IN THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patricia M. Wald
Judge Fausto Pocar

Registrar:
Mr. Hans Holthuis

Judgement of: 5 July 2001

PROSECUTOR
v.

GORAN JELISIC

JUDGEMENT

Counsel for the prosecution:

Mr. Upawansa Yapa
Mr. Geoffrey Nice
Mr. Morten Bergsmo
Mr. Fabricio Guariglia

Counsel for the defence:

Mr. William Clegg
Mr. Jovan Babic

The Appeals Chamber of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former

Yugoslavia since 1991 ("the International Tribunal" or "the Tribunal") is seized of two appeals against the judgement rendered by Trial Chamber I orally on 19 October 1999 and in writing on 14 December 1999 in the case of *Prosecutor v. Goran Jelisic*.[1]

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

INTRODUCTION

A. Procedure before the Trial Chamber

1. The initial indictment against Goran Jelisic alleged crimes of genocide, grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war and crimes against humanity committed in May 1992 in the municipality of Brcko in the north-eastern part of Bosnia and Herzegovina.[2]
2. Following discussions between the parties at the pre-trial stage, an agreement setting out the factual basis was signed by the parties on 9 September 1998 ("the agreed factual basis").[3] Subsequently , on 20 October 1998, a second amended indictment was filed ("the second amended indictment").[4] On 29 October 1998, Jelisic pleaded not guilty to the genocide count and guilty to thirty-one counts comprising violations of the laws or customs of war and crimes against humanity. Trial proceedings were, therefore, scheduled to deal with the count relating to genocide.
3. The trial commenced on 30 November 1998, but was suspended on 2 December 1998 , due to the illness of one of the Trial Judges. The Trial Chamber, accordingly , considered rendering its decision and passing a sentence on the guilty pleas and postponing the genocide trial until a later date. Discussions between the parties on this issue were held at a status conference on 18 March 1999.[5] The prosecution agreed to the proposal.[6] However, the defence objected to the suggestion of separate sentencing procedures on the basis that, *inter alia*, during the forthcoming trial on genocide the witnesses called by the prosecution might present evidence that could be used in mitigation of sentence.[7]
4. The trial resumed on 30 August 1999 and the prosecution completed its presentation of evidence on 22 September 1999. A status conference was held following the examination - in-chief of the last prosecution witness and the matter adjourned to re-start with the defence case on 8 November 1999; the defence was also asked to confirm to the Senior Legal Officer whether it intended to file a motion for judgement of acquittal pursuant to Rule *98bis* of the Rules of Procedure and Evidence of the International Tribunal ("the Rules").[8] It later replied in the negative by way of fax dated 1 October 1999. However, prior to the commencement of the defence case, the Trial Chamber informed the parties by

way of notice from the Registry, on 12 October 1999, that it would render a judgement pursuant to Rule *98bis*(B) of the Rules. This Rule requires the Trial Chamber to "order the entry of judgement of acquittal [...] if it finds that the evidence is insufficient to sustain a conviction on that or those charges". On 15 October 1999, the prosecution filed a motion to postpone the Trial Chamber's decision until the prosecution had been given the opportunity to present arguments ("the motion to be heard").[9]

5. On 19 October 1999, the Trial Chamber pronounced its oral judgement ("the oral judgement") pursuant to Rule *98bis*(B), stating that written reasons as well as sentencing would follow.[10] It decided that there was an "indissociable" link between the motion to be heard and the judgement itself, and dismissed the motion to be heard.[11] The Trial Chamber convicted Jelisic of the counts alleging violations of the laws or customs of war and crimes against humanity, to which he had pleaded guilty, but acquitted him on the count of genocide pursuant to Rule *98bis*(B) of the Rules . A sentencing hearing was held on 25 November 1999. The written judgement of the Trial Chamber was subsequently issued on 14 December 1999 ("the Judgement") and a single sentence of 40 years' imprisonment was imposed.[12]

