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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-95-10-T

Date: 14 December 1999

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French

IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Almiro Rodrigues

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 14 December 1999

THE PROSECUTOR

v.

GORAN JELISI]

JUDGEMENT

The Office of the Prosecutor:
Mr. Geoffrey Nice
Mr. Vladimir Tochilovsky

Defence Counsel:
Mr. Veselin Londrovi}
Mr. Michael Greaves

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I. INTRODUCTION

1. The trial of Goran Jelisi} before Trial Chamber I (hereinafter "the Trial 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 (hereinafter "the Tribunal") opened on 30 November 1998 and ended on 25 November 1999.

2. Further to several amendments to the indictment, Goran Jelisi} had to answer to thirty-two (32) distinct counts[1] of genocide, violations of the laws or customs of war and crimes against humanity.

A. The Indictment

3. The indictment[2] charges Goran Jelisi} with genocide:

> In May 1992, Goran Jelisi}, intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group, systematically killed Muslim detainees at the Laser Bus Co., the Br~ko police station and Luka camp. He introduced himself as the "Serb Adolf", said that he had come to Br~ko to kill Muslims and often informed the Muslim detainees and others of the numbers of Muslims he had killed. In addition to killing countless detainees, whose identities are unknown, Goran Jelisi} personally killed the victims in paragraphs 16-25, 30 and 33. By these actions, Goran Jelisi} committed or aided and abetted:
>
> Count 1: Genocide, a crime recognised by Article 4(2)(A) of the Tribunal's Statute.

The accused was also specifically prosecuted for murdering thirteen (13) persons[3], for inflicting bodily harm on four (4) persons[4] and for stealing money from the detainees in Luka camp – a count characterised as "plunder" in the indictment[5]. For these acts, the accused was prosecuted for violations of the laws or customs of war and for crimes against humanity.

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[1] Second Amended Indictment against Goran Jelisi} and Ranko ^esi}, 19 October 1998, paras. 14 ff. Ranko ^esi} has not been arrested to date.
[2] In this instance, the Second Amended Indictment. See the Procedural Background below.
[3] Counts 4 to 23, 32, 33, 38 and 39 (for counts 14 and 15, see footnote 7 below). All the victims 1isted under these counts were also specified under genocide.
[4] Counts 30, 31, 36, 37, 40 and 41.
[5] Count 44.

B. Procedural Background

4. The initial indictment issued against the accused on 30 June 1995 was confirmed by Judge Lal Chand Vohrah on 21 July 1995. Goran Jelisi} was accused of genocide (Article 4(2) of the Statute), grave breaches of the Geneva Conventions of 1949 (Article 2(a) of the Statute), violations of the laws or customs of war (Article 3 of the Statute) and crimes against humanity (Article 5 (a) of the Statute).

5. Goran Jelisi} was arrested on 22 January 1998 in accordance with a warrant of arrest issued by the Tribunal and immediately transferred to its Detention Unit in The Hague. That same day, the President of the Tribunal, Judge Gabrielle Kirk McDonald, assigned the case to Trial Chamber I, composed of Judge Claude Jorda, presiding, Judge Fouad Riad and Judge Almiro Rodrigues.

6. Pursuant to Rule 62 of the Rules of Procedure and Evidence of the Tribunal (hereinafter "the Rules"), the initial appearance of the accused took place on 26 January 1998 before Trial Chamber I. The accused pleaded not guilty to all the counts on which he was charged.

7. On 11 March 1998, the Trial Chamber issued a confidential Order that the accused undergo a psychiatric examination. The expert report dated 6 April 1998 declared the accused fit to understand the nature of the charges brought against him and to follow the proceedings fully informed. He was therefore declared fit to stand trial.

8. In the amended indictment of 13 May 1998, Goran Jelisi} was charged with genocide under Article 4(2) of the Statute, multiple violations of the laws or customs of war under Article 3 of the Statute and crimes against humanity under Article 5(a) of the Statute. The indictment was again amended by the Prosecutor on 19 October 1998 in accordance with Goran Jelisi}'s intention to plead guilty to 31 of the counts.

9. On 19 August 1998, at the request of Defence counsel to the accused, Mr. Londrovi}, himself assigned, the Registry of the Tribunal appointed Mr. Nikola P. Kostich as co-counsel[6].

10. Following discussions between the parties and pre-trial preparations organised by Judge Fouad Riad under the authority of the Trial Chamber, an "Agreed Factual Basis for Guilty Pleas to be Entered by Goran Jelisi}" was signed by the parties on 9 September 1998. A second amended indictment relying upon this Agreed Factual Basis was confirmed by Judge Lal Chand Vohrah on 19 October 1998.

11. On 29 October 1998, Goran Jelisi} confirmed that he was pleading not guilty to genocide but guilty to war crimes and crimes against humanity as described in the Agreed Factual Basis of 9 September 1998[7]. The Trial Chamber declared that the guilty plea had been informed and that it was not equivocal. It also noted that the Prosecution and Counsel for the accused did not disagree on any of the facts relating to the guilty plea.

12. In a note dated 24 November 1998, the Defence indicated its intention to invoke the special defence of alibi pursuant to Sub-rule 67(A)(ii)(a)(b) of the Rules for the acts which the accused allegedly committed after 19 May 1992. The note stated that Goran Jelisi} purportedly fled Br~ko on 19 May 1992 and consequently could not have committed the acts ascribed to him in the indictment after this date. The Defence also intended to invoke two special grounds of defence, the seriously diminished psychological responsibility of the accused at the time the acts mentioned in the indictment were committed and the fact that the accused allegedly acted on the orders of his superiors and under hierarchical duress.

13. The trial of the accused was begun on 30 November 1998 and was suspended on 2 December 1998 but could not then be swiftly re-opened due to the inability of Judge Fouad Riad to participate in the hearings on medical grounds, the refusal of Goran Jelisi} to have

[6] This assignment was conducted in accordance with the Rules which provide that the accused may request the assignment of a co-counsel in the sixty (60) days preceding the date that the trial opens.

[7] The wording of counts 14 and 15 is slightly ambiguous. Whilst the heading of paragraph 21 of the indictment specifies the murder of two persons, Sead]erimagi} and Jasminko ^umurovi}, the text only refers to the incident in which "Goran Jelisi} shot and killed Jasminko ^umurovi}". But the Agreed Factual Basis drafted by the Prosecution and the Defence related solely to J. ^umurovi} and in the statements attached to this agreement ("Factual basis for the charges to which Goran Jelisi} intends to plead guilty" (hereinafter "the factual basis"), Annex II, (confidential) statement of 29 June 1998, pp. 20-21), Goran Jelisi} did not admit having killed Sead ^erimagi}. In these circumstances, the Trial Chamber deems that the indictment and the guilty plea do concern only the murder of Jasminko ^umurovi}.

him replaced and the unavailability of Judge Claude Jorda and Judge Almiro Rodrigues who were occupied in another trial which had commenced before that of Goran Jelisi}. On 18 December 1998, the Trial Chamber issued an order granting protective measures to certain witnesses whose names and other identifying elements were not to be revealed during open sessions.

14. In view of the delay in the trial, the Trial Chamber considered pronouncing its decision on the guilty plea, including the corresponding sentence, if necessary, but to keep the genocide trial back for a later date. At the status conference held to take up this issue on 18 March 1999, the Defence declared itself in favour of a single sentence, citing the close connection between the counts to which Goran Jelisi} had pleaded guilty and the count of genocide to which he had pleaded not guilty. The hearings finally resumed once more on 30 August 1999. On 22 September 1999, the Prosecutor announced that she had finished presenting her evidence.

15. Having heard the arguments of the Prosecution, the Judges of the Trial Chamber reviewed the evidence presented by the Prosecution. In deliberations, they concluded that, without even needing to hear the arguments of the Defence, the accused could not be found guilty of the crime of genocide.

16. In these conditions, on 12 October 1999, the Trial Chamber informed the parties pursuant to Rule 98*ter* of the Rules that it would render its Decision on 19 October 1999. On 15 October 1999 the Prosecutor filed a Motion for the Trial Chamber to postpone its Decision until the Prosecution had had the opportunity to present its arguments stating *inter alia* that the effect of Rule 98*ter* could not be to deprive the Prosecution of its right to submit a closing argument on the law and the facts. At the hearing of 19 October 1999, the Trial Chamber, adjudging that an indissociable link existed between the Motion submitted by the Prosecutor and the Decision on the merits, decided that there was reason to join the interlocutory Motion to the merits. The Trial Chamber then found Goran Jelisi} guilty of war crimes and crimes against humanity but declared his acquittal on the count of genocide pursuant to Rule 98 *bis* of the Rules[8].

[8] Rule 98 *bis* obliges the Trial Chamber to pronounce the acquittal of the accused when the evidence presented by the Prosecution is insufficient to sustain a conviction.

17. Lastly, the Trial Chamber heard the witnesses and the arguments of the parties relating to the sentencing. The hearings were declared closed on 25 November 1999 pursuant to Rule 81 of the Rules.

II. HISTORICAL BACKGROUND[9]

18. This trial concerns the events which occurred in May 1992 in the municipality of Br~ko, a sizeable town in the Posavina corridor in the extreme north-eastern corner of Bosnia-Herzegovina on the border with Croatia.

19. On 30 April 1992, two explosions destroyed the two bridges in Br~ko spanning the Sava River[10]. The Trial Chamber heard testimony that the Serbian political officials in Br~ko had previously demanded that the town be split into three sectors, including one which was to be exclusively Serbian[11]. These explosions may be considered as marking the commencement of hostilities by the Serbian forces[12]. On 1 May 1992, radio broadcasts ordered Muslims and Croats to surrender their arms[13]. As from 1 May 1992, the Serbian forces, comprised of soldiers and paramilitary and police forces, deployed within the town[14].

20. Several statements reproduced in the factual basis bring to light the involvement of Serbian military, paramilitary and police forces not from the municipality of Br~ko[15]. One witness declared that he had seen Arkan's men criss-cross the town carrying pumps used to set fire to the houses[16]. The presence of "Arkan's Tigers" was confirmed by several witnesses appearing before the Trial Chamber[17].

