of capital importance, however delicately made. As to the last sentence of the quoted passage, an appellate court may "itself" make a finding as to whether the verdict was *safe*, but it may not do that by "itself" determining whether there was *guilt*. Otherwise, it is difficult to answer the obvious criticism that, as observed in the High Court of Australia, *Stafford* "allows an appeal court to try the case on the fresh evidence ….".[1776]

81. What I regard as the correct thinking on the subject was summed up by Gibbs, C.J., in *Gallagher v. The Queen.* Speaking in the High Court of Australia, he accepted that there "can be no doubt that the Court of Criminal Appeal is required to form some view as to credibility of the fresh evidence" [1777] – a matter expressly left to the Appeals Chamber by paragraph (B) of Rule 115 of the

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[1773] *Stafford's* case, *supra*, per Lord Dilhorne at pp. 260-261, and per Lord Kilbrandon at p.289.
[1774] [2002] 1 Cr. App. R. 34, para. 19.
[1775] Emphases added.
[1776] *Gallagher v. The Queen* [1985-1986] 160 C.L.R. 392 at 420, per Dawson J.
[1777] Ibid., p. 397.

Rules of Procedure and Evidence.[1778] But the effect of the evidence is another matter. The question appeared to Gibbs, C.J., to be "whether the court should act upon its own view of the effect of the fresh evidence, or should consider what effect a reasonable jury might have attributed to it, because in that case the Court of Criminal Appeal has to consider material which was not available to the jury."[1779] On the question thus stated, it seemed to Gibbs, C.J., to be "more consistent with the proper role of the jury that the Court of Criminal Appeal should inquire what effect the fresh evidence might have had if it had been before the jury."[1780] Thus, it is not for the appellate court to be "itself convinced" of guilt.

G. The argument of the size of additional evidence

82. In its judgement in *Blaškić*, the Appeals Chamber had to consider the standard for dealing with additional evidence because the appeal was, "in part, … characterized by the filing of an enormous amount of additional evidence" following on the opening of the archives of a state which had not been cooperative with the Tribunal "at the trial stage."[1781] The appellant had submitted "that the overwhelming majority of 'crucial evidence' in [that] case has entered the record following his conviction, and that the Appeals Chamber 'is sitting as a court of first impression with respect to the new evidence accepted on appeal.'"[1782] He accordingly "suggested that the Appeals Chamber review the mix of evidence *de novo*."[1783] Seemingly, the Appeals Chamber rejected that submission, correctly holding, in paragraph 13 of its judgement, "that an appeal is not a trial *de novo.*" With respect, it appears to me that the Appeals Chamber nevertheless gave some credence to the submission when it proceeded to put forward the guilt determination test in subparagraph (ii) of paragraph 24(c) of *Blaškić*.

83. The additional evidence in Kupreškić, though less than in Blaškić, was considerable too;[1784] so there would appear to be a difficulty in drawing a line. In my view, the question before an appellate court is always whether no reasonable tribunal of fact could have found guilt on the basis of the additional evidence, whatever its size, taken together with the trial evidence.

[1778] This does not mean that, having later heard the live evidence and the submissions of the parties, the Appeals Chamber cannot reconsider questions of credibility.
[1779] *Gallagher v. The Queen*, *supra,* p. 398.
[1780] Ibid.
[1781] *Blaškić*, para. 4.
[1782] Ibid., para. 9.
[1783] Ibid., para. 10.
[1784] There was written evidentiary material in *Kupreškić*, although not as much as in *Blaškić.* As to oral evidentiary material, in the latter case six witnesses were examined in four days; in the former case three witnesses were examined in three days. See *Blaškić*, Annex A, para. 41, and *Kupreškić*, Annex A, para. 505.

84. If the additional evidence in a case is unmanageably large, the answer is to order a retrial. In Blaškić, although the additional evidence was staggeringly huge and indeed the largest that ever came to the Appeals Chamber, the Appeals Chamber, referring to the circumstances of the case, found that "a re-trial was not warranted."[1785] That decision is not a matter for inquiry here. In issue are the principles on which the Appeals Chamber proceeded to hear the case to finality with particular reference to the additional evidence. It appears to me that, however extensive was the additional evidence, the object of that evidence was to persuade the Appeals Chamber that it cast reasonable doubt on the finding of the Trial Chamber that guilt was proved beyond reasonable doubt: it was not the object to enable the Appeals Chamber "itself" to make its own finding as to whether guilt was proved beyond reasonable doubt.

85. If a matter were remitted by the Appeals Chamber for retrial, the designated Trial Chamber would of course be free to make a finding as to whether guilt was proved beyond reasonable doubt by all the evidence in the case, inclusive of the additional evidence. But if the Appeals Chamber decides to hear the whole case itself, it seems to me that it cannot take the place of the Trial Chamber and "itself" make a finding as to guilt: the Appeals Chamber is not vested with an option to decide that a trial leading to a finding as to guilt may be held either by a Trial Chamber or by "itself". If it decides to hear the whole case itself, it hears the whole case as an appellate court, not as a trial court: its mission would be to determine whether doubt was cast by the additional evidence together with the trial evidence on the original Trial Chamber's finding of guilt, not "itself" to make a finding as to whether the appellant was guilty.

H. The fact that additional evidence is admitted by the Appeals Chamber does not mean that it is for the Appeals Chamber to determine whether it is "itself convinced beyond reasonable doubt as to the finding of guilt"

86. A possible argument is that, since additional evidence is *admitted* by the Appeals Chamber, it must be for the Appeals Chamber "itself" to say, in its *final* evaluation, whether or not that evidence, coupled with the trial evidence, proved guilt beyond reasonable doubt. I demur.

