

**CASENOTE**

**PROSECUTOR v MILORAD KRNOJELAC\***

**International Criminal Tribunal for the Former Yugoslavia**

**I. BACKGROUND**

On 25 May 1993, the United Nations Security Council passed resolution 827 on the International Criminal Tribunal for the former Yugoslavia (ICTY) resulting in the creation of this tribunal under its new Statute. The move was in response to the threat to international peace and security caused by serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>1</sup> This case note will comment on one of a series of trials before this tribunal concerning crimes against humanity, violations of the laws and customs of war and severe breaches of the 1949 Geneva Conventions. More specifically, it concerns the Milorad Krnojelac trial on questions of individual and vicarious responsibility.

Krnojelac was born near Foca, Yugoslavia in 1940. On 15 June 1998, the Stabilisation Force in Bosnia and Herzegovina (SFOR),<sup>2</sup> created with United Nations sanction, apprehended him under an ICTY sealed indictment.<sup>3</sup> At the time of his trial he was a Captain first class in the Yugoslav National Army.<sup>4</sup> For some 15 months from 1992-1993 he was the warden of the Foca Kazneno-Popravni Dom (KP Dom), the main detention camp for Muslim and non-Serb civilian men from Foca and neighbouring villages.<sup>5</sup>

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\* Trial Chamber II, Case No: IT-97-25, 15 March 2002, The Hague, The Netherlands at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)>.

<sup>1</sup> See the ICTY's website at <[www.un.org/icty/](http://www.un.org/icty/)> (visited February 2003).

<sup>2</sup> SFOR is a coalition military force of some 13,000 troops and headquartered in Sarajevo. The contributing states include NATO and non-NATO states: SFOR, "SFOR Organisation" at <[www.nato.int/sfor/organisation/sfororg.htm](http://www.nato.int/sfor/organisation/sfororg.htm)> (visited February 2003).

<sup>3</sup> See "Milorad Krnojelac: Being held in custody at The Hague" at <[www.wcw.org/icty/suspects/Milorad\\_Krnojelac.html](http://www.wcw.org/icty/suspects/Milorad_Krnojelac.html)> (visited February 2003).

<sup>4</sup> Judicial Diplomacy: Chronicles and Reports on International Criminal Justice, Milorad Krnojelac, 18 March 2002.

<sup>5</sup> ICTY's website at <[www.un.org/icty/](http://www.un.org/icty/)> (visited February 2003).

Before the trial began, the prosecution withdrew the charges<sup>6</sup> after it conceded during the pleading stage that it could not establish that Krnojelac was personally involved in the events alleged to have occurred inside the KP Dom. The prosecution could not show that at the relevant time he had committed the offences as part of a joint criminal enterprise.<sup>7</sup> Thus, although the prosecution had previously pleaded that he aided and abetted with subordinates who committed the offences, the trial proceeded on the basis that he was responsible for their acts as their superior.<sup>8</sup>

## II. THE CHARGES

The prosecution alleged that on 7 April 1992, Serb military forces occupied the town of Foca for about ten days, gained control of parts of that town, and together with local and non-local soldiers arrested Muslim and other non-Serb residents.<sup>9</sup> The prosecution charged Krnojelac in Trial Chamber II with twelve counts under the third amended indictment dated 25 June 2001,<sup>10</sup> alleging that he was individually responsible for crimes under Article 7(1) of the ICTY Statute or alternatively he was responsible for the acts of his subordinates as their superior under Article 7(3).<sup>11</sup> All the allegations<sup>12</sup> were related to crimes found under Article 3 as violations of the laws or customs<sup>13</sup> and/or under Article 5, with the exception of Counts 3, 6,

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<sup>6</sup> Originally, the charges included seven counts of crimes against humanity (persecution, torture, inhumane acts, murder, imprisonment, enslavement), six counts of grave breaches of the 1949 Geneva Conventions (torture, willfully causing serious injury to body and health, wilful killing, unlawful confinement of civilians, wilfully causing great suffering, inhumane treatment) and five counts of violations of the laws and customs of war (cruel treatment, murder, slavery): "Milorad Krnojelac: Being held in custody at The Hague" at <[www.wcw.org/icty/suspects/Milorad\\_Krnojelac.html](http://www.wcw.org/icty/suspects/Milorad_Krnojelac.html)> (visited February 2003).