21. The events described in the factual basis very clearly show that the Serbian offensive targeted the non-Serbian population of Br~ko. The statements also relate the organised

[9] The facts detailed herein are based on the witness statements and descriptions contained in the factual basis to which the Defence expressed its agreement [French Provisional Transcript (hereinafter "FPT") p. 183].
[10] Factual basis: Witness F, p. 3; Witness O, p. 2; Witness W, p. 2.
[11] Witness F, factual basis, p. 2.
[12] Witness W, factual basis, p. 2.
[13] Witness O, factual basis, p. 2.
[14] Witness P, factual basis, p. 2.
[15] The elements presented in the factual basis show that some witnesses stated that these soldiers were from Serbia. The witnesses heard during the trial often stated that the members of the Serbian forces involved in the conflict were from Bijeljina.
[16] Witness BB, factual basis, p. 2.
[17] Factual basis: Witness C, p. 2; Witness P, p. 3; Witness V, p. 2; Witness M, p. 2; Witness J, p. 2; Witness I, p. 3.

evacuation of the inhabitants of Br~ko, neighbourhood by neighbourhood, to collection centres[18] where the Serbs were separated from the Muslims and Croats. According to witnesses[19], the Serbian men were immediately enrolled in the Serbian forces whilst the women, children and men over sixty were evacuated by bus to neighbouring regions[20]. The Muslim and Croatian men between sixteen and about sixty remained in detention at the collection centres. Many of them, nearly all Muslims, were then transferred by bus or lorry to Luka camp, a former port facility. A series of warehouses lay on the left side of a narrow road which cut through the camp. The detainees were incarcerated in the first two warehouses. Administrative buildings to the right of the road stood opposite them. The interrogations were conducted in the first of these buildings.

22. The detainees at Luka camp and also some of those who were rearrested after having been released were then interned at the Batkovi} detention camp in July 1992[21]. Most of these prisoners were then exchanged beginning in October 1992[22].

23. The indictment states that "[o]n about 1 May 1992 Goran Jelisi} [...] came to Br~ko from Bijeljina". In his guilty plea entered on 29 October 1998[23], Goran Jelisi} admitted his guilt for committing thirteen murders, inflicting bodily harm on four persons and having stolen money from detainees at Luka camp.

III. THE CRIMES ADMITTED TO BY THE ACCUSED IN THE GUILTY PLEA

24. Goran Jelisi} pleaded guilty to violations of the laws or customs of war (sixteen counts)[24] and crimes against humanity (fifteen counts)[25].

[18] The main collection centres given were: the Br~ko Mosque, the JNA barracks, the Laser Bus Co. and the Br~ko police station (SUP).
[19] Factual basis, Witness W, p. 2; Witness Q, p. 3.
[20] Factual basis, Witness E, p. 3; Witness N, p. 4.
[21] Factual basis, Witness V, pp. 7-8; Witness B, p. 6; Witness P, p. 6.
[22] Factual basis, Witness C, p. 9; Witness J, p. 13; Witness K, p. 13; Witness N, p. 10.
[23] As regards the legal validity of the guilty plea, see Section III below.
[24] Twelve of them charge him with murder (counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 32, 38), three with cruel treatment (counts 30, 36, 40) and one with plunder (count 44).
[25] Twelve of them charge him under crimes against humanity with murder (counts 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 33, 39) and three with inhumane acts (counts 31, 37, 41).

25. A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime.

26. Pursuant to Rule 62 *bis* of the Rules, the Judges must verify that:

(i) the guilty plea has been made voluntarily;

(ii) the guilty plea is informed;

(iii) the guilty plea is not equivocal; and

(iv) there is sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.

27. In this respect, the Trial Chamber recalls that on 11 March 1998 it ordered an expert evaluation whose results[26] indicated that Goran Jelisi} was fit to understand the nature of the charges brought against him and to follow the proceedings fully informed. Moreover, the accused pleaded guilty only after long discussions between the parties either directly or during hearings. The ensuing Memorandum of Understanding quite clearly presents the result of these discussions as regards the nature and scope of the crimes committed by the accused.

28. The Trial Chamber must also verify whether the elements presented in the guilty plea are sufficient to establish the crimes acknowledged.

29. First, it is appropriate to note that the existence of an armed conflict is a condition for both Article 3 and Article 5 of the Statute to apply[27]. The Trial Chamber here takes up the definition of armed conflict used by the Appeals Chamber in the *Tadi}* Case which states that:

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[26] Psychiatric evaluation reports of Dr. Nikola Kmeti} dated 1 April 1998 and of Dr. Elsman dated 15 April 1998; psychological evaluation report of Dr. Herfst dated 16 April 1998; and the forensic report presented by the psychiatric experts N. Duits and C.M. van der Veen dated 25 November 1998.

[27] The Tribunal has noted on several occasions that the armed conflict mentioned in Article 5 of the Statute was a condition for the jurisdiction of the Tribunal and not a legal ingredient of a crime against humanity, Judgements of the Appeals Chamber in the case *The Prosecutor v. Du{ko Tadi} alias Dule* (hereinafter "the *Tadi}* case"), IT-94-1-AR72, 2 October 1995 (hereinafter "the *Tadi}* Appeal Decision"), paragraphs (hereinafter "paras.") 140 and 249; and IT-94-1-A, 15 July 1999 (hereinafter "the *Tadi}* Appeal Judgement"), para. 251.

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State[28]

30. The Defence concurred that the municipality of Br~ko was the theatre for an armed conflict at the moment the crimes were committed[29] and there can be no doubt that the crimes were linked to this conflict. The Trial Chamber also observes that the facts accepted in support of the guilty plea[30] as recounted in the historical background do not leave any doubt about the existence of an armed conflict in the region at that time.

31. The legal ingredients of war crimes and crimes against humanity invoked as part of the armed conflict are as follows.

A. Violations of the laws or customs of war

32. The counts based on Article 3 of the Statute charge the accused with murder, cruel treatment and plunder.

33. Article 3 of the Statute is a general, residual clause which applies to all violations of humanitarian law not covered under Articles 2, 4 and 5 of the Statute provided that the rules concerned are customary[31].

34. The charges for murder and cruel treatment are based on Article 3 common to the Geneva Conventions whose customary character has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda[32] [33]. As a rule of customary international law,

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[28] *Tadi}* Appeal Decision, para. 70.
[29] See *inter alia* the "Addendum to the agreed factual basis for guilty pleas to be entered by Goran Jelisi}", confidential, 28 October 1998 (hereinafter "the Addendum"), p. 2.
[30] Factual basis, pp. 18-19.
[31] *Tadi}* Appeal Decision, para. 91.
[32] International 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 and 31 December 1994, (hereinafter "the ICTR" or "the Tribunal for Rwanda").
[33] See *inter alia* the Judgement in the case *The Prosecutor v. Zejnil Delali}, Zdravko Muci} alias "Pavo", Hazim Deli}, Esad Land`o alias "Zenga"*, IT-96-21-T, 16 November 1998 (hereinafter "the *^elebi}i* Judgement"), para. 301 or the Judgement in the case *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, 2 September 1998, (hereinafter "the *Akayesu* Judgement"), para. 608.

Article 3 common to the Geneva Conventions is covered by Article 3 of the Statute as indicated in the *Tadi} Appeal Decision*[34]. Common Article 3 protects "[p]ersons taking no active part in the hostilities" including persons "placed *hors de combat* by sickness, wounds, detention, or any other cause". Victims of murder, bodily harm and theft, all placed *hors de combat* by their detention, are clearly protected persons within the meaning of common Article 3.

1. Murder

35. Murder is defined as homicide committed with the intention to cause death. The legal ingredients of the offence as generally recognised in national law may be characterised as follows:

- the victim is dead,
- as a result of an act of the accused,
- committed with the intention to cause death.[35]

36. The elements submitted in the Annex to the factual basis clearly confirmed that the accused was guilty of the murder of the thirteen persons listed in support of the counts.

37. Five of the thirteen murders to which the accused pleaded guilty were perpetrated at the Br~ko police station on about 7 May 1992[36] in an always identical manner which was described by the accused himself[37]. Having undergone an interrogation at the Br~ko police station, the victims were placed in the hands of the accused who took them out to an alley near the police station. The accused executed them, generally with two bullets to the back of the neck fired from a "Skorpion" pistol fitted with a silencer. A lorry then came to gather up the bodies. According to the accused, these murders were committed over a period of two days. Goran Jelisi} admitted killing in this manner:

- an unidentified male (count 4),

[34] *Tadi}* Appeals Decision, para. 87; the *^elebi}i* Judgement also considered that Article 3 of the Statute covered violations of Article 3 common to the Geneva Conventions (para. 298).
[35] See the *Akayesu* Judgement, para. 589.
[36] Counts 4 and 5 (murder of an unidentified male), 6 and 7 (murder of Hasan Ja{arevi}), 8 and 9 (murder of a young man from [interaj), 10 and 11 (murder of Ahmet Hod`i} or Had`i} alias Papa), 12 and 13 (murder of Suad).
[37] Statement of the accused dated 29 June 1998, Annex II, pp. 5-6, pp. 15-16, p. 29.

- Hasan Ja{arevi} (count 6),

- a young man from [interaj (count 8),

- Ahmet Hod`i} or Had`i}, *alias* Papa (count 10), the head of the Muslim SDA political party,

- a person by the first name of Suad (count 12).

38. Eight of the thirteen murders to which the accused pleaded guilty were perpetrated at Luka camp. Here again, the murders were always committed in an identical way. First, the victims underwent an interrogation inside the administrative buildings in which for the most part the accused participated and during which they were severely beaten, in particular with truncheons and clubs. Armed with a "Skorpion" pistol fitted with a silencer, the accused made them go to the corner of the offices where he then executed them with one or two bullets fired point-blank into the back of the neck or into the back. Some victims were killed even before they reached the corner of the administrative buildings such that other detainees actually witnessed the murders. Other detainees were killed with one or two bullets to the back of the head whilst kneeling over a grate near the office where the interrogations were held. He then made some detainees carry the body of the victim behind the administrative offices where the bodies were piled up. The accused admitted to having killed in this manner:

- Jasminko]umurovi}, *alias* Ja{}e (count 14),

- Huso and Smajil Zahirovi} (count 16),

- Naza Bukvi} (count 18),

- Muharem Ahmetovi}, father of Naza Bukvi}, killed the day after his daughter died (count 20),

- Stipo Glavo~evi}, *alias* Stipo, (count 22),

- Novalija (count 32),

- Adnan Kucalovi} (count 38).

39. Naza Bukvi}[38] was very severely beaten before being executed[39]. It appears that her executioners wanted to find out where her brother and father, members of the police forces before the war, were hiding. She was handcuffed to a signpost and then beaten with long truncheons by several policemen for a whole day[40]. The victim's clothes were torn and covered with blood. That evening, she was brought back to the hangar covered in bruises and moaning with pain. The accused returned for her the next morning and executed her in the same fashion as he had his other victims[41].