B. Procedure before the Appeals Chamber

6. Both parties have appealed. Following the Trial Chamber's oral judgement, the prosecution filed an appeal against the acquittal on the count of genocide.[13] Jelisic ("the cross-appellant" or "the respondent") also filed a notice of appeal against the oral judgement.[14] Following the delivery of the Judgement, the cross-appellant filed a second notice of appeal on 15 December 1999.[15]
7. The prosecution requested clarification of the right of the cross-appellant to file a notice of cross-appeal as well as a notice of appeal to appeal against acquittal.[16] The Appeals Chamber found that the cross-appellant was barred from raising arguments regarding the acquittal on the count of genocide in his appellant's brief, since Article 25 of the Statute does not confer on an accused person the right to appeal from an acquittal. However , the Chamber held that if the prosecution sought to reverse the acquittal, then the cross-appellant in his brief in response would be permitted to support his acquittal . [17]

1. Appellate filings

8. The briefs relating to the prosecution's appeal against the Judgement were filed as follows. On 14 July 2000, the prosecution filed its appeal brief ("the prosecution's brief").[18] On 14 August 2000, the respondent filed a response to the prosecution's brief ("the response to prosecution's brief")[19] and on 29 August 2000, the prosecution filed its brief in reply ("the prosecution's reply ").[20]

9. Following requests by the cross-appellant, the briefing schedule was extended on several occasions.[21] The submissions relating to the cross-appellant's appeal were filed as follows. The cross-appellant filed his brief on 7 August 2000 ("the cross-appellant's brief").[22] On 6 September 2000, the prosecution filed its respondent's brief ("the prosecution's response").[23] On 6 October 2000, the cross-appellant submitted a reply to the prosecution's response ("the cross- appellant's reply").[24]
10. On 16 February 2001, the cross-appellant, now represented by new counsel,[25] filed a document which identified the grounds being advanced by the cross-appellant in his appeal and clarified his position with regard to the prosecution's appeal ("the skeleton argument").[26] Oral argument was heard on 22 and 23 February 2001, during which the cross-appellant requested and obtained leave to add a further ground of appeal and confirmed that certain issues advanced in the cross-appellant's brief would not be pursued.[27]

2. Grounds of appeal and relief requested

a) The prosecution's appeal

11. The prosecution has advanced the following three grounds of appeal against the Judgement.[28]

"The Trial Chamber made an error of law under Article 25 of the Statute by not giving the Prosecution an opportunity to be heard on a *proprio motu* decision of the Trial Chamber under Rule *98bis*" ("the prosecution's first ground of appeal ").[29]

"The Trial Chamber erred in law by adopting the standard of guilt beyond a reasonable doubt for the purposes of a Rule *98bis* determination of the sufficiency of the evidence to sustain a conviction" ("the prosecution's second ground of appeal ").[30]

"The Trial Chamber erred in law to the extent it is proposing that the definition of the requisite mental state for genocide in Article 4 of the Statute include the *dolus specialis* standard, and not the broader notion of general intent; the Trial Chamber erred in law and fact when it decided in paragraphs 88-98 of the Judgement that the evidence did not establish beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Brcko or elsewhere within which the murders committed by Goran Jelisic would allegedly fit; and the Trial Chamber erred in law and fact when it decided in paragraphs 99-108 that the acts of Goran Jelisic were not the physical expression of an affirmed resolve to destroy in whole or in part a group as such, but rather, were arbitrary acts of killing resulting from a disturbed personality" ("the prosecution's third ground of appeal").[31]

12. The prosecution submits that the appropriate remedy is to remit the matter to a differently constituted Trial Chamber for a new trial.[32] It further submits that there is an interrelationship between the prosecution's first two grounds of appeal and the third ground such that, if the Appeals Chamber decides to remit the case to a newly constituted Trial Chamber, the Appeals Chamber should "provide guidance by ruling on the legal issue of the necessary intent for genocide". However, "the Appeals Chamber need not address the factual errors as alleged" as this would be determined by the newly constituted Trial Chamber.[33]