<sup>7</sup> Press Release, Sentencing Judgment in the Krnojelac Case, 15 March 2002 at <[www.un.org/icty/pressreal/p663-e.htm](http://www.un.org/icty/pressreal/p663-e.htm)> (visited July 2002).

<sup>8</sup> Ibid 1.

<sup>9</sup> Ibid.

<sup>10</sup> Trial Chamber II, Prosecutor v Milorad Krnojelac, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002).

<sup>11</sup> Ibid 1.

<sup>12</sup> Refer note 6 above.

<sup>13</sup> These crimes were also recognised by Article 3 of the 1949 Geneva Conventions.

9, 14 and 17 brought under Article 2 but were withdrawn before the trial began.<sup>14</sup>

Under Count 1, Krnojelac was charged with persecution on political, racial or religious grounds, a crime against humanity under Article 5(h). It was alleged that when he was warden in KP Dom, in concert with the guards under his command and in common purpose with other guards and soldiers he persecuted the non-Serb male civilian detainees on political, racial or religious grounds. As part of this persecution, he allegedly participated and/or aided and abetted in the common plan and its execution involving imprisonment, confinement, torture, beatings, forced labour, inhumane conditions, deportation and expulsion.

Under Counts 2 and 4, Krnojelac was charged with torture as a crime against humanity under Articles 3 and 5(f). Those counts alleged that he took part in the torture and beatings carried out as punishment for even minor breaches of prison rules such as passing messages to other detainees and giving an extra slice of bread to a fellow detainee following a warning not to do so. It was also alleged he aided and abetted in torture and beatings during the interrogation process.

Under Counts 5 and 7, Krnojelac was charged with inhumane acts as crimes against humanity under Articles 3 and 5(i). Those charges related to his alleged role in the beatings of detainees upon their arrival in the prison yard from April to December 1992, including beatings when they were *en route* to the canteen and other arbitrary beatings.

Under Counts 8 and 10, Krnojelac was charged with murder as a crime against humanity under Articles 3 and 5(a). It was alleged he took part in the murder of detainees from June to August 1992. It was alleged that the KP Dom guards had selected groups of detainees according to lists provided by the prison authorities and taken them into rooms in the administration building where they were beaten and several died. It was also alleged that he incurred criminal responsibility by ordering and supervising guards' actions and for allowing military personnel access to the detainees for this purpose.

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<sup>14</sup> Trial Chamber II, Prosecutor v Milorad Krnojelac, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 2.

Under Count 11, Krnojelac was charged with imprisonment as a crime against humanity, pursuant to Article 5(e). It was alleged he implemented the unlawful confinement of Muslim and other non-Serb civilians from April 1992 to August 1993 as warden of the KP Dom.

Under Counts 13 and 15, Krnojelac was charged with the commission of inhumane acts as a crime against humanity under Articles 3 and 5(i) including cruel treatment. This charge was based on the allegation that while he was warden of the KP Dom, the living conditions there were characterised by inhumane treatment, overcrowding, forced labour, starvation and constant physical and psychological assault.

Finally, under Counts 16 and 18, Krnojelac was charged with enslavement as a crime against humanity pursuant to Articles 3 and 5(c), including the 1926 Slavery Convention<sup>15</sup> and international customary law. It was alleged he subjected detainees to forced labour from May 1992 to August 1993 and approved decisions forcing individual detainees to work during May 1992. More specifically, it was also alleged that together with other high-ranking prison staff, he formed and supervised a workers' group of approximately 70 detainees with special skills primarily for forced labour from July 1992 to October 1994.

### III. THE DEFENCE

In his defence, Krnojelac argued that he was not part of the military police and although he was warden in the KP Dom, this camp was divided into military and civilian sections and his authority was limited only to the civilian sections.<sup>16</sup> He argued that the Military Command was responsible for the non-Serb detainees and, accordingly, he was not responsible for any crimes committed on them within the camp. The Trial Chamber rejected this argument after being satisfied that he exercised and retained all the powers of warden in KP Dom and this authority extended to all subordinate personnel and detainees.<sup>17</sup>

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<sup>15</sup> 60 League of Nations Treaty Series 253. The Convention entered into force on 9 March 1927.