40. One Croatian person, named Stipo Glavo~evi}, also suffered serious bodily harm before being killed. He arrived at Luka camp on about 9 May 1992 on a truck. His right ear was cut off and then Goran Jelisi}, accompanied by a guard carrying a sabre, stood the victim before the detainees under guard in the hangar. Stipo Glavo~evi} begged someone to put him out of his misery. Goran Jelisi} offered his weapon to the detainees for one of them to volunteer to do so. No one moved. The guard accompanying the accused hit Stipo Glavo~evi} with the edge of the sabre. Stipo Glavo~evi} was led outside the hangar and then the accused went out and killed him in the manner previously described.

2. Cruel Treatment

41. This Trial Chamber shares the opinion of the Trial Chamber in the *^elebi}i* case which defined cruel treatment as "an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity"[42].

42. The bodily harm suffered by the brothers Zej}ir and Re{ad Osmi} is the focus of count 30. The two brothers were first taken to the Br~ko police station where Goran Jelisi} came looking for them. The accused called them "balijas"[43], handcuffed them and punched them. He then made them get into the boot of a red "Zastava 101" car. The victims were thus transported to Luka camp. Goran Jelisi} forced them to go into the administrative office in which were his girlfriend Monika, who was sitting at a desk in front of a typewriter, and her brother, Kole. The two brothers were made to stand with their backs to the wall and Goran Jelisi} began to hit them with a club, mostly to the head, the neck and the chest. According to

[38] Counts 18 and 19.
[39] Witness P, factual basis, p. 6.
[40] Witness N, factual basis, pp. 5-6.
[41] Witness O, factual basis, p. 6. This witness reports having seen the body of Naza Bukvi} the day after she died amongst other bodies (p. 10).
[42] *^elebi}i* Judgement, para. 552.
[43] A term which seems to have no direct equivalent in English but which is considered highly offensive.

one of the brothers, they were allegedly beaten like this for approximately thirty minutes. Zej}ir Osmi} was then taken to the hangar. Goran Jelisi} continued to beat Re{ad Osmi} who was no longer able to open his eyes as his eyelids were too swollen. He ended up collapsing from the blows. Goran Jelisi} kicked him in the chest while he was trying to get back up. The accused then left. The victim was not beaten while Goran Jelisi} was away. Goran Jelisi} returned after approximately ten minutes. His shirt was stained with blood. He explained "I just killed a man from fifty centimetres away. I cut off his ear. He didn't want to talk, like you". The accused then slashed the victim's two forearms with a knife before again beating him with a club. Goran Jelisi} next made the victim take out his papers and his money. None of his identity papers gave any indication that he was Muslim. The accused then became angry and asked why the two brothers had been brought to Luka. He ordered their immediate release[44].

43. Count 37 relates to the bodily harm suffered by Muhamed Bukvi}. The factual basis offered in support of the guilty plea shows that this man was very severely beaten by Goran Jelisi} during an interrogation which he underwent in the administrative offices in Luka camp. The victim, already covered in bruises from the beating he received the previous day from another guard at the camp named Kosta, was beaten all over his body by Goran Jelisi} with a truncheon[45]. The accused, using his fingers to squeeze the victims cheeks up towards his eyes, hit him with his truncheon at eye level.

44. The bodily harm inflicted on Amir Didi} is covered in count 40. He was beaten several times during the interrogations to which he was subjected in the Luka camp offices. Amir Didi} indicated that he had been beaten by several guards even though the accused was by far the most active. Goran Jelisi} hit him on one occasion with a fire hose thereby making him lose consciousness. Amir Didi} was allegedly beaten to the point of being unrecognisable. He stated that another official at the camp named Kole and the girlfriend of the accused, Monika, were always present during these beatings[46].

45. The Trial Chamber is of the opinion that the assault described in the indictment, admitted by the accused and moreover confirmed by the elements presented during the trial, constitute inhumane acts.

[44] Factual basis, Witness T p. 2-4; Witness U, p. 2-4.
[45] Factual basis, p. 15.
[46] Factual basis, p. 16.

3. Plunder

46. Count 44 charges the accused with stealing money from persons detained at Luka camp, in particular from Hasib Begi}, Zej}ir Osmi}, Enes Zuki} and Armin Drapi}, between approximately 7 May and 28 May 1992.

47. Pursuant to Article 3(e), the Tribunal has jurisdiction over violations of the laws or customs of war which:

> shall include, but not be limited to:
>
> [...]
>
> (e) plunder of public or private property.

48. Plunder is defined as the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto. The Trial Chamber hearing the *^elebi}i* case recalled that the "prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory"[47]. It thus found that the individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators.

49. The factual basis attached to the guilty plea[48] indicates that the accused stole money, watches, jewellery and other valuables from the detainees upon their arrival at Luka camp by threatening those who did not hand over all their possessions with death. The accused was sometimes accompanied by guards or Monika[49] but he mostly acted alone. The Trial Chamber holds that these elements are sufficient to confirm the guilt of the accused on the charge of plunder.

B. Crimes against humanity

50. Within the terms of Article 5 of the Statute, murder and other inhumane acts specified in paragraphs (a) and (i) respectively must be characterised as crimes against humanity when

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[47] *^elebi}i* Judgement, para. 590.
[48] Factual basis, pp. 17-18.
[49] Factual basis, Witness AA, p. 18.

"committed in armed conflict, whether international or internal in character, and directed against any civilian population".

1. Underlying offences: murder and other inhumane acts

(a) murder[50]

51. The Trial Chamber notes firstly that the English text of the Statute uses the term "murder". The Trial Chamber observes that in line with the *Akayesu* case[51] of the Tribunal for Rwanda it is appropriate to adopt this as the accepted term in international custom[52]. The Trial Chamber will therefore adopt the definition of murder set out above[53]. The murders listed in support of the counts of crimes against humanity are the same as those enounced in support of the violations of the laws or customs of war and which, as previously seen, have been established.

(b) other inhumane acts

52. The sub-characterisation "other inhumane acts" specified under Article 5(i) of the Statute is an generic charge which encompasses a series of crimes. It is appropriate to recall the position of the Trial Chamber in the *^elebi}i* case which stated that the notion of cruel treatment set out in Article 3 of the Statute " carries an equivalent meaning [...] as inhuman treatment does in relation to grave breaches of the Geneva Conventions"[54]. Likewise, the Trial Chamber considers that the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning. The facts submitted in support of these counts are moreover the same as those invoked for cruel treatment under Article 3 which, as the Trial Chamber has already noted, have been established.

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[50] The Trial Chamber notes however that the French version of the indictment specifies crimes under Article 5(a) as "*meurtre*" of the Statute (emphasis added) whilst the Statute uses the term "*assassinat*".
[51] *Akayesu* Judgement, para. 588.
[52] "Meurtre" is also used in the Statute of the International Criminal Court (Article 7(1)(a)) and in Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind, Official Document (hereinafter "Off. Doc.") of the United Nations Assembly General (hereinafter "UN"), 51st session, A/51/10 (1996) Suppl. No. 10 (hereinafter "Draft Articles of the ILC").
[53] See section III A) 1, above.
[54] *^elebi}i* Judgement, para. 552.

2. An attack against a civilian population as a general condition of the charge

(a) A widespread or systematic attack

53. Article 5 defines crimes against humanity as crimes "directed against any population". Customary international law has interpreted this characteristic, particular to crimes against humanity, as assuming the existence of a widespread or systematic attack against a civilian population[55]. The conditions of scale and "systematicity" are not cumulative as is evidenced by the case-law of this Tribunal[56] and the Tribunal for Rwanda[57], the Statute of the International Criminal Court[58] and the works of the International Law Commission (hereinafter "the ILC")[59]. Nevertheless, the criteria which allow one or other of the aspects to be established partially overlap. The existence of an acknowledged policy targeting a particular community[60], the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.

(b) against a civilian population

54. It follows from the letter and the spirit of Article 5 that the term "civilian population" must be interpreted broadly. The text states that the acts are directed against "any" civilian population. In addition, reference to a civilian population would seek to place the emphasis more on the collective aspect of the crime than on the status of the victims[61]. The Commission of Experts formed pursuant to Security Council resolution 780 (hereinafter "the

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[55] See, in particular, the report of the Secretary-General pursuant to Security Council resolution 808 (S/25704, 3 May 1993, para. 48). Article 3 of the Statute of the International Criminal Tribunal for Rwanda and Article 7 of the Statute of the International Criminal Court also state this element explicitly. The widespread or systematic attack was also specified as a legal ingredient of a crime against humanity by the Appeals Chamber of the Tribunal in the *Tadi}* Appeal Judgement, para. 648. The Legal Committee of the United Nations War Crimes Commission also adopted this position (History of the U.N. War Crimes Commission, p. 179).

[56] In particular, in the cases *The Prosecutor v. Miroslav Radi} and Veselin [ljivan}anin* (Case No. IT-95-13-R61 of 3 April 1996, para. 30) and *The Prosecutor v. Du{ko Tadi} alias "Dule"* (Case No. IT-94-1-T of 7 May 1997, hereinafter "the *Tadi}* Judgement", paras. 646-647).

[57] In particular, in the *Akayesu* Judgement (para. 579) and in *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, para. 123 (hereinafter "the *Kayishema* case").

[58] Article 7, paragraph 1.

[59] Draft Articles of the ILC, pp. 94-95.

[60] Expressed, in particular, in the writings and speeches of political leaders and media propaganda.

[61] In the *Tadi}* Judgement, the Trial Chamber noted that "[i]t is the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian 'population'" (para. 648).

Commission of Experts")[62] considered furthermore that the civilian population within the meaning of Article 5 of the Statute must include all those persons bearing or having borne arms who had not, strictly speaking, been involved in military activities. The Trial Chamber therefore adjudges that the notion of civilian population as used in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed *hors de combat* when the crime is perpetrated. Moreover, in accordance with the case-law of this Tribunal and the Tribunal for Rwanda[63], the Trial Chamber deems that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character"[64].

55. The elements presented in support of the guilty plea as summarised in the historical background[65] do not leave any doubt as to the widespread and systematic nature of the attack against the Muslim and Croatian civilian population in the municipality of Br~ko.

3. An attack in which an accused participates in full knowledge of the significance of his acts

56. The accused must also be aware that the underlying crime which he is committing forms part of the widespread and systematic attack.