87. It is indeed for the Appeals Chamber to make both the initial decision to *admit* additional evidence and the final decision as to the *evaluation* of additional evidence which has been admitted: it is the only judicial body which can do so. But, following the reasoning of Lord Devlin (already

[1785] *Blaškić*, para. 6; and "Decision on Evidence" of the Appeals Chamber, IT-95-14-A, of 31 October 2003, p. 7. The last considerandum at p. 6 of the "Decision on Evidence" stated "that the decision whether to retain a case or to send it back for a re-trial lies within the discretion of the Appeals Chamber, in light of the circumstances of the case; and that the interests of justice must be considered in such a decision."

mentioned), what is in issue is the standard by which the Appeals Chamber makes the final evaluation, and not the availability of power to make the final evaluation.

88. If the Appeals Chamber determines that it is "itself convinced" that the totality of the evidence proves guilt beyond reasonable doubt, that determination does not necessarily show that the conviction was correct. Likewise, if the Appeals Chamber determines that it is not "itself convinced" that the totality of the evidence proves guilt beyond reasonable doubt, that determination does not necessarily show that the conviction was incorrect. This is because of the principle, referred to above, that two reasonable triers of fact could with equal reason reach opposed conclusions based on the same material.

89. The opposite view may seek support from *Stafford v. Director of Public Prosecutions*,[1786] in which Viscount Dilhorne said:

> If the Court [of Appeal] has no reasonable doubt about the verdict, it follows that the Court does not think that the jury could have one; and, conversely, if the Court says that a jury might in the light of the new evidence have a reasonable doubt, that means that the Court has a reasonable doubt.[1787]

But that holding has to be read in the light of the rider put on it in *R. v. Pendleton,*[1788] as discussed above. In *Pendleton's* case, the House of Lords made clear that an appellate court is not concerned to find guilt.

90. This is in line with the statement by Dawson, J., speaking in the High Court of Australia in *Gallagher v. The Queen*[1789], that he was "unable to accept the view that it was a circumlocution to speak in terms of a doubt which ought to have been entertained by any reasonable jury rather than in terms of a doubt which the court has." In his judgement, the "view must be taken to have been dispelled in this country that a reasonable doubt or the absence of a reasonable doubt upon the part of an appellate court is in every case the same thing as a reasonable doubt or the absence of a reasonable doubt on the part of a jury."[1790]

91. I agree with those remarks. They point to a real distinction. They are consistent with Lord Devlin's observation that "surely any judge who has presided over an appreciable number of jury trials will remember cases in which he had no reasonable doubt but the jury had."[1791] The judge and the jury may be both reasonable, but the latter nevertheless arrives at a different conclusion. True, at

[1786] (1974) 58 Cr. App. R. 256.
[1787] Ibid., at p. 264.
[1788] [2002] 1 Cr. App. R. 34, para. 19.
[1789] [1985-1986] 160 C.L.R. 392 at 418.
[1790] Ibid., pp. 419-420.

the level of the Trial Chamber there is no corresponding distinction between judge and jury; but there is a corresponding distinction between the Trial Chamber and the Appeals Chamber, and it is germane to the analysis.

92. The finding of the appellate court has to be by a standard which objectively challenges the correctness of the conviction. A challenge is made on an objective standard by showing that no reasonable tribunal of fact could have made a finding of guilt on the additional evidence considered with the trial evidence. If the answer is in the affirmative, the conviction is quashed; if in the negative, the conviction is affirmed.

I. The general legal position concerning appeals by convicted appellants on errors of fact, in which additional evidence has been admitted

93. I would understand the general legal position concerning an appeal on facts against a conviction, in which additional evidence has been admitted, to be based on the settled principle that, in this Tribunal, an appeal is not a trial *de novo*.[1792] Additional evidence is received as a method of challenging the correctness of the conviction by the trial court; and, as both *Blaškić*[1793] and the general jurisprudence[1794] make clear, the appellate consideration of additional evidence starts out on the footing that the conviction was correctly made on the basis of the trial evidence. Accordingly, one has to begin with the fact that there is a conviction on record; unless set aside on appeal, it stands.

94. An appeal by a convicted appellant on an error of fact based on trial evidence is really an appeal against a finding by the Trial Chamber that the prosecution had satisfactorily discharged its legal burden to prove guilt beyond reasonable doubt. The appellant[1795] has a "persuasive onus"[1796] to establish that the prosecution had not discharged that legal burden; the appellant carries that "persuasive onus" by showing that the trial evidence cast reasonable doubt (as distinguished from a fanciful doubt) on the correctness of the conviction. The object of additional evidence, when taken with the trial evidence, is similarly to cast reasonable doubt on the correctness of the conviction. If the appellant succeeds in thus casting reasonable doubt and in thereby persuading the Appeals Chamber that no reasonable tribunal of fact could have found that guilt was proved beyond

[1791] Patrick Devlin, *op. cit.*, p. 161.
[1792] See *Blaškić*, para. 13, and *Kordić*, IT-95-14/2-A, of 17 December 2004, paras. 13 and 21.
[1793] See the opening words of paras. 23 and 24(c)(ii) of *Blaškić*.
[1794] "In a 'fresh evidence' case nothing has gone wrong in the conduct of the trial …", per Viscount Dilhorne in *Stafford v. Director of Public Prosecutions*, [1974] A.C.878, H.L., at 894.
[1795] See *R. v. Hanratty* [2002] 3 All ER 534, para. 79, stating: "With this background the onus must be squarely on the appellant to establish that the appeal should succeed". See also *Delalić*, IT-96-21-A, of 20 February 2001, paras. 725 and 780, concerning an appeal on sentence.

reasonable doubt, the conviction is quashed; if he fails, the conviction is affirmed, that is to say, it continues to stand undisturbed. In neither case is the Appeals Chamber called upon "itself" to make a finding as to guilt.