<sup>16</sup> Trial Chamber II, *Prosecutor v Milorad Krnojelac*, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 16.

<sup>17</sup> *Ibid.*

Krnojelac also argued that the detainees were prisoners of war and their detention was therefore lawful because, when the conflict broke out in Foca in 1992, many non-Serb civilians (Muslim) were arrested and transported to the KP Dom for detention.<sup>18</sup> The Trial Chamber rejected this argument because it was shown that even though some of them were combatants, they were not arrested as such and they included the young, elderly, ill, wounded, and disabled (physical and mental).<sup>19</sup>

#### IV. THE ICTY STATUTE

Krnojelac was charged mainly with violations under Articles 3 and 5 of the ICTY Statute. However, the Statute in this case required certain general criteria to be satisfied before the violations complained of could be established.

##### *(a) Article 3*

Article 3 required two preliminary elements to be satisfied. First, an armed conflict, whether internal or international, should exist when the offences were committed. Under this provision "armed conflict" existed "whenever there is a resort to armed forces between States or protracted army violence between governmental authorities and organised armed groups or between such groups within a State."<sup>20</sup> Secondly, a close nexus should exist between the alleged offence and the armed conflict. This nexus or "required relationship" is satisfied when the alleged crimes are "closely related to the hostilities."<sup>21</sup> Article 3 also required four other elements to be satisfied:

- (a) the violation must constitute an infringement of a rule of international humanitarian law;
- (b) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

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<sup>18</sup> Trial Chamber II, *Prosecutor v Milorad Krnojelac*, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 16.

<sup>19</sup> *Ibid.*

<sup>20</sup> Trial Chamber II, *Prosecutor v Milorad Krnojelac*, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 7.

<sup>21</sup> *Ibid.*

- (c) the violation must be “serious,” namely, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- (d) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

As a result, depending on the charges laid under Article 3 the required elements for its application may differ. In the present case, the basis for the charges of torture, cruel treatment and murder is common Article 3 of the 1949 Geneva Conventions (“common Article 3”) referring to violations under those conventions as firmly established by the Tribunal’s jurisprudence. *Inter alia*, common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of Armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith or sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
  - (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (2) The wounded and the sick shall be collected and cared for.

For a charge to be successful under Article 3 that is linked to common Article 3, the victims should not have engaged in the hostilities at the relevant time, which is another requirement of this provision. On the

other hand, the charge of enslavement under Article 3 is related to the 1926 Slavery Convention and customary international law, and has no connection to common Article 3.<sup>22</sup>

**(b) Article 5**

For Krnojelac to have committed a crime against humanity under Article 5, the following elements should exist:

- (a) there must be an “attack”;
- (b) Krnojelac’s acts must be part of the attack;
- (c) the attack must be directed against a civilian population;
- (d) the attack must be widespread or systematic; and
- (e) the principal offender must know of the wider context in which his acts occur and know that his acts are part of the attack.

Additionally, the Statute of the ICTY Statute imposes a jurisdictional requirement that the crimes be “committed in armed conflict.”

The Trial Chamber was satisfied that every general requirement of Articles 3 and 5 of the Statute and Common Article 3 were met, and that Krnojelac knew about the attacks and what they involved. Also, the four requirements specific to the application of Article 3, which amounted to violations of international humanitarian law, were met.

**V. ARTICLE 7(1) AND INDIVIDUAL CRIMINAL RESPONSIBILITY**

Article 7(1) of the Tribunal’s Statute provides:

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.

The prosecution pleaded this provision in its entirety, an approach which was accepted in *Prosecutor v Tadic*, (“*Tadic Appeal*

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<sup>22</sup> Trial Chamber II, *Prosecutor v Milorad Krnojelac*, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 8.