57. The accused has not denied that his acts formed part of the attack by the Serbian forces against the non-Serbian population of Br~ko[66]. The Trial Chamber moreover notes that, despite remaining uncertainties regarding his exact rank and position, the accused was part of the Serbian forces that took part in the operation conducted against the non-Serbian civilian population in Br~ko. It was indeed in anticipation and in the service of the attack that the accused, who comes from Bijeljina, was given police duties in the municipality of Br~ko. As one of the active participants in this attack, Goran Jelisi} must have known of the widespread and systematic nature of the attack against the non-Serbian population of Br~ko.

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[62] *Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992)*, UN Off. Doc., S/1994/674, para. 78.
[63] *Tadi}* Judgement, para. 639. The Tribunal for Rwanda took the same position in the *Akayesu* case (Judgement, para. 582) and *Kayishema* case (Judgement, para. 128).
[64] This case-law is based upon Article 50(3) of the first Protocol additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims in International Armed Conflicts.
[65] See section II above.
[66] See the "Addendum", p. 3.

C. Conclusion

58. In conclusion, the Trial Chamber declares Goran Jelisi} guilty on thirty-one counts of violations of the laws or customs of war and crimes against humanity.

IV. GENOCIDE

59. Within the terms of Article 4(2) of the Statute, genocide is defined as:

> any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.

60. Article 4 of the Statute takes up word for word the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide[67] (hereinafter "the Convention"), adopted on 9 December 1948[68] and in force as of 12 January 1951[69]. The concepts of genocide and crimes against humanity came about[70] as a reaction to the horrors committed by the Nazis during the Second World War - genocide being more particularly associated with the holocaust. Subsequently, the Convention has become one of the most widely accepted

[67] Articles II and III.
[68] The draft Convention was approved by a General Assembly plenary session with 55 votes for, none against and no abstentions. The Convention was immediately signed by 20 States.
[69] That is, pursuant to Article XIII of the Convention, 90 days after the filing of the twentieth ratification instrument. Yugoslavia was amongst the first States to ratify the Convention on 29 August 1950.
[70] The concept of crimes against humanity first appeared in the Charters and Statutes of the International Military Tribunals established by the London Agreement of 1945 and by the Declaration of the Allied Supreme Commander in the Far-East of 1946. Genocide, a term created by Raphaël Lemkin in 1944 (Axis Rules in Occupied Europe, Washington D.C., Carnegie Endowment, 1944), was first officially consecrated in the indictment brought against the major German war criminals of 8 April 1945.

international instruments relating to human rights[71]. There can be absolutely no doubt that its provisions fall under customary international law as, moreover, noted by the International Court of Justice as early as 1951. The Court went even further and placed the crime on the level of *jus cogens*[72] because of its extreme gravity. It thus defined genocide as:

> "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations ... The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention).[73]

61. In accordance with the principle *nullum crimen sine lege*[74], the Trial Chamber means to examine the legal ingredients of the crime of genocide taking into account only those which beyond all doubt form part of customary international law. Several sources have been considered in this respect. First, the Trial Chamber takes note of the Convention on whose incontestable customary value it has already remarked. It interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties[75]. In addition to the normal meaning of its provisions, the Trial Chamber also considered the object and purpose of the Convention[76] and could also refer to the preparatory work and circumstances associated with the Convention's

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[71] The Convention was ratified by 129 States on 1 October 1999.

[72] Article 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm of general international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

[73] ICJ, *Case of the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Rec. 1951, p. 23. The Court reaffirmed its position in the case involving the *Barcelona Traction, Light and Power Co.*(ICJ, Reports 1970, p. 32) by indicating that given the importance of the rights at issue, certain areas exist such as the prevention and punishment of the crime of genocide for which States have obligations towards the entire international community (*erga omnes* obligations) and not only to another State: the *erga omnes* obligations in contemporary international law derive, for instance, from the prohibition of acts of aggression and genocide.

[74] A principle recalled by the Secretary-General in his report pursuant to paragraph 2 of Security Council resolution 808 (1993) of 3 May 1993 (UN Off. Doc. S/25704, para. 34): "application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".

[75] Vienna Convention on the Law of Treaties of 23 May 1969, in force as of 27 January 1980.

[76] Article 31 of the Vienna Convention: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

coming into being[77]. The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgements rendered by the Tribunal for Rwanda[78], in particular to the *Akayesu* and *Kayishema* cases which constitute to date the only existing international case-law on the issue[79]. The practice of States, notably through their national courts[80], and the work of international authorities in this field [81] have also been taken into account. The ILC report commenting upon the "Articles of the Draft Code of Crimes Against the Peace and Security of Mankind"[82] which sets out to transcribe the customary law on the issue appeared especially useful.

62. Genocide is characterised by two legal ingredients according to the terms of Article 4 of the Statute:

- the material element of the offence, constituted by one or several acts enumerated in paragraph 2 of Article 4;

- the *mens rea* of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

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[77] Article 32 of the Vienna Convention on the Law of Treaties: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable".

[78] The Tribunal for Rwanda has jurisdiction to judge those persons presumed responsible for the crime of genocide pursuant to Article 2 of its Statute which also reproduces Articles II and III of the Convention on genocide.

[79] *The Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was brought before the International Court of Justice in 1993 by Bosnia-Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro) pursuant to Article IX of the Convention. In this case, the Court rendered two orders (Request for the indication of provisional measures dated 8 April 1993, Reports 1993 p. 1; Further requests for the indication of provisional measures dated 13 September 1993, Reports 1993, p. 325) and a decision on its jurisdiction (Decision dated 11 July 1996, preliminary objections, Reports 1996, p. 595). However, it has not yet ruled on the merits of the case.

[80] Of the judgements rendered in this field by national courts, the following may *inter alia* be noted: the Judgement rendered on 29 May 1962 by the Supreme Court of Israel against Adolf Eichmann for complicity in a "crime against the Jewish people", a crime defined the same as genocide but whose victims are exclusively Jewish; the Judgement rendered by the courts in Equatorial Guinea against the tyrant Macias and the Judgement rendered in absentia against Pol Pot and his deputy Prime Minister by a revolutionary people's tribunal set up by the Vietnamese authorities following their invasion of Cambodia. Proceedings were also initiated in Ethiopia against 70 representatives of the Mengistu Haile Mariam regime which held power from 1974 to 1991. Two Judgements relating to Serbian nationals accused of genocide or complicity in genocide were also recently rendered by the German courts (Appeals Court of Bavaria, *Novislav Djaji}* case, 23 May 1997, 3 St 20/96; Düsseldorf Supreme Court, *Nikola Jorgi}* case, 26 September 1997, 2 StE 8/96).

[81] Particular attention should be paid to the two reports submitted by the United Nations Subcommittee for anti-discriminatory measures and the protection of minorities by Nicodème Ruhashyankiko in 1978 ("Study of the question of the prevention and punishment of the crime of genocide" E/CN.4/Sub.2/416, 4 July 1978) and by Benjamin Whitaker in 1985 ("Revised and updated report on the question of the prevention and punishment of the crime of genocide", E/CN.4/Sub.2/1985/6, 2 July 1985).

[82] Draft Articles of the ILC, in particular pp. 85-93.

A. The material element of the offence: the murder of members of a group[83]

63. The murder[84] of members of a group constitutes the crime evoked by the Prosecutor in support of the genocide charge (Article 4(2)(a) of the Statute).

64. In her pre-trial brief, the Prosecutor alleges that throughout the time Luka operated, the Serbian authorities, including the accused, killed hundreds of Muslim and Croatian detainees[85]. The number of the victims would thus be much higher than the figure given for only those crimes to which the accused pleaded guilty[86].

65. Although the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisi} for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied. Consequently, the Trial Chamber must evaluate whether the intent of the accused was such that his acts must be characterised as genocide.

B. The *mens rea* of the offence: the intent to destroy, in whole or in part, a national, ethnical, racial or religious group

66. It is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law. The underlying crime or crimes must be characterised as genocide when committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Stated otherwise, "[t]he prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group"[87]. Two elements which may therefore be drawn from the special intent are:

- that the victims belonged to an identified group;

[83] In the instance, the group was defined by the Prosecution in the charge as being Muslim. For the legal discussion on the notion of group see B) 1) b).
[84] In the *Akayesu* case, the Trial Chamber remarked that the term "meurtre" used in the French text was more exact and favourable term for the accused than "killing" used in the English text of the Statute. It selected one of the two definitions of murder in accordance with the general principles of criminal law by which the interpretation which most benefits the accused must be chosen (Judgement, para. 501).
[85] Prosecutor's pre-trial brief of 19 November 1998, para. 1.7.
[86] Moreover, Goran Jelisi} expressly admitted that he was guilty of three other murders not included in the indictment, FPT p. 81.
[87] ILC Draft Articles, p. 88.

- that the alleged perpetrator must have committed his crimes as part of a wider plan to destroy the group as such.

1. Acts committed against victims because of their membership in a national, ethnical, racial or religious group

(a) The discriminatory nature of the acts

67. The special intent which characterises genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the "membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide"[88].

68. From this point of view, genocide is closely related to the crime of persecution, one of the forms of crimes against humanity set forth in Article 5 of the Statute. The analyses of the Appeals Chamber[89] and the Trial Chamber[90] in the *Tadi}* case point out that the perpetrator of a crime of persecution, which covers bodily harm including murder[91], also chooses his victims because they belong to a specific human group. As previously recognised by an Israeli District Court in the *Eichmann*[92] case and the Criminal Tribunal for Rwanda in the *Kayishema*[93] case, a crime characterised as genocide constitutes, of itself, crimes against humanity within the meaning of persecution.

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[88] ILC Draft Articles, p. 88; the same comment was made by Pieter N. Drost, based on the preparatory works of the Convention, in *The Crime of State, Genocide,* A.W. Sythoff, Leyden, 1959, p. 124: "It is an externally perceptible quality or characteristic which the victim has in common with the other members of the group, which makes him distinct from the rest of society in the criminal mind of his attacker and which *for that very reason* causes the attacker to commit the crime against such marked and indicated individual"(emphasis added).
[89] *Tadi}* Appeals Judgement, para. 305.
[90] *Tadi}* Judgement, para. 697: "what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely race, religion or politics".
[91] See in particular the *Tadi}* Judgement, para, 717.
[92] The Israeli District Court noted that "All [the accused] did with the object of exterminating the Jewish people also amounts *ipso facto* to persecution of Jews on national, racial, religious and political grounds" (Attorney General of Israel v. Eichmann, Judgement of the District Court, in E. Lauterpacht, *International Law Reports*, vol. 36, part VI, para. 201, p. 239 (1968)).
[93] Judgement, para. 578.