95. The process is illustrated by *R. v. Harding*.[1797] In that case, which involved fresh evidence, Lord Chief Justice Hewart said:

> The question for this Court to consider is whether, if that evidence had been before the jury, it might have had the effect of raising in the minds of the jury a reasonable doubt. The function of the prosecution is, of course, to establish the case beyond a reasonable doubt. If it fails to fulfil that condition, the prisoner is entitled to be acquitted. The burden of proof is never upon the prisoner. Acquittal must follow if the evidence is such as to cause a reasonable doubt, because that is only another way of saying that the prosecution have failed to establish the case.
>
> Looking at this evidence with care, and recognising the force of the rest of the evidence in this case, we are clearly of the opinion that, if this evidence had been offered in the Court below, there might have been upon the part of the jury a reasonable doubt as to the guilt of the appellant; or, to put it another way, we cannot say that, if that evidence had been offered, the jury must inevitably have come to the same conclusion. In those circumstances the only conclusion which is possible for this Court is to say that the appeal must be allowed, and the conviction quashed.[1798]

96. The Lord Chief Justice referred to the position of the jury, but what is significant is that the reasoning process did not require the court of appeal to be "itself convinced beyond reasonable doubt as to the finding of guilt." If, through the fresh evidence, the appellant succeeds in casting doubt on the conviction, the latter is quashed; if he fails, it continues in force. The language may differ here and there, but this in substance is the approach normally taken in adversarial systems.[1799]

97. Although precedents cannot be drawn from common law jurisdictions in which the appellate process itself does not consider additional evidence, it is useful to note the general principle applicable in such jurisdictions to appellate consideration of trial evidence. Writing for the Supreme Court of the United States in *Jackson v. Virginia*,[1800] Justice Stewart put the principle thus:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court "to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt"…. Instead, the relevant question is whether, after viewing the evidence in the light most favourable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt… This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve

[1796] *Maguire*, (1992) 94 Cr. App. R. 133 at 142.
[1797] (1936) 25 Cr. App. R. 190, C.C.A.
[1798] Ibid., pp. 196-197.
[1799] See R.E.Selhany, *Canadian Criminal Procedure*, 6th ed. (Ontario, 2004), para. 9.960; and *R. v. Saleam* (1989) 16 N.S.W.L.R. 14 at 21, per Hunt J.
[1800] 443 U.S. 307 (1979), emphasis as in the original.

> conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.[1801]

98. I am not able to appreciate why a similar principle should not apply to additional evidence in those adversarial jurisdictions in which it is admitted on appeal. If additional evidence is admitted, the question remains whether, on that evidence taken together with the trial evidence, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". True, the rational trier of fact would not have heard the additional evidence; but, equally, he would not have heard the trial evidence also. He is a notional arbiter and can judge on any admitted material, whether it is trial evidence or additional evidence. I cannot imagine any reason for not extending to the case of additional evidence the fundamental prohibition against an appellate court asking "whether *it* believes that the evidence" at trial established guilt beyond a reasonable doubt.

J. The key reasoning in *Blaškić*

99. The key reasoning of the Appeals Chamber in *Blaškić* is set out in paragraph 23 of its judgement in that case, already cited but for convenience reproduced thus:

> However, if in a given case, the outcome were that a reasonable trier of fact could reach a conclusion of guilt beyond reasonable doubt, the Appeals Chamber considers that, when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal. The Appeals Chamber underscores that in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond reasonable doubt.

100. The Appeals Chamber correctly held that guilt has to be proved beyond reasonable doubt. On this basis, it proceeded to argue that, since additional evidence was not presented to the Trial Chamber, the Appeals Chamber had to be "itself convinced" that such evidence (taken together with the trial evidence) proved guilt beyond reasonable doubt; otherwise, there would be no judicial evaluation as to whether the totality of that evidence proved guilt beyond reasonable doubt. That is an attractive argument. I respectfully disagree with it.

101. Consideration has to be given to the purposes sought to be served by additional evidence proffered by the defence. Such evidence, and any rebuttal evidence proffered by the prosecution, may indeed be said to prove guilt but only, it is apprehended, in the sense of making stronger what

[1801] Ibid., pp. 316ff; footnotes omitted; emphases as in the original.

is already strong,[1802] or of giving additional support to a decision which can in any event stand on its own.

102. Save in the sense mentioned above, additional evidence proffered by the defence is not evidence adduced with the intention of proving guilt; so the question is not whether (taken together with the trial evidence) it proves guilt. It is evidence adduced by the defence to cast reasonable doubt on a finding of guilt which has already been made and which is being challenged. That finding of guilt continues to stand, unless it has been upset on appeal on the ground that the additional evidence, taken together with the trial evidence, cast reasonable doubt on it. The focus therefore is not on whether "in light of the trial evidence and additional evidence admitted on appeal [the Appeals Chamber] is itself convinced beyond reasonable doubt as to the finding of guilt." The focus is on whether the *old* conviction can stand in the light of the additional evidence taken with the trial evidence – not on whether what is to all intents and purposes a *new* conviction can be made by a *new* court on *new* evidence. In this respect, I agree with Judge Weinberg de Roca's statement in *Blaškić*, reading:

> Of course, I accept that every finding of guilt in a criminal trial must be established beyond a reasonable doubt. Where additional evidence adduced on appeal raises sufficient doubt, then the Appeals Chamber will reverse the conviction. I emphasize, however, that this is not because the Appeals Chamber has conducted a second trial and has reached its own conclusion of guilt beyond a reasonable doubt on the basis of the combined trial and appellate evidence, but rather because the Trial Chamber's finding of fact is no longer one that a reasonable trier of fact could have reached in light of the newly adduced doubt-raising evidence.[1803]

K. Finding on this part

103. In an appeal from a conviction based on an alleged error of fact, whether or not additional evidence has been admitted, the function of the Appeals Chamber is to determine whether the conviction made by the Trial Chamber was correct in the sense of being safe. That is not the same thing as the Appeals Chamber determining whether it is "itself convinced beyond reasonable doubt as to the finding of guilt". The Tribunal's system has to work. It cannot work if the essential function of the Trial Chamber to find guilt is in whole or in part exercised by the Appeals Chamber in a case of this kind.