Judgment”),<sup>23</sup> thereby extending responsibility to Krnojelac as a participant in various joint criminal enterprises. As stated by the Appeals Chamber in *Tadic*.<sup>24</sup>

...Although only some members of the group may physically perpetrate the criminal act,...the participation and contribution of the other members of the group is often vital in facilitating the commission of the offences 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. 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 on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

The liability of a participant in a joint criminal enterprise who was not the principal offender would be that of an accomplice, described by the Trial Chamber as “co-perpetrator” in this case.

## **VI. JOINT CRIMINAL ENTERPRISE**

The prosecution needed to establish that Krnojelac participated in the joint criminal enterprise and that the criminal enterprise existed. A criminal enterprise exists where.<sup>25</sup>

...there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not

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<sup>23</sup> Prosecutor v Tadic, IT-94-1-A, Judgment 15 July 1999 (“Tadic Appeal Judgment”).

<sup>24</sup> Tadic Appeal Judgment paras 191-192. The Prosecutor takes this statement to mean an accused person can still be held to have committed the crime when he or she participated in a joint criminal enterprise even though the accused did not personally physically perpetrate the crime.

<sup>25</sup> Decision on Form of Second Indictment, 11 May 2000 para 15; See also Tadic Appeal Judgment para 227(ii).



have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

In addition, a person would be deemed to have participated in a joint enterprise by:<sup>26</sup>

- (a) directly committing the agreed crime as principal offender;
- (b) being present when the crime was committed and knowing that the crime was to be or was being committed by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that act; or
- (c) acting in furtherance of a particular system in which the crime was committed by reason of that person's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

Therefore, if an agreed crime were committed every participant in the act or criminal enterprise would be guilty, and the prosecution should prove that the participants all shared a common state of mind.

In the indictment the prosecution had alleged that Krnojelac acted pursuant to a joint criminal enterprise with the guards and soldiers to persecute the Muslim and other non-Serb male civilian detainees in the KP Dom on political, racial or religious grounds.<sup>27</sup> The Trial Chamber interpreted this as a basic joint criminal enterprise, but did not extend it to crimes as it fell outside the agreed aspects of that joint criminal enterprise.<sup>28</sup> The indictment also alleged that he acted "in concert" with others with respect to acts of torture, beatings<sup>29</sup> and enslavement.<sup>30</sup> At the trial, the Trial Chamber interpreted the words "in concert with" to

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<sup>26</sup> Trial Chamber II, *Prosecutor v Milorad Krnojelac*, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) at 12.

<sup>27</sup> Indictment para 5.1.

<sup>28</sup> Decision on Form of Second Indictment, 11 May 2000 para 11.

<sup>29</sup> Indictment paras 5.17, 5.21-22 and 5.26.

<sup>30</sup> *Ibid* para 5.41.

mean acting pursuant to a basic joint criminal enterprise. Accordingly, he was specifically found to have acted pursuant to a basic joint criminal enterprise<sup>31</sup> with respect to certain acts alleged as torture, enslavement, cruel treatment and inhumane acts.<sup>32</sup>

The prosecution had alleged in the pre-trial brief that Krnojelac was a participant in a joint criminal enterprise. Although the Trial Chamber was not satisfied that the prosecution had established that he shared the same state of mind in relation to joint criminal enterprise, he could still incur criminal responsibility for those crimes as an aider and abetter.

#### **VII. SUPERIOR'S RESPONSIBILITY UNDER ARTICLE 7(3)**

The prosecution alleged that for each of the criminal acts charged Krnojelac had incurred criminal responsibility as a superior under Article 7(3) of the Tribunal's Statute. That provision states:

The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Three conditions should be met before superiors are responsible for the acts of their subordinates:<sup>33</sup>

- (a) a superior-subordinate relationship exists;
- (b) the superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and

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<sup>31</sup> Namely, not within an intended common purpose.

<sup>32</sup> Although it was unnecessary for the purpose of this case, the Trial Chamber noted that the Indictment had also alleged that Krnojelac participated or aided and abetted in the execution of a common plan involving imprisonment, torture, beatings, killings, forced labour, inhumane conditions, deportation and expulsion, all deemed as persecution: see Indictment para 5.2. This put Krnojelac on notice that a common purpose was alleged for those crimes identified as part of persecution and charged as separate offences.