(b) Groups protected by Article 4 of the Statute

69. Article 4 of the Statute protects victims belonging to a national, ethnical, racial or religious group and excludes members of political groups. The preparatory work of the Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting "stable" groups objectively defined and to which individuals belong regardless of their own desires[94].

70. Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators[95]. This position corresponds to that adopted by the Trial Chamber in its Review of the Indictment Pursuant to Article 61 filed in the Nikoli} case[96].

71. A group may be stigmatised in this manner by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. The Trial

[94] Not retained at the draft stage when submitted to the United Nations General Assembly (E/447) because of their lack of permanence, political groups were included under protected groups in the *ad hoc* committee's draft document by a narrow majority (4 votes to 3; UN Off. Doc. E/794 of 24 May 1948 pp. 13-14). The reference to political groups was however again rejected in the final draft of the Assembly General's Sixth Committee (see in particular the commentaries of the Brazilian and Venezuelan representatives expressing their concern about the fact that only "permanent" groups were specified, A/C.6/SR 69, p. 5).

[95] Here, the Trial Chamber follows in part the position taken by the International Criminal Tribunal for Rwanda which stated that "an ethnic group is one whose members share a common language and culture; or a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including the perpetrators of the crimes (identification by others)" in the *Kayishema* case (Judgement, para. 98).

[96] Review in the case *The Prosecutor v. Nikoli}* (hereinafter "the *Nikoli}* Review"), 20 October 1995, para. 27, as part of the appraisal of the crime against humanity "persecution": "the civilian population subjected to such

Chamber concurs here with the opinion already expressed by the Commission of Experts[97] and deems that it is consonant with the object and the purpose of the Convention to consider that its provisions also protect groups defined by exclusion where they have been stigmatised by the perpetrators of the act in this way.

72. In this case, it is the positive approach towards a group which has been advanced by the Prosecution. The genocide charge states that the murders committed by the accused targeted the Bosnian Muslim population.

(c) Proof of discriminatory intent

73. In seeking proof of discriminatory intent, the Trial Chamber takes account of not only the general context in which the acts of the accused fit but also, in particular, his statements and deeds. The Trial Chamber deems, moreover, that an individual knowingly acting against the backdrop of the widespread and systematic violence being committed against only one specific group could not reasonably deny that he chose his victims discriminatorily.

74. The testimony heard during the trial[98] shows that the offensive against the civilian population of Br~ko, of which the acts of Goran Jelisi} formed part, was directed mainly against the Muslim population. A great majority of the persons detained in the collection centres and at Luka camp were Muslim[99]. During interrogations, the Muslims were questioned about their possible involvement in resistance movements or political groups[100]. Most of the victims who were killed during the conflict in Br~ko were Muslims[101].

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discrimination was identified by *the perpetrators of the discriminatory measures*, principally by its religious characteristics" (emphasis added).

[97] *Final Report of the Commission of Experts*, *op. cit.*, para. 96, p. 25: "If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the Convention to consider all the victim groups as a larger entity. The case being, for example, that there is evidence that group A wants to destroy in whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A. In a sense, group A has defined a pluralistic non-A group using national, ethnic, racial and religious criteria for the definition. It seems relevant to analyse the fate of the non-A group along similar lines as if the non-A group had been homogenous".

[98] In this regard, the Trial Chamber notes that several witnesses (Q, B, N, E) whose statements are included in the factual basis also testified before the Trial Chamber during the genocide trial.

[99] Witness B, FPT p. 159; Witness I, FPT p. 686; Witness N, FPT pp. 1115-1116.

[100] Witness D, FPT pp. 525-526.

[101] See exhibit 12. The witness Mustafa Rami}, former mayor of Br~ko, alleged that about 2000 of the 3000 Muslims who supposedly remained in Br~ko after the destruction of the bridges were killed or disappeared (FPT pp.1318-1327).

According to the prior statement of witness John Ralston, in 1991 the town of Br~ko had a population of 41 046 of which 55.5% were Muslims, 19.9% Serbs, 6.9% Croats and 17.5% others. Muslims also accounted for the majority of the population throughout most of the Br~ko municipality.

75. The words and deeds of the accused demonstrate that he was not only perfectly aware of the discriminatory nature of the operation but also that he fully supported it. It appears from the evidence submitted to the Trial Chamber that a large majority of the persons whom Goran Jelisi} admitted having beaten and executed were Muslim. Additionally, many of the elements showed how Goran Jelisi} made scornful and discriminatory remarks about the Muslim population. Often, Goran Jelisi} insulted the Muslims by calling them "balijas" or "Turks"[102]. Of one detainee whom he had just hit, Goran Jelisi} allegedly said that he must be have been mad to dirty his hands with a "balija" before then executing him[103].

76. It also appears from the testimony that Goran Jelisi} allegedly humiliated the Muslims by forcing them to sing Serbian songs. At the police station, he supposedly made them line up facing the Serbian flag and sing[104].

77. The Trial Chamber concludes that in this case the discriminatory intent has been proved.

2. The intent to destroy, in whole or in part, the group as such

78. In examining the intentionality of an attack against a group, the Trial Chamber will first consider the different concepts of the notion of destruction of a group as such before then reviewing the degree of intent required for a crime to be constituted. In other words, the Trial Chamber will have to verify that there was both an intentional attack against a group and an intention upon the part of the accused to participate in or carry out this attack. Indeed, the intention necessary for the commission of a crime of genocide may not be presumed even in the case where the existence of a group is at least in part threatened. The Trial Chamber must verify whether the accused had the "special" intention which, beyond the discrimination of the crimes he commits, characterises his intent to destroy the discriminated group as such, at least in part.

(a) Definition

79. Apart from its discriminatory character, the underlying crime is also characterised by the fact that it is part of a wider plan to *destroy*, in whole or in part, the group *as such*. As indicated by the ILC, "the intention must be to destroy the group "as such", meaning as a

[102] Witness A, FPT p. 45; Witness F, FPT p. 248.
[103] Witness F, FPT p. 248.
[104] Witness Q, FPT pp. 1203-1227.

separate and distinct entity, and not merely some individuals because of their membership in a particular group".[105] By killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member. The Tribunal for Rwanda notes that "[t]he perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or in part, the group of which the individual is just one element"[106]. Genocide therefore differs from the crime of persecution in which the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such[107].

80. Notwithstanding this, it is recognised that the destruction sought need not be directed at the whole group which, moreover, is clear from the letter of Article 4 of the Statute. The ILC also states that "[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe"[108]. The question which then arises is what proportion of the group is marked for destruction and beyond what threshold could the crime be qualified as genocide? In particular, the Trial Chamber will have to verify whether genocide may be committed within a restricted geographical zone.

81. The Prosecution accepts that the phrase "in whole or in part" must be understood to mean the destruction of a significant portion of the group from either a quantitative or qualitative standpoint. The intention demonstrated by the accused to destroy a part of the group would therefore have to affect either a major part of the group or a representative fraction thereof, such as its leaders[109].

82. Given the goal of the Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group[110]. The

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[105] ILC Draft Articles, p. 88.
[106] *Akayesu* Judgement, para. 522.
[107] Stefan Glaser, *Droit international pénal conventionnel*, Bruylant, Brussels, 1970, p. 107. Professor Pella also uses this criterion to distinguish the two crimes in his "Memorandum concerning a draft code of offences against the peace and security of mankind" submitted to the ILC during its second session (UN Off. Doc., A/CN.4/39, 4 November 1950, para. 141, pp. 188-189).
[108] ILC Draft Articles, p. 89.
[109] Prosecutor's pre-trial brief, para. 4.3, pp. 12-13.
[110] The ILC Draft Articles just as Nehemia Robinson's commentary indicate that the perpetrators of genocide must be seeking to destroy a "substantial part" of the group (ILC Draft Articles, p. 89; Nehemia Robinson, *The Genocide Convention*, New York, 1949 (1st edition), 1960, p. 63); the U. S. Senate's "understanding" of Article II of the Convention also states that the U.S. interprets "partial destruction" as the destruction of a "*substantial*

Tribunal for Rwanda appears to go even further by demanding that the accused have the intention of destroying a "considerable" number of individual members of a group[111]. In a letter addressed to the United States Senate during the debate on Article II of the Convention on genocide, Raphaël Lemkin explained in the same way that the intent to destroy "in part" must be interpreted as an desire for destruction which "must be of a substantial nature [...] so as to affect the entirety"[112]. A targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community. The Commission of Experts specified that "[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality per se may be a strong indication of genocide regardless of the actual numbers killed. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group*. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose"[113]. Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group "selectively". The Prosecutor did not actually choose between these two options[114].

83. The Prosecution contends, however, that the geographical zone in which an attempt to eliminate the group is made may be limited to the size of a region or even a municipality[115].

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part" of the group (*Genocide Convention, Report of the Committee on Foreign Relations*, U.S. Senate, 18 July 1981, p. 22).

[111] *Kayishema* Judgement, para. 97.

[112] Raphaël Lemkin in *Executive Session of the Senate Foreign Relations Committee, Historical Series*, 1976, p. 370. In the same vein, the implementing legislation proposed by the Nixon and Carter administrations stated that "'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity", S EXEC. REP. No. 23, 94th Cong., 2nd Sess. (1976), pp. 34-35.

[113] Report of the Commission of Experts, para. 94 (emphasis added).

[114] For the discussion of this point, see below.

[115] Prosecutor's pre-trial brief, para. 4.4, pp. 13-14.

The Trial Chamber notes that it is accepted that genocide may be perpetrated in a limited geographic zone[116]. Furthermore, the United Nations General Assembly did not hesitate in characterising the massacres at Sabra and Shatila[117] as genocide, even if it is appropriate to look upon this evaluation with caution due to its undoubtedly being more of a political assessment than a legal one. Moreover, the Trial Chamber adopted a similar position in its Review of the Indictment Pursuant to Article 61 filed in the Nikoli} case. In this case, the Trial Chamber deemed that it was possible to base the charge of genocide on events which occurred only in the region of Vlasenica[118]. In view of the object and goal of the Convention and the subsequent interpretation thereof, the Trial Chamber thus finds that international custom admits the characterisation of genocide even when the exterminatory intent only extends to a limited geographic zone.

(b) The degree of intention required

84. The accused is charged with committing genocide or aiding and abetting therein. These charges are grounded on Article 7(1) of the Statute according to which any person who has either committed a crime or instigated, ordered or otherwise aided and abetted in the commission of the crime without having himself directly committed it must be held responsible for the crime.