104. In sum, the approach of the Appeals Chamber in this case effectively makes the Appeals Chamber a Trial Chamber, causes a trial to be held before the Appeals Chamber, requires the Appeals Chamber to make a finding as to whether it is "itself convinced" that the guilt of the

[1802] See generally *R.v. Hakala* [2002] EWCA Crim 730 (judgement of Judge L.J.), and *R.v. Hanratty* [2002] EWCA Crim 1141, para. 93.
[1803] *Blaškić*, "Partial Dissenting Opinion of Judge Weinberg de Roca", para. 9.

appellant has been proved beyond reasonable doubt, and in these and other ways misapprehends the appellate process of the Tribunal.

IV. CONCLUSION

105. The Appeals Chamber's holding, following *Blaškić,* is in conflict with its earlier holding in *Kupreškić.* The jurisprudence of the Tribunal provides for a choice to be made between two conflicting holdings of the Appeals Chamber. It is now necessary to make that choice. With respect, my judgement is for *Kupreškić.*

106. Alternatively, it is necessary to consider whether the holding in *Blaškić* was correctly made and, if it was not, whether it should be departed from. In my judgement, it is not a correct statement of the law of the Tribunal; the correct statement of the law of the Tribunal is that set out in *Kupreškić*.

107. The fact that *Kupreškić* was unanimous and *Blaškić* was not[1804] may be ignored: each decision has the full authority of the whole of the Appeals Chamber. However, unless the *Kupreškić* test is restored, I fear that it is not possible to escape the reach of a recent observation that it "should not happen that due to shifting majorities the Appeals Chamber changes its jurisprudence from case to case."[1805]

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

Mohamed Shahabuddeen

Dated 28 February 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

[1804] Ibid.
[1805] "Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions", para. 13, in *Kordić*, IT-95-14/2-A, of 17 December 2004. No view is offered here on the merits of the relevant holding in that case.

ANNEX A: PROCEDURAL BACKGROUND

A. Notice of Appeal

726. The Trial Judgement was handed down on 2 November 2001.[1806] Notices of appeal against the Trial Judgement were filed by the Appellant Kvočka on 13 November 2001, by the Appellants Radić and Prcać on 15 November 2001, and by the Appellants Žigić and Kos on 16 November 2001.

B. Assignment of Judges

727. By Order dated 4 December 2001, President Jorda assigned Judge Shahabuddeen, Judge Hunt, Judge Güney, Judge Gunawardana and Judge Meron to this bench of the Appeals Chamber.[1807]

728. On 30 January 2002, Judge Shahabuddeen, Presiding Judge in this case, designated Judge Hunt as pre-appeal Judge pursuant to Rule 65*ter*, read together with Rule 107 of the Rules.[1808]

729. On 17 March 2003, President Theodor Meron assigned Judge Pocar to this bench of the Appeals Chamber to replace him with immediate effect.[1809]

730. On 17 June 2003, Judge Weinberg de Roca was assigned to the case in place of Judge Gunawardana.[1810] On 11 July 2003, pursuant to Rule 27(C) of the Rules, which states that the President may at any time temporarily assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber, Judge Hunt was replaced by Judge Schomburg.[1811] On 16 July 2003, Judge Weinberg de Roca was designated as pre-appeal Judge in place of Judge Hunt. [1812]

731. On 18 February 2004, Judge Schomburg was replaced by Judge Mumba.[1813] The resulting and final composition of this bench of the Appeals Chamber was Judge Shahabuddeen (Presiding), Judge Pocar, Judge Mumba, Judge Güney and Judge Weinberg de Roca.

[1806] *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, Case No. IT-98-30/1-T. Available in BCS on 15 April 2002.
[1807] Order of the President Assigning Judges to a Bench of the Appeals Chamber, signed 4 December 2001, filed 13 December 2001.
[1808] Order Designating a Pre-Appeal Judge, 30 January 2002.
[1809] Order Replacing a Judge in a Case Before the Appeals Chamber, 17 March 2003.
[1810] Order Assigning a Judge to a Case Before the Appeals Chamber, signed 17 June 2003, filed 18 June 2003.
[1811] Order Assigning a Judge to a Case Before the Appeals Chamber, signed 11 July 2003, filed 14 July 2003.
[1812] Order Designating a Pre-Appeal Judge, issued 16 July 2003.
[1813] Order Replacing a Judge in a Case Before the Appeals Chamber, 18 February 2004.