<sup>33</sup> Trial Chamber II, Prosecutor v Milorad Krnojelac, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 13.

- (c) the superior failed to take necessary and reasonable measures to prevent such acts or punish the principal offenders.

The relationship between the superior and the subordinate should show that the superior had “effective control” over the persons committing the offences, namely, the ability to prevent the offence or punish the principal offenders.<sup>34</sup> It should also be shown that the superior failed to take reasonable measures to prevent the crime.

#### **VIII. KRNOJELAC AS WARDEN**

Krnojelac acknowledged that he was the warden of the KP Dom from 18 April 1992 to end July 1993, which meant that he held the highest position of authority and was responsible for the management and control of the entire prison. As a result, the Trial Chamber did not accept his argument that his position as warden was limited, and instead concluded the following:

- (a) he had freely accepted his position as warden, a position he could leave at any time without punishment;
- (b) he knew that the prisoners were detained illegally and that they were Muslim civilians;
- (c) the lease to the military of certain parts of the prison did not divide military and civilian personnel;
- (d) the prison guards under the warden had looked after both Serb and non-Serb detainees without regard to the civilian/military split.

In this respect the Trial Chamber found that Krnojelac was responsible for the following:

- (a) the welfare of all detainees and their complaints;
- (b) Krnojelac was responsible for ensuring that no detainee escaped the KP Dom;
- (c) food and medical attention for the detainees; and
- (d) the work the detainees undertook including forced labour.

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<sup>34</sup> Trial Chamber II, Prosecutor v Milorad Krnojelac, Judgment of 15 March 2002 at <[www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm](http://www.un.org/icty/krnjelac/trialc2/judgement/krn-tj020315e-1.htm)> (Visited August 2002) 13.

Although the Trial Chamber was not satisfied that Krnojelac as warden could have unilaterally ordered or granted the release of any detainee it was also not satisfied that this placed any real limit on his powers.

In conclusion, the Trial Chamber held that it was satisfied that the prosecution had established that Krnojelac held the position of warden at the KP Dom, the lease he gave to the military of part of the KP Dom had little impact upon the single hierarchy, and he had supervisory responsibility over all subordinate personnel and detainees at the camp.

#### **IX. FORMAL ORDERS**

The Trial Chamber, composed of Hunt (presiding), Mumba and Daqun JJ, delivered its judgment on 15 March 2002 finding Krnojelac guilty of the following crimes:

Count 1: persecution as a crime against humanity incurring both his individual responsibility – as a superior (based on imprisonment, living conditions and beatings).

Count 5: inhumane acts as a crime against humanity in his position – as a superior (based on beatings).

Count 7: cruel treatment as a violation of the laws or customs of war – as a superior (based on beatings).

Count 15: cruel treatment as a violation of the laws or customs of war – individual responsibility (based on living conditions).

For those crimes, Krnojelac was ultimately sentenced to a single sentence of imprisonment totaling seven and a half years, to be reduced by three years and nine months representing the period he had already served in custody. He was acquitted of the crimes alleged in Counts 2, 4, 8, 10, 11, 13, 16 and 18.<sup>35</sup>

#### **X. CONCLUDING COMMENTS**

The Accused held the position of warden at the KP Dom and he did nothing in his power to improve the conditions for the non-serb detainees - instead he chose to bury his head in the sand. The participation of the

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<sup>35</sup>Press Release, Sentencing Judgment in the Krnojelac Case, 15 March 2002 at <[www.un.org/icty/pressreal/p663-e.htm](http://www.un.org/icty/pressreal/p663-e.htm)> (visited July 2002) 6.

Accused was limited to that of aiding and abetting the criminality of others, he failed through his inaction to prevent these crimes from taking place and failed to exercise his powers as warden notwithstanding the knowledge that these crimes were taking place. The Trial Chamber has set out to punish the Accused and set the example for others who, like the Accused, seek to avoid their responsibilities and duties of command, which go along with the position they have accepted. This sentence is evidence that failure to carry out those responsibilities will be punished.

*Kelly Mardon*