85. The Prosecutor proposes a broad understanding of the intention required under Article 7(1) of the Statute and submits that an accused need not *seek* the destruction in whole or in part of a group. Instead, she claims that it suffices that he *knows* that his acts will inevitably, or even only probably, result in the destruction of the group in question[119]. Furthermore, she states that premeditation is not required[120].

86. The Trial Chamber notes that, contrary to the Prosecutor's contention, the Tribunal for Rwanda in the *Akayesu* case considered that any person accused of genocide for having committed, executed or even only aided and abetted must have had "the specific intent to commit genocide", defined as "the intent to destroy, in whole or in part, a national, ethnical,

[116] Nehemia Robinson states that "the intent to destroy a multitude of persons of the same group must be classified as Genocide even if these persons constitute only a part of a group either within a country or within a region *or within a single community*", (emphasis added) p. 63.
[117] UN Off. Doc. AG/Res. 37/ 123 D (16 December 1982), para. 2.
[118] *Nikoli}* Review, para. 34.
[119] Prosecutor's pre-trial brief, 19 November 1998, para. 3.1, pp. 7-8.
[120] Prosecutor's pre-trial brief, 19 November 1998, para. 3.2, p. 8.

racial or religious group as such"[121]. The *Akayesu* Trial Chamber found that an accused could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of a group. It declared that such an individual must be convicted of complicity in genocide[122].

87. Before even ruling on the level of intention required, the Trial Chamber must first verify whether an act of genocide has been committed as the accused cannot be found guilty of having aided and abetted in a crime of genocide unless that crime has been established.

(i) The intention to commit "all-inclusive" genocide

88. As has already been seen, the collection of the population in centres located at different points around the town, their subsequent transfer to detention camps and the interrogations always conducted in an identical manner over a short period of time demonstrate that the operation launched by the Serbian forces against the Muslim population of Br~ko was organised. Consequently, whether this organisation meant to destroy in whole or in part the Muslim group must be established.

89. The Trial Chamber notes in this regard that one witness related how a Serbian friend had told him that he had planned for only 20% of the Muslims to remain[123]. Another witness declared that he was told during an interrogation at the mosque that 5% of the Muslims and Croats would be allowed to live but that this 5% would have to perform back-breaking work[124]. Some witnesses even declared that on several occasions during their time at Luka they had carried up to twenty bodies[125].

90. During the exhumations which took place in summer 1997, approximately 66 bodies were discovered scattered about in four mass graves. The positions of the bodies indicate that

[121] *Akayesu* Judgement, para. 485.
[122] *Akayesu* Judgement, paras. 544-547.
[123] Witness J, FPT p. 830.
[124] Witness I, FPT pp. 687-758.
[125] Witness L, FPT p. 965; Witness D, FPT p.445. Allegedly, these bodies were then loaded into a refrigerated lorry (Witness A, FPT p. 5; Witness J, FPT p. 773), while others were thrown into the Sava River (Witness B, FPT pp. 136-139).

they were piled haphazardly into the graves[126]. Most were the bodies of males of fighting age and most of them had been shot dead[127].

91. The Prosecutor also tendered lists[128] of names of persons who were reputedly killed at the time of the acts ascribed to the accused[129]. In particular, the Prosecutor submitted a list of thirty-nine persons who for the most part were either members of the local administrative or political authorities, well-known figures in town, members of the Muslim Youth Association, members of the SDA or simply SDA sympathisers[130].

92. One witness[131] described how the police detectives who interrogated the detainees at Luka camp appeared to decide which detainees were to be executed upon the basis of a document. Another detainee[132] claimed at the hearing to have seen a list of numbered names headed "people to execute" in one of the administrative building offices in Luka camp. According to this witness, about fifty names appeared on the list and they were mostly Muslim.

93. However, the reason for being on these lists and how they were compiled is not clear. Nor has it been established that the accused relied on such a list in carrying out the executions. One witness stated *inter alia* that Goran Jelisi} seemed to select the names of persons at random from a list[133]. Other witnesses suggested that the accused himself picked out his victims from those in the hangar. In no manner has it been established that the lists seen by Witness K or by Witness R at Luka camp correspond to that submitted by the Prosecutor[134]. It is not therefore possible to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Br~ko to the point of threatening the survival of that community[135].

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[126] Testimony of Mr. Wright, FPT p. 1356, exhibit 60.
[127] Testimony of Mr. Albert Charles Hunt, FPT pp. 1363 and 1369.
[128] These lists name just over a hundred people who died. The first list (exhibit 12) was compiled using documents supplied by Republika Srpska which established a list of persons whose bodies were reportedly found in a mass grave. The second list (exhibit 13) was compiled by witness Mustafa Rami}. It appears from these exhibits that about sixty persons were killed in Br~ko during May 1992 (of a total Muslim population of about 22 000 people – see note 101).
[129] Exhibits 12 and 13.
[130] Exhibit 13.
[131] Witness L, FPT pp. 945-948.
[132] Witness K, FPT pp. 840-903 and 980 to 1026.
[133] Witness R, FPT pp. 1384-1476. The existence of lists was also remarked upon by Witness J, FPT p. 830.
[134] Exhibit 13.
[135] As indicated above, the figures provided by a prosecution witness put the Muslim population at over 22 000 in the town of Br~ko alone.

94. In addition, it has been established that many detainees at Luka camp had a laissez-passer[136]. According to Witness F, eighty to a hundred persons out of a total of six to seven hundred detainees were reputedly released in this way on the day they arrived, 8 May 1992. Other laissez-passer were reportedly issued subsequently. Allegedly, the detainees were also exchanged as of 19 May 1992[137].

95. It has also not been established beyond all reasonable doubt whether the accused killed at Luka camp under orders. Goran Jelisi} allegedly presented himself to the detainees as the Luka camp commander[138]. The detainees believed that he was the chief or at least a person in authority because he gave orders to the soldiers at the camp[139] who appeared to be afraid of him[140]. The Trial Chamber does not doubt that the accused exercised a *de facto* authority over the staff and detainees at the camp.

96. However, no element establishing the chain of command within which he operated has been presented. In particular, no clear information has been provided concerning the authority to which he answered. Some testimony did however make reference to a man who supposedly presented himself as being Jelisi}'s superior[141]. This commander[142], who wore the uniform of the Yugoslav National Army (JNA), supposedly came to Luka camp on about 16 or 18 May 1992 with other military personnel and reported that an order had been given for the detainees not to be killed but kept alive for use in exchanges[143]. Several witnesses attested to Goran Jelisi}'s being present in Luka camp up until 18 or 19 May 1992 and reported that there was a change of regime following his departure. Cruel treatment allegedly became less frequent and there were supposedly no more murders[144].

97. The Trial Chamber thus considers it possible that Goran Jelisi} acted beyond the scope of the powers entrusted to him. Some of the testimony heard would appear to confirm this conclusion since it describes the accused as a man acting as he pleased and as he saw

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[136] Witness L, FPT p. 944; Witness H, FPT p. 669; Witness I, FPT p. 730; Witness G, FPT p. 423; Witness J, FPT p. 808.
[137] Witness M, FPT p. 1076; Witness O, FPT p. 1155; Witness B, FPT pp. 158-159.
[138] Witness D, FPT pp. 440-441. According to Witness O, Goran Jelisi} wore the uniform of the civilian police or a camouflage uniform, FPT p. 1153.
[139] Witness L, FPT pp. 907-970.
[140] Witness B, FPT p. 139.
[141] Witness A, FPT p. 95; Witness B, FPT p. 139.
[142] Djurkovi} or Jerkovi}, Witness A, FPT p. 55; Witness B declared that "Kole" was the chief at Luka on 12 or 13 May 1992 and that he had been replaced by Vojkan and then Kosta, FPT p. 181.
[143] Witness M, FPT p. 1076; Witness O, FPT p. 1155; Witness B, FPT pp. 158-159.
[144] Witness K, FPT p. 885; Witness A, FPT p. 55.

fit[145]. One witness even recounted that Goran Jelisi} had an altercation with a guard and told him that he should not subject the detainees to such treatment[146].

98. In consequence, the Trial Chamber considers that, in this case, the Prosecutor has not provided sufficient evidence allowing it to be established beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Br~ko or elsewhere within which the murders committed by the accused would allegedly fit.

(ii) Jelisi}'s intention to commit genocide

99. It is therefore only as a perpetrator that Goran Jelisi} could be declared guilty of genocide.

100. Such a case is theoretically possible. The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated[147]. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the *ad hoc* committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text[148] and that such precision would only make the burden of proof even greater[149]. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.

[145] Witness I, FPT p. 761; Witness R, FPT p. 1413.
[146] Witness I.
[147] Pieter N. Drost, *The Crime of State, Genocide,* A.W. Sythoff, Leyden, 1959, p. 85: "both as a question of theory and as a matter of principle nothing in the present Convention prohibits its provisions to be interpreted and applied to individual cases of murder by reason of the national, racial, ethnical or religious qualities of the single victim if the murderous attack was done with the intent to commit similar acts in the future and in connection with the first crime".
[148] The French word "délibéré" was dropped further to a proposal of Belgium (UN Off. Doc. A/C.6/217, UN Doc. A/C.6/SR.72 p. 8).
[149] On this point, see *inter alia* the commentary of J. Graven, *op. cit.*, p. 495.

101. The Trial Chamber observes, however, that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system[150].

102. Admittedly, the testimony makes it seem that during this period Goran Jelisi} presented himself as the "Serbian Adolf"[151] and claimed to have gone to Br~ko to kill Muslims. He also presented himself as "Adolf" at his initial hearing before the Trial Chamber on 26 January 1998[152]. He allegedly said to the detainees at Luka camp that he held their lives in his hands and that only between 5 to 10 % of them would leave there[153]. According to another witness, Goran Jelisi} told the Muslim detainees in Luka camp that 70% of them were to be killed, 30% beaten and that barely 4% of the 30% might not be badly beaten[154]. Goran Jelisi} remarked to one witness that he hated the Muslims and wanted to kill them all, whilst the surviving Muslims could be slaves for cleaning the toilets but never have a professional job. He reportedly added that he wanted "to cleanse" the Muslims and would enjoy doing so, that the "balijas" had proliferated too much and that he had to rid the world of them[155]. Goran Jelisi} also purportedly said that he hated Muslim women, that he found them highly dirty and that he wanted to sterilise them all in order to prevent an increase in the number of Muslims but that before exterminating them he would begin with the men in order prevent any proliferation[156].