C. Filings

1. Filings of briefs

732. Following several motions seeking extensions of time for the filing of their respective Appeal Briefs, the Appellants were given until 31 May 2002 to file their briefs.[1814] Milojica Kos filed his Appeal Brief on 2 April 2002.[1815] On 21 May 2002, Kos withdrew his appeal against the Trial Judgement.[1816] He was granted early release by Order of the President of the International Tribunal dated 31 July 2002.[1817] Radić and Kvočka filed their Appeal Briefs on 11 April 2002[1818] and Prcać on 12 April 2002.[1819]

733. Žigić filed an Appeal Brief on 21 May 2002,[1820] but, on 24 May 2002, the Prosecution lodged a motion requesting that Žigić be ordered to specify his grounds of appeal, pursuant to Rules 73 and 107 of the Rules.[1821] At the time the Appellant lodged his Notice of Appeal, on 16 November 2001, the Rules required the grounds of appeal to be set out in the Appeal Brief, rather than in the Notice of Appeal.[1822] By the time the Appellant Žigić filed his Appeal Brief, the Rules required the grounds to be stated in the notice of appeal. On 14 June 2002, Judge Hunt ordered Žigić to file a new document listing each ground of appeal on which he intended to rely within 14 days.[1823] On 3 July 2002, he filed an additional document outlining 47 grounds of appeal ("Žigić Additional Document").[1824]

734. Following an extension of time, the Prosecution filed confidentially its Prosecution Respondent's Brief on 15 July 2002.[1825] The public redacted version of the Prosecution Respondent's Brief was filed on 30 October 2002. Kvočka filed his reply on 23 August 2002, Radić on 30 July 2002, and Prcać on 29 July 2002. Žigić filed confidentially his reply to the Prosecution Respondent's Brief on 10 September 2002. The public redacted version of the Žigić Reply Brief was filed on 13 November 2002.

[1814] Decision on Appellant's Second Request on Extension of Time, 11 April 2002.
[1815] Kos's Brief on Appeal, signed 1 April 2002, filed 2 April 2002.
[1816] Kos's Brief on Appeal Withdrawal, signed 14 May 2002, filed 21 May 2002.
[1817] Order of the President for the Early Release of Milojica Kos, signed 30 July 2002, filed 1 August 2002.
[1818] Radić Appeal Brief, 11 April 2002; Kvočka Appeal Brief, 11 April 2002.
[1819] Prcać Appeal Brief, 12 April 2002.
[1820] Žigić Appeal Brief (public with confidential annexes), 21 May 2002.
[1821] Prosecution Motion Requesting Statement of Grounds of Appeal, 24 May 2004.
[1822] IT/32/Rev. 21, 26 July 2001, Rule 108 and Rule 111.
[1823] Decision on Prosecution Motion Requesting Order to Zoran Žigić to File Grounds of Appeal, 14 June 2002.
[1824] Submission Pursuant to Order Given in Decision on Prosecution Motion Requesting Order to Zoran Žigić to file Grounds of Appeal Issued on 14 June 2002, 3 July 2002.
[1825] Decision on Time-Limit for Prosecution Response Brief, 14 June 2002.

2. Other filings and decisions

735. On 22 August 2002, Kvočka filed a motion for provisional release. By Order dated 11 September 2002, the Appeals Chamber dismissed the request for provisional release.[1826]

736. On 6 December 2002, Kvočka filed a request for early release. This request was dismissed by the President of the International Tribunal on 16 December 2002.

737. On 27 July 2003, Kvočka filed confidentially a request for pardon before the President of the International Tribunal. On 7 August 2003, the President dismissed the request.[1827]

738. On 8 December 2003, Kvočka requested provisional release pending the hearing of the appeal.[1828] On 17 December 2003, Kvočka was granted provisional release pending the hearing of his appeal.[1829] Pursuant to Rule 65 of the Rules, the Appeals Chamber varied the terms of Kvočka's provisional release by Order of 11 March 2004.[1830] Kvočka was ordered to surrender to the custody of the International Tribunal in The Hague on 19 March 2004. From 19 until 29 March 2004 he remained in the custody of the International Tribunal for the hearing of his appeal, which took place from 23 March until 26 March 2004. He was put back on provisional release on 29 March 2004 pending delivery of this Judgement.[1831]

D. Issues relating to evidence

1. General

739. The Appeals Chamber has been seised of a number of requests for access to confidential material pursuant to Rule 75 of the Rules, filed by the Prosecution, the Appellants and other accused persons before this International Tribunal. In addressing these requests, the Appeals Chamber has issued a number of decisions and orders, regarding access to information and implementation and variation of protective measures.[1832]

[1826] Order of the Appeals Chamber on the Motion for Provisional Release by Miroslav Kvočka, issued 11 September 2002.
[1827] Order of the President in Response to Miroslav Kvočka's Request for Pardon, 7 August 2003.
[1828] Appellant's Amendment to Request for Provisional Release according to 'Decision on request for separation of Miroslav Kvočka's request for provisional release pending hearing of the Appeal', 8 December 2003.
[1829] Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003.
[1830] Order varying the Provisional Release of Miroslav Kvočka and for his return to the Tribunal during the Appeal Hearing, 11 March 2004.
[1831] *Ibid.*
[1832] *See* for example: Order on Protective Measures, 4 March 2003; Order issued 12 November 2002; Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003.

2. Rule 115 Motions

740. During the appellate proceedings, Žigić, Prcać and Radić filed four separate motions pursuant to Rule 115 of the Rules, seeking to admit additional material as evidence on appeal.

(a) Žigić's First Rule 115 Motion

741. On 23 August 2002, Žigić filed confidentially a motion to admit additional evidence on appeal pursuant to Rule 115 of the Rules ("Žigić's First Motion").[1833] Žigić sought to adduce 13 items of additional evidence[1834] and his own testimony; these related to six of his 47 grounds of appeal, namely, the murder of Bećir Medunjanin, the murder of Drago Tokmadžić, the murder of Sead Jusufagić, the murder of Emsud Bahonjić, the torture of Fajzo Mujanović, and the alleged unfairness of the trial.