103. The statements of the witnesses bring to light the fact that, during the initial part of May, Goran Jelisi} regularly executed detainees at Luka camp. According to one witness, Goran Jelisi} declared that he had to execute twenty to thirty persons before being able to drink his coffee each morning. The testimony heard by the Trial Chamber revealed that Goran Jelisi} frequently informed the detainees of the number of Muslims that he had killed. Thus, on 8 May 1992 he reputedly said to one witness that it was his sixty-eighth victim[157], on 11 May that he had killed one hundred and fifty persons[158] and finally on 15 May to another witness[159] following an execution that it was his "eighty-third case".

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[150] The International Criminal Tribunal for Rwanda noted similarly in the *Kayishema* case that "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation" (para. 94).
[151] Witness J, FPT pp. 774 and 808; Witness A, FPT p. 125.
[152] FPT p. 1
[153] Witness F, FPT pp. 234-567.
[154] Witness G, FPT pp. 372-434.
[155] Witness K, FPT pp. 864-865.
[156] Witness K, FPT pp. 867-868.
[157] Witness F, FPT p. 249.
[158] Witness A, FPT p. 45.
[159] Witness R, FPT pp. 1401-1405.

104 Some witnesses pointed out that Goran Jelisi} seemed to take pleasure from his position, one which gave him a feeling of power, of holding the power of life or death over the detainees and that he took a certain pride in the number of victims that he had allegedly executed[160]. According to another testimony, Goran Jelisi} spoke in a bloodthirsty manner, he treated them like animals or beasts and spittle formed on his lips because of his shouts and the hatred he was expressing. He wanted to terrorise them[161].

105. The words and attitude of Goran Jelisi} as related by the witnesses essentially reveal a disturbed personality[162]. Goran Jelisi} led an ordinary life before the conflict. This personality, which presents borderline, anti-social and narcissistic characteristics and which is marked simultaneously by immaturity, a hunger to fill a "void" and a concern to please superiors, contributed to his finally committing crimes[163]. Goran Jelisi} suddenly found himself in an apparent position of authority for which nothing had prepared him. It matters little whether this authority was real. What does matter is that this authority made it even easier for an opportunistic and inconsistent behaviour to express itself.

106. Goran Jelisi} performed the executions randomly. In addition, Witness R, an eminent and well-known figure in the Muslim community was allegedly forced to play Russian roulette with Goran Jelisi} before receiving a laissez-passer directly from him[164]. Moreover, on his own initiative and against all logic, Goran Jelisi} issued laissez-passer to several detainees at the camp, as shown *inter alia* by the case of Witness E[165] whom Goran Jelisi} released after having beaten.

107. In conclusion, the acts of Goran Jelisi} are not the physical expression of an affirmed resolve to destroy in whole or in part a group as such.

108. All things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Br~ko during the period covered by the indictment. Furthermore, the behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of

[160] Witness B, FPT pp. 131-133.
[161] Witness K, FPT pp. 840-903 and 980-1026.
[162] See note 25. See also the report of Doctor van den Bussche, 8 November 1999.
[163] The Trial Chamber notes that the presence of a woman at Goran Jelisi}'s side also seems to have encouraged him to commit certain murders in order to impress the young woman.
[164] Witness R, FPT pp. 1383-1476.

genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisi} must be found not guilty on this count.

V. SENTENCING

109. The Trial Chamber ultimately found Goran Jelisi} guilty of sixteen violations of the laws or customs of war, twelve for murder (counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 23, 32 and 38), three for cruel treatment (counts 30, 36 and 40) and one for plunder (count 44) and fifteen for crimes against humanity, that is, twelve counts of murder (counts 5, 7, 9, 11 13, 15, 17, 19, 21, 23, 33 and 39) and three counts of inhumane acts (counts 31, 37 and 41). The Trial Chamber will pronounce sentence on the basis of that guilt.

A. Principles and Purpose of the Sentence

110. In order to pronounce the appropriate penalty the Tribunal is guided by the Statute and the Rules. The Statute states:

> Article 23
> Judgement
>
> 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
>
> 2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.
>
> Article 24
> Penalties
>
> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> [...]

[165] Witness E, exhibit 24.

The Trial Chamber also notes the provisions of Rules 100 and 101 of the Rules[166].

111. Article 41(1) of the 1990 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY) states which elements must be considered for the determination of sentence:

> For a given offence, the court shall set the limits prescribed by law for the offence and shall consider all the circumstances which might influence the severity of the penalty (mitigating and attenuating circumstances) and, in particular: the level of criminal responsibility, the motives for the offence, the intensity of the threat or assault on the protected object, the circumstances under which the offence was committed, the previous history of the perpetrator of the offence, his personal circumstances and conduct subsequent to the perpetration of the offence and any other circumstances relating to the character of the perpetrator.

112. The Trial Chamber also notes Chapter XVI of the SFRY Criminal Code entitled Criminal Offences against Humanity and International Law. Article 142 thereof provides that:

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Rule 100
Sentencing Procedure on a Guilty Plea

(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Sub-rule 102(B).

Rule 101
Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute. As well as such factors as:

(i) any aggravating circumstances

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) 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, as referred to in Article 10, paragraph 3, of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

> Any person who out of a disregard for the rule of law among peoples in times of war, armed conflict or occupation orders an attack against a civilian population [..] or commits[…] acts of homicide or torture or who has subjected the civilian population to inhumane treatment […] shall be punished with a term of imprisonment of at least five years or by death.

113. It is clear that Article 142 authorises severe penalties for the crimes for which Goran Jelisi} has been found guilty, that is, "a term of imprisonment of at least five years" or death. The Trial Chamber notes that in November 1998 Bosnia and Herzegovina abolished the death penalty and replaced it with a 20 to 40 year prison term[167]. The Trial Chamber notes that, pursuant to Article 24 of the Statute, the International Tribunal may pass a sentence of life imprisonment but never a death sentence.

114. The Trial Chamber considers, however, that the only obligation imposed by the Statute through its reference to the general range of penalties applied by the courts of the former Yugoslavia is to keep that range in mind. It is valid only as an indication[168].

115. In conclusion, the Trial Chamber will take into account the Tribunal's practice in respect of the nature of the confirmed indictments and the scope of the crimes they cover, the characteristics peculiar to the accused, the declarations of previous guilt and sentences handed down.

116. As the Trial Chamber hearing the *Tadi}* case recently recalled, the mission of the Tribunal, pursuant to Security Council resolutions 808 and 827, is to put a end to the serious violations of international humanitarian law and to contribute to restoring and keeping the peace in the former Yugoslavia. This is especially relevant for determining the penalty[169]. To achieve these objectives, in concert with the case-law of the two *ad hoc* Tribunals, the

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[167] *The Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 November 1999 (hereinafter "the *Tadi}* Sentencing Judgement of 11 November 1999"), para. 12.

[168] This interpretation is in line with the case-law of the two *ad hoc* Tribunals: the *Tadi}* Sentencing Judgement of 11 November 1999, para 12; the *^elebi}i* Judgement, para 1194; *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999, para. 242; *The Prosecutor v. Dra`en Erdemovi}*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996, (hereinafter "the *Erdemovi}* Sentencing Judgement of 29 November 1996"), para. 39; and *mutatis mutandis*, for the ICTR: *The Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999, (hereinafter "the Serushago Sentence"), para. 18; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Sentencing Judgement, 2 October 1998, (hereinafter "the *Akayesu* Sentence"), para. 14; and *The Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998 (hereinafter "the *Kambanda* Sentence"), para. 23.

[169] The *Tadi}* Sentencing Judgement of 11 November 1999, para. 7.

Trial Chamber must pronounce an exemplary penalty both from the viewpoint of punishment and deterrence[170].

117. Moreover, as noted in another case before the International Tribunal:

> the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators as one of the essential functions of a prison sentence for a crime against humanity[171].

118. Lastly, the Trial Chamber agrees with the Trial Chamber which heard the *Furund`ija* case, that is, that this reasoning applies not only to crimes against humanity but also to war crimes and other serious violations of international humanitarian law[172].

B. Conclusions of the Parties

119. Both parties presented their final arguments in respect of the penalty at a public hearing held on 25 November 1999. On 24 November 1999, the Prosecution called two witnesses, one "character witness" and a psychiatric expert and claimed that no decisive mitigating circumstances exist. It did, however, mention many aggravating circumstances including Goran Jelisi}'s demonstrated dishonesty, his discriminatory behaviour, his enthusiasm in committing the crimes and his submissiveness vis à vis people in authority. In respect of sentencing practice, the Prosecution referred *inter alia* to the recent sentence handed down in the *Tadi}* case and asked the Trial Chamber to pronounce a life sentence on the accused[173].

120. From 8 to 11 November 1999 and on 22 and 24 November 1999, the Trial Chamber heard 20 Defence witnesses including a psychiatric expert. Five of the witnesses were heard by video-link from Br~ko and Sarajevo. The Defence claimed that the orders from superiors which Goran Jelisi} allegedly obeyed, his guilty plea, his co-operation with the Office of the Prosecutor, his remorse, his youth and his good relations with Muslims constitute mitigating circumstances. Furthermore, the Defence held that when deliberating on the penalty to be

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[170] *Tadi}* Sentencing Judgement of 11 November 1999, para. 9; ^e*lebi}i* Judgement, paras. 1231 and 1234; *The Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (hereinafter "the *Furund`ija* Judgement"), para. 288; *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 2; *Serushago* Sentence, para. 20; *Akayesu* Sentence, para. 19; *Kambanda* Sentence, para. 28.
[171] *Erdemovi}* Sentencing Judgement of 29 November 1996, para. 65.
[172] *Furund`ija* Judgement, para. 289.
[173] FPT p. 2310.

pronounced, the Trial Chamber must take into account the consistency of penalties meted out by both *ad hoc* Tribunals and the local courts of Bosnia and Herzegovina. In this respect, it mentioned four recent judgements in Bosnia and Herzegovina[174]. In conclusion, though not recommending a specific penalty, the Defence argued that the Trial Chamber should not sentence the accused to life in prison[175].

C. Determination of the penalty

121. The Trial Chamber is of the opinion that the most important factors to be considered in the case in point are the gravity of the crimes to which the accused pleaded guilty and his personal circumstances.

1. The accused

122. The Trial Chamber has relatively little information on Goran Jelisi}. Most of its information was provided by the expert reports it ordered or which were prepared at the request of the Defence. The Trial Chamber notes that on important points, such as whether he may have been subjected to physical violence when he was arrested by the Croats, the accused presented conflicting accounts.

123. Goran Jelisi} was born on 7 June 1968 in Bijeljina in Bosnia and Herzegovina. After leaving school early in his first year of secondary education, he became a farm mechanic. He has been married since February 1995 and is the father of a young son[176]. Since his arrest on 22 January 1998, Goran Jelisi} has been held in the United Nations Detention Unit at Scheveningen in The Hague[177].

2. Mitigating circumstances

124. Among the mitigating circumstances set out by the Defence, the Trial Chamber will consider the age of the accused. He is now 31 years old and, at the time of the crimes, was 23. The Trial Chamber also takes into account the fact that the accused had never convicted of a violent crime and that he is the father of a young child. Nonetheless, as indicated by the Trial

[174] FPT pp. 2349-2350.
[175] FPT p. 2354.
[176] Forensic Report, Duits & Van der Veen, 25 November 1998, pp. 5-9.
[177] Initial appearance of 26 January 1998, FPT p. 1.

Chamber hearing the *Furund`ija* case, many accused are in that same situation and, in so serious a case, the Judges cannot accord too great a weight to considerations of this sort[178].

125. As previously stated, the expert diagnosis indicated that Goran Jelisi} suffered from personality disorders, had borderline, narcissistic and anti-social characteristics. Still, though this does speak in favour of psychiatric follow-up, the Trial Chamber concurs with the Prosecution and does not agree that such a condition diminishes Goran Jelisi}'s criminal responsibility.

126. Moreover, the Trial Chamber considers that, even if it had been proved that Goran Jelisi} acted on the orders of a superior, the relentless character and cruelty of his acts would preclude his benefiting from this fact as a mitigating circumstance.

127. The Trial Chamber is not convinced that the remorse which Goran Jelisi} allegedly expressed to the expert psychiatrist was sincere[179]. Moreover, although the Trial Chamber considered the accused's guilty plea out of principle, it must point out that the accused demonstrated no remorse before it for the crimes he committed. The Trial Chamber further states that photographs attached to the Agreed Factual Basis or produced at trial which the accused was fully aware had been taken show Goran Jelisi} committing crimes. It therefore accords only relative weight to his plea[180]. The Trial Chamber also notes that the accused allegedly had considered surrendering voluntarily[181] but did not. Furthermore, his co-operation with the Office of the Prosecutor in this case does not seem to constitute a mitigating circumstance within the meaning of Sub-rule 101(B)(ii) of the Rules. Finally, although the accused's behaviour has improved since he has been in detention, it is not such as to mitigate the penalty in any substantial way.

128. Lastly, the Trial Chamber considered the testimony heard at trial in respect of sentencing. The cordial relations that Goran Jelisi} may have had with Muslims does not make up for the extreme gravity of the acts which he discriminatorily committed. In addition, the Trial Chamber does not rule out the possibility that, once he realised what crimes he had

[178] *Furund`ija* Judgement, para. 284.
[179] Report of Doctor van den Bussche, 8 November 1999, p. 22.
[180] The Trial Chamber observes that the accused pleaded guilty to crimes against humanity contrary the advice of his counsel, FPT p. 187.
[181] Witness DQ, FPT p. 2108.

committed, Goran Jelisi} actively sought out potential witnesses[182], including witnesses from the Muslim community itself.

3. Aggravating circumstances

129. The Trial Chamber concludes that the statements attached to the factual basis and the testimony heard at the genocide trial show that Goran Jelisi}'s crimes were committed under particularly aggravating circumstances.

130. The Trial Chamber points out the repugnant, bestial and sadistic nature of Goran Jelisi}'s behaviour. His cold-blooded commission of murders and mistreatment of people attest to a profound contempt for mankind and the right to life.

131. It was especially during the period spent at Luka camp that Goran Jelisi} enthusiastically committed his crimes and took advantage of the opportunity afforded to him by the feeling of power to impose his own will on the defenceless victims and to decide who would live and who would die.

132. Furthermore, the Trial Chamber holds that the impact of the accused's behaviour goes well beyond the great physical and psychological suffering inflicted on the immediate victims of his crimes and on their relatives. All the witnesses to the crimes who were at Goran Jelisi}'s mercy suffered as well.

133. One of the missions of the International Criminal Tribunal is to contribute to the restoration of peace in the former Yugoslavia. To do so, it must identify, prosecute and punish the principal political and military officials responsible for the atrocities committed since 1991 in the territories concerned. However, where need be, it must also recall that although the crimes perpetrated during armed conflicts may be more specifically ascribed to one or other of these officials, they could not achieve their ends without the enthusiastic help or contribution, direct or indirect, of individuals like Goran Jelisi}.

[182] The Trial Chamber notes, for example, the testimony of witness DR who met the accused for the first time in 1995.

134. Ultimately, in Goran Jelisi}'s case, the aggravating circumstances far outweigh the mitigating ones and this is why a particularly harsh sentence has been imposed on him.

4. Calculation of the length of custody pending trial

135. Sub-rule 101(D) of the Rules states that "credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal". When calculating the time to be served, the fact that the accused has been detained by the Tribunal since 22 January 1998, that is, to date, for one year, ten months and twenty-two days, must be taken into account.

5. The sentence itself

136. The Trial Chamber considers that the provisions of Rule 101 of the Rules do not preclude the handing down of a single sentence for several crimes. In this respect, the Trial Chamber points out that although, to date, the ICTY's Trial Chambers have rendered judgements imposing multiple penalties, Trial Chamber I of the ICTR imposed single penalties in the *Kambanda*[183] and *Serushago*[184] cases.

137. In the case in point, the crimes ascribed to the accused were given two distinct characterisations but form part of a single set of crimes committed over a brief time span which does not allow for distinctions between their respective criminal intention and motives. In view of their overall consistency, the Trial Chamber is of the opinion that it is appropriate to impose a single penalty for all the crimes of which the accused was found guilty.

[183] *Kambanda* Sentence.
[184] *Serushago* Sentence.

VI. DISPOSITION

138. For the foregoing reasons, the Trial Chamber unanimously:

ACQUITS Goran Jelisi} of count 1, genocide:

FINDS Goran Jelisi} GUILTY:

- of stealing money from persons detained at Luka camp, in particular Hasib Begi}, Zej}ir Osmi}, Enes Zuki} and Armin Drapi}, between about 7 and 28 May 1992, count 44, a violation of the laws or customs of war (plunder);
- of causing bodily harm between 10 and 12 May 1992 at Luka camp to the Osmi} brothers, Zej}ir and Re{ad, count 30, a violation of the laws or customs of war (cruel treatment), and count 31, a crime against humanity (inhumane acts);
- of causing bodily harm to Muhamed Bukvi} at Luka camp around 13 May 1992, count 36, a violation of the laws or customs of war (cruel treatment), and count 37, a crime against humanity (inhumane acts);
- of causing bodily harm to Amir Didi} at Luka camp between 20 and 28 May 1992, count 40, a violation of the laws or customs of war (cruel treatment), and count 41, a crime against humanity (inhumane acts);
- of the murder of an unidentified male around 6 or 7 May 1992 near the Br~ko police station, count 4, a violation of the laws or customs of war, and count 5, a crime against humanity;
- of the murder of Hasan Ja{arevi} near the Br~ko police station around 7 May 1992, count 6, a violation of the laws or customs of war, and count 7, a crime against humanity;
- of the murder of an unidentified young man from [interaj near the Br~ko police station around 7 May 1992, count 8, a violation of the laws or customs of war and count 9, a crime against humanity;
- of the murder of Ahmet Hod`i} (or Had`i}) alias Papa near the Br~ko police station around 7 May 1992, count 10, a violation of the laws or customs or war, and count 11, a crime against humanity;
- of the murder of Suad on 7 May 1992 near the Br~ko police station, count 12, a violation of the laws or customs of war, and count 13, a crime against humanity;

- of the murder of Jasminko ^umurovi} alias Ja{~e around 8 May 1992 at the Luka camp, count 14, a violation of the laws or customs of war, and count 15, a crime against humanity;
- of the murders of Huso and Smajil Zahirovi} around 8 May at the Luka camp, count 16, a violation of the laws or customs of war, and count 17, a crime against humanity;
- of the murder of Naza Bukvi} around 9 May 1992 at the Luka camp, count 18, a violation of the laws or customs of war, and count 19, a crime against humanity;
- of the murder of Muharem Ahmetovi} around 9 May 1992 at the Luka camp, count 20, a violation of the laws or customs of war, and count 21, a crime against humanity;
- of the murder of Stipo Glavo~evi}, alias Stjepo, around 9 May 1992 at the Luka camp, count 22, a violation of the laws of customs of war, and count 23, a crime against humanity;
- of the murder of Novalija, an elderly Muslim man, around 12 May 1992 at the Luka camp, count 32, a violation of the laws or customs of war, and count 33, a crime against humanity;
- of the murder of Adnan Kucalovi} around 18 May 1992 at the Luka camp, count 38, a violation of the laws or customs of war, and count 39, a crime against humanity;

crimes covered by Articles 3, 5(a) and 7(1) of the Statute of the Tribunal and Article 3(1)(a) of the Geneva Conventions.

139. For these reasons, the Trial Chamber SENTENCES Goran Jelisi} to forty (40) years in prison;

140. RECOMMENDS that he receive psychological and psychiatric follow-up treatment and REQUESTS that the Registry take all the appropriate measures in this respect together with the State in which he will serve his sentence[185].

[185] The Trial Chamber points out that all the Agreements entered into with States willing to receive convicted persons provide that when the Registrar presents her request, she will attach any appropriate recommendation relating to continued treatment in the State where the convicted person serves his sentence. *See* Article 2(2)(c) of the Agreements entered into with the different States: Agreement between the Government of Norway and the United Nations on the enforcement of sentences of the International Criminal Tribunal for the former Yugoslavia (24 April 1998), Agreement between the International Criminal Tribunal for the former Yugoslavia and the Government of Finland on the enforcement of sentences of the International Tribunal (7 May 1997), Agreement between the Government of the Italian Republic and the United Nations on the enforcement of sentences of the International Criminal Tribunal for the former Yugoslavia (6 February 1997), Agreement between the United Nations and the federal Government of Austria on the enforcement of sentences of the International Criminal Tribunal for the former Yugoslavia (23 July 1999), Agreement between the United

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

Done this fourteenth day of December 1999

At The Hague

The Netherlands

Claude Jorda
Presiding Judge, Trial Chamber

Fouad Riad

Almiro Rodrigues

(Seal of the Tribunal)

Nations and the government of Sweden on the enforcement of sentences of the International Criminal Tribunal for the former Yugoslavia (23 February 1999).