742. On 29 August 2002, before filing its response to Žigić's First Motion, the Prosecution filed a request for an extension of time limit and page limit. A decision granting the requested extensions was rendered on 30 August 2002.[1835] The Prosecution filed its response to Žigić's First Motion on 9 September 2002,[1836] to which Žigić replied on 23 September 2002. The Prosecution further filed a "Supplemental Response to Zoran Žigić's Addendum to Zoran Žigić's Motion to Present Additional Evidence filed on 22 August 2002" on 25 June 2003, and Žigić replied on 30 June 2003. Paragraphs 33 and 34 of Žigić's reply were added to Žigić's First Motion pursuant to the Appeals Chamber's decision of 3 October 2002.[1837]

(b) Žigić's Second Rule 115 Motion

743. Žigić filed confidentially his Second Motion to present additional evidence on 11 April 2003.[1838] He sought to adduce 19 items of additional evidence[1839] relating to four of his 47 grounds of appeal.[1840] The Prosecution responded to Žigić's Second Motion on 9 May 2003, having been granted an extension of page limit by Order of 3 May 2003. Žigić confidentially filed a motion for

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[1833] Motion to Present Additional Evidence-Defense for the Accused Zoran Žigić filed confidentially on 23 August 2002 and Addendum thereto filed 13 June 2003. This motion was re-filed on 14 March 2003.
[1834] Confidential Annex C to Decision on Appellants' Motions to admit Additional Evidence Pursuant to Rule 115, 16 February 2004.
[1835] Decision granting extension of time and page limits, 30 August 2002.
[1836] Prosecution's Response to Zoran Žigić's Motion to Present Additional Evidence, 9 September 2002.
[1837] Decision on Zoran Žigić's motion seeking leave to add paragraphs to his motion to present additional evidence, 3 October 2002.
[1838] Zoran Žigić's Second Motion to Present Additional Evidence, filed confidentially on 11 April 2003.
[1839] Identified in Confidential Annex D to Decision on Appellants' Motions to admit Additional Evidence Pursuant to Rule 115, 16 February 2004.
[1840] The murder of Bećir Medunjanin; the murder of Drago Tokmadžić; the alleged unfairness of the trial; and the finding that Žigić was engaged in a joint criminal enterprise with respect to the Omarska camp.

an extension of time to reply to the Prosecution's response on 14 May 2003; this extension was granted by Order of 15 May 2003. He filed his reply to the Prosecution response on 19 May 2003.

(c) Prcać's Rule 115 Motion

744. Prcać filed confidentially his "Motion of Dragoljub Prcać to admit Additional Evidence Pursuant to Rule 115" on 4 March 2003, and an addendum thereto on 10 March 2003. He sought to adduce 27 pieces of additional evidence on appeal relating to the general situation in the Prijedor Municipality and to his status in the Omarska camp.[1841] The Prosecution filed confidentially the "Prosecution's Response to the Rule 115 Motion of Mlađo Radić and Dragoljub Prcać" on 25 March 2003.

(d) Radić's Rule 115 Motion

745. The "Motion of Mlađo Radić to Admit Additional Evidence Pursuant to Rule 115" was filed confidentially on 25 February 2003; an addendum thereto was filed on 7 March 2003. Radić sought to adduce five pieces of additional evidence pertaining to the credibility of a Prosecution witness.[1842]

(e) Appeals Chamber Decision on the Rule 115 Motions

746. On 16 February 2004, the Appeals Chamber rendered its "Decision on Appellants' Motions to Admit Additional Evidence". The motions of Prcać and Radić and Žigić's First Motion were dismissed. The Appeals Chamber granted Žigić's Second Motion in part, finding that the supplemental statement of the witness listed in item 4 and the evidence listed as item 16 of Žigić's Second Motion were admissible as additional evidence on appeal pursuant to Rule 115 of the Rules.[1843] The Appeals Chamber ordered that those two witnesses be heard by the Appeals Chamber pursuant to Rules 98 and 107 of the Rules during the Appeals Hearing.[1844]

3. Rebuttal material

747. On 27 February 2004, the Prosecution filed confidentially a motion to adduce rebuttal material pursuant to Rule 115 of the Rules ("Prosecution Motion").[1845] Žigić filed confidentially his

[1841] Identified in Confidential Annex A to Decision on Appellants' Motions to admit Additional Evidence Pursuant to Rule 115, 16 February 2004.
[1842] Confidential Annex B to Decision on Appellants' Motions to admit Additional Evidence Pursuant to Rule 115, 16 February 2004.
[1843] Decision on Appellants' Motions to admit Additional Evidence Pursuant to Rule 115, 16 February 2004, p. 7.
[1844] *Ibid.*
[1845] Prosecution's Motion to Adduce Rebuttal Evidence, filed confidentially on 27 February 2004.

response on 8 March 2004. The Prosecution replied confidentially on 11 March 2004. On 12 March 2004, the Appeals Chamber found the evidence contained in three witness statements attached to the Prosecution Motion to be admissible as rebuttal material and ordered the Prosecution, in conjunction with the Victims and Witness Unit, to arrange for the rebuttal witnesses to appear before the Appeals Chamber during the Appeals Hearing.[1846]

E. Status conferences

748. Status Conferences were held in accordance with Rule 65*bis* of the Rules on 8 March 2002, 28 June 2002, 28 October 2002, 14 February 2003, 13 June 2003, 13 October 2003, 16 February 2004, 21 July 2004 and 10 November 2004.

F. Assignment of counsel and legal aid

749. During the appeal process, the Registrar issued several decisions regarding the assignment of counsel to the Appellants. In his decision of 21 December 2001, the Registrar assigned Mr Matt Henessey as co-counsel to Miljoca Kos. On 11 March 2002, the Registrar withdrew the assignment of Mr Zarko Nikolić as counsel to Kos and assigned Ms Jelena Nikolić as lead counsel.[1847] Kos's legal aid was ended with the withdrawal of his appeal and his early release on 1 August 2002. On 8 July 2002, the Registrar discontinued the provision of legal aid to Žigić and decided to withdraw the assignment of counsel to the accused.[1848] Žigić appealed this decision on 4 October 2002.[1849] On 22 October 2002, Mr Stojanović expressed his willingness to represent Žigić during the appellate proceedings on a *pro bono* basis.[1850] On 7 February 2003, the Appeals Chamber confirmed the Registrar's decision to withdraw legal aid to Žigić.[1851] On 10 December 2003, the Registrar rejected a second application by Žigić for legal aid. On 9 January 2004, Žigić filed a "Request to the Trial Chamber [sic] to Review the Decision of the Registry of 10 December 2003" and on 16 January 2004, he filed a supplement thereto. On 10 March 2004, the Appeals Chamber quashed the Registrar's Decision of 10 December 2003 and remitted the matter to the Registrar for re-consideration.[1852] On 22 September 2004, the Registrar filed his "Reconsideration in relation to the financial status of the appellant Zoran Žigić", confirming his decision not to grant legal aid to Žigić.

[1846] Decision on the Prosecution's Motion to Adduce Rebuttal Material, 12 March 2004.
[1847] Decision by the Registry to withdraw the assignment of Mr. Zarko Nikolić as counsel to Mr. Kos and to assign Ms Jelena Nikolić as lead counsel, 11 March 2002.
[1848] Decision by the Registrar re: Withdrawal of the Assignment of mr. Stojanović as Counsel for Mr. Žigić, 8 July 2002, at p. 3.
[1849] Appeal Against the Decision by the Registrar of the Tribunal of 8 July 2002, filed 4 October 2002.
[1850] Letter from Mr Stojanović to the Registry, 23 October 2002.
[1851] Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003.
[1852] Decision on Zoran Žigić's Request for Review of the Registrar's Decision of 10 December 2003.

G. Hearings on appeal

750. The hearings on appeal took place between 23 and 26 March 2004. Additional Witness KV1 was heard on 23 March 2004. Another additional witness, Witness KV2, was heard during the additional evidentiary hearing which took place on 19 July 2004.[1853] Two witnesses in rebuttal, Witnesses KV3 and KV4, were heard during additional evidentiary hearings on 20 and 21 July 2004 respectively.[1854]

[1853] Scheduling Order, issued 14 July 2004.
[1854] *Ibid.*

ANNEX B: GLOSSARY OF TERMS

A. List of Court Decisions

1. ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT 95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement").

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BANOVIĆ
Prosecutor v. Pedrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement").

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 20 July 2004 ("*Blaškić* Appeal Judgement").

ČELEBIĆI
Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo also known as "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo also known as "Zenga" ("Čelebići Case"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-T*bis*-R117*,* Sentencing Judgement, 9 October 2001 ("*Čelebići* Sentencing Judgement").

Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A *bis,* Judgement on Sentence Appeal, 8 April 2003 ("*Čelebići* Sentence Appeal Judgement").

ERDEMOVIĆ
Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Judgement, 7 October 1997, ("*Erdemović* Appeal Judgement").

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemović* Sentencing Judgement").

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-T *bis*, Sentencing Judgement, 5 March 1998 ("*Erdemović* Sentencing Judgement II").

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement").

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

GALIĆ
Prosecutor v. Galić, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 ("*Galić* Decision on Leave to Appeal").

Prosecutor v. Galić, Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Trial Judgement").

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement").

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

JOKIĆ
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004 ("*Jokić* Sentencing Judgement").

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001, ("*Kordić and Čerkez* Trial Judgement").

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, ("*Kordić and Čerkez* Appeal Judgement").

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement").

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgement, signed 17 September 2003, filed 5 November 2003 ("*Krnojelac* Appeal Judgement").

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement").

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUNARAC et al.
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement").

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

KUPREŠKIĆ et al.
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16, Trial Judgement, 14 Januray 2000 ("*Kupreškić et al.* Trial Judgement").

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA et al.
Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("Trial Judgement" or "*Kvočka* Trial Judgement").

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000 ("Decision on Defence Motions for Acquittal").

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, Decision on Judicial Notice, 8 June 2000.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999.

NIKOLIĆ
Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, 2 December 2003 ("*Nikolić* Sentencing Judgement").

OBRENOVIĆ
Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement").

PLAVŠIĆ
Prosecutor v. Biljana Plavšić, Case No. IT-00-39&40/1, Sentencing Judgement, 27 February 2003 ("*Plavšić* Sentencing Judgement").

SIKIRICA et al.
Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija, Case No. IT-95-8-T, Judgement on Defence Motions to Acquit, 3 September 2001 ("*Sikirica et al.* Judgement on Defence Motions to Acquit").

Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija, Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001 ("*Sikirica et al.* Sentencing Judgement").

SIMIĆ
Prosecutor v. Milan Simić, Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002 ("*Simić* Sentencing Judgement").

SIMIĆ et al.
Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Trial Judgement").

STAKIĆ
Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Decision on Rule 98*bis* Motion for Judgement of Acquittal, 31 October 2002 ("*Stakić* Decision on Rule 98*bis* Motion for Judgement of Acquittal").

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, 31 July 2003 ("*Stakić* Trial Judgement").

TADIĆ
Prosecutor v. Duško Tadić, Case No. IT-94-1/AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997("*Tadić* Trial Judgement").

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Sentencing Judgement, 14 July 1997("*Tadić* Sentencing Judgement").

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Judgement in Sentencing Appeals").

TODOROVIĆ
Prosecutor v. Stevan Todorović, Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001 ("*Todorović* Sentencing Judgement").

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement").

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Appeal Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement").

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement").

BAGILISHEMA
Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement").

Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 ("*Bagilishema* Appeal Judgement").

KAMBANDA
Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement").

KAJELIJELI
Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement, 1 December 2003 ("*Kajelijeli* Trial Judgement").

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement").

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUSEMA
Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement").

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

RUTAGANDA
Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement").

Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA
Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement and Sentence").

SERUSHAGO
Prosecutor v. Omar Serushago, Case No. ICTR-98-39-S, Sentence, 5 February 1999 ("*Serushago* Sentence").

B. List of other legal authorities

Report of the Preparatory Commission for the International Criminal Court, 6 July 2000, PCNICC/2000/INF/3/Add.2, ("Report of the Preparatory Commission for the ICC").

Report of the International Law Commission on the work of its 48th session, 6 May – 26 July 1996, supplement no. 10 (A/51/10), ("1996 ILC Report").

Report of the International Law Commission on the work of its 43rd session, 29 April – 9 July 1991, supplement no. 10 (A/46/10) ("1991 ILC Report").

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), (S/25704), ("Report of the Secretary-General").

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (S/1994/674) ("Commission of Experts Report").

C. List of abbreviations

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

ABiH	Army of Bosnia and Herzegovina
ACHR	American Convention on Human Rights of 22 November 1969
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
Appeal Hearing	Appeal hearing of 23 to 26 March 2004, in *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A
Appellants	Collective term for Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać
AT.	Transcript page from hearings before the Appeals Chamber. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
BiH	Bosnia and Herzegovina
Common Article 3	Article 3 of Geneva Conventions I through IV of 12 August 1949
Exh. D	Denotes a Defence Exhibit
Exh. P	Denotes a Prosecution Exhibit
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1959 (European Convention on Human Rights)
Exh.	Exhibit
Federation	The Federation of Bosnia and Herzegovina, being one of the entities of BiH
FRY	Federal Republic of Yugoslavia (*now*: Serbia and Montenegro)
Geneva Convention I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949

Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
Geneva Conventions	Geneva Conventions I through IV of August 12, 1949
Hague Convention IV	The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV
ICC	International Criminal Court
ICC Statute	(Rome) Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9
ICCPR	International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966
ICRC	International Committee of the Red Cross
ICRC Commentary (GC IV)	Pictet (ed.)-Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958)
ICRC Commentary (Additional Protocol I)	Sandoz *et al.* (eds.)-Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949
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
ICTR Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, established by Security Council Resolution 955
ICTY	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
ILC	International Law Committee
IMT	International Military Tribunal sitting at Nuremberg, Germany
IMTFE	International Military Tribunal for the Far-East sitting at Tokyo, Japan
Indictment	*Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30-PT, Further Amended Indictment, 26 October 2000

JNA	Yugoslav People's Army (Army of the Socialist Federal Republic of Yugoslavia)
Kvočka	Miroslav Kvočka
Kvočka Notice of Appeal	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Notice of Appeal against the Judgement filed by Mr. Miroslav Kvočka in accordance with Rule 108 of the Rules of Procedure and Evidence, 13 November 2001 (public)
Kvočka Appeal Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Appellant-Miroslav Kvočka's Brief on Appeal against Conviction and Sentence, 11 April 2002 (public)
Kvočka Reply Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Appellant Miroslav Kvočka's Brief in Reply, 23 August 2002 (public)
Law Reports	Law Reports of Trials of War Criminals (the United Nations War Crimes Commission)
OTP/Prosecution	Office of the Prosecutor
p.	Page
pp.	Pages
Parties	The Prosecutor and the Defence in *Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30/1-A
para.	Paragraph
paras	Paragraphs
Prcać	Drajoljub Prcać
Prcać Notice of Appeal	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Defence Notice of Appeal, 15 November 2001 (public)
Prcać Appeal Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Prcać's Brief on Appeal, 12 April 2002 (public)
Prcać Pre-Trial Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Defence Pre-Trial Brief, 6 April 2000
Prcać Reply Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, the Defense's Reply to the Prosecution's "Consolidated Prosecution Respondent's Brief" (sic), 29 July 2002 (public)
Prosecution Respondent's Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Public Redacted Version of Consolidated Prosecution Respondent's Brief, 30 October 2002
Prosecution Final Trial Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-T, Prosecutor's Final Trial Brief, 29 June 2001

Prosecution Pre-Trial Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-PT, Prosecutor's Filing Pursuant to Rule 65 *ter* (E) / Prosecutor's Pre-Trial Brief Pursuant to Rule 65 *ter* (E) (i*),* 14 February 2000
Radić	Mlađo Radić
Radić Notice of Appeal	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Defence Notice of Appeal, 15 November 2001 (public)
Radić Appeal Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Radić's Brief on Appeal, 11 April 2002 (public)
Radić Reply Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, The Defense's Reply to the Prosecution's "Consolidated Prosecution Respondent's Brief" (sic), 30 July 2002 (public)
Rules	Rules of Procedure and Evidence of the ICTY
Statute	The Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827
T.	Transcript page from hearings before the Trial Chamber. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the UN General Assembly, in force as of 26 June 1986
Tribunal	See: ICTY
TWC	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10
UN	United Nations
Vol.	Volume
Žigić	Zoran Žigić
Žigić Notice of Appeal	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Defendant's Notice of Appeal, 16 November 2001 (public)
Žigić Additional Document	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Submission Pursuant to Order given in Decision on Prosecution Motion Requesting Order to Zoran Žigić to File Grounds of Appeal issued on 14 June 2002 (sic), 3 July 2002.
Žigić Appeal Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Appellant's Brief of Argument- Defence for the accused Zoran Žigić (sic), 21 May 2002 (public with confidential annexes)
Žigić Reply Brief	*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-A, Žigić's Reply to Consolidated Prosecution Respondent's Brief, 13 November 2002 (public)