b) The cross-appellant's appeal

13. The cross-appellant states that he "does not seek a retrial, he has been acquitted of all the offences he contested. He seeks only to appeal against his sentence".[34]
14. In support of his appeal against sentence, the cross-appellant in his brief presented arguments under two heads, challenging on several grounds, first, the fairness of the proceedings and, second, the correctness of the judgement.
15. The cross-appellant's first head of argument included allegations challenging the manner in which the presiding Judge conducted the hearing at trial on the count of genocide. However, it is not necessary to consider these arguments. At the hearing on appeal before the Appeals Chamber and as mentioned above, newly retained counsel for the cross-appellant submitted a skeleton argument, stating that the "grounds advanced are those identified in the skeleton".[35] The grounds presented in the skeleton argument did not repeat all the grounds which had been presented in the cross-appellant's brief. In opening the cross-appellant's case, counsel said: "The Court will have observed that the appellant's brief concentrated on the conduct of the Trial Judge both during the course of the trial on genocide , where verdicts were returned in favour of the accused, and also during the protracted sentencing hearings"; but, he added: " I do not press today the criticism of the trial Judge during the hearing on the genocide because, of course, that was a trial in which none of the offences for which he was being sentenced were being examined by the Trial Chamber".[36]
16. In the circumstances, the Appeals Chamber will not pass on the complaints originally made, treating them as having been abandoned. It will only observe that, in long and complicated cases, such as most of those which come to the Tribunal, it is necessary for the Trial Chamber to exercise control over the proceedings. That control may well need to be vigorous, provided of course that it does not encroach on the right of a party to a fair hearing. In this case, because of the abandonment of this ground of appeal, it is not necessary to consider whether reasonable limits were exceeded.
17. The second head of argument in the cross-appellant's brief related to matters arising from the Judgement itself.[37] These were refined during the hearing on appeal, where the cross-

appellant stated that he did not pursue certain of the sub-grounds previously advanced,[38] and in the skeleton argument. In particular, in the latter, the cross-appellant stated that his appeal would focus on the following seven factors, to be elaborated in oral argument:

(i) His plea of guilty.

(ii) His co-operation with the prosecution.

(iii) The necessity for the I.C.T.Y. to establish a recognised tariff for sentencing .

(iv) His youth, maturity, the impact of propaganda on him and mental state.

(v) The agreed factual basis of his plea.

(vi) Comparison with other sentences passed in the I.C.T.Y and the International Criminal Tribunal for Ruanda [sic].

(vii) Insufficient account was given of the general practice regarding prison sentences in the courts of the Former Yugoslavia as required by Article 24 of the Statute of the International Tribunal.[39]

18. During the hearing on appeal the cross-appellant requested leave to amend his notice of appeal, in light of the recent *Delalic* appeal judgement,[40] to argue that the Trial Chamber erred by imposing cumulative convictions.[41] Leave was granted orally by the Appeals Chamber, with time limits fixed for the filing of further submissions by the parties in response and reply.[42]
19. Accordingly, the Appeals Chamber views the cross-appellant as raising the following grounds of appeal:

The Trial Chamber erred by imposing cumulative convictions ("the cross-appellant's first ground of appeal").

The Trial Chamber erred in fact and in the exercise of its discretion when imposing sentence on the particular grounds mentioned in the skeleton argument, later set out in part III of this judgement ("the cross-appellant's second ground of appeal ").

3. Additional evidence and other evidentiary matters

20. On 8 September 2000, the cross-appellant filed an application for the presentation of

additional evidence.[43] In this application, he requested the admission into evidence of reports by an expert witness , Mrs. Ljiljana Mijovic, and the Commanding Officer of the United Nations Detention Unit in the Hague, Mr. Timothy McFadden, concerning respectively the rank of the accused as a member of the reserve police and the overall behaviour of the accused whilst in custody before and after the Judgement. The prosecution submitted that the application should be denied[44] and it was rejected by the Appeals Chamber in its decision dated 15 November 2000 .[45]

21. On 7 March 2001, after the close of oral arguments, the cross-appellant filed a report by Dr. Tomic on the general practice of courts in the former Yugoslavia .[46] The prosecution objected to the filing.[47] Generally speaking, for additional evidence to be admitted at the appeal stage, a motion pursuant to Rule 115 of the Rules must be presented at least fifteen days prior to the hearing of the appeal.[48] Such application can , in exceptional circumstances, be filed later, but should be supported by both a request for an extension of time and a showing of good cause, pursuant to Rule 127 of the Rules. Neither requirement has been met in the circumstances of this case. During the hearing on appeal counsel for the cross-appellant stated that he would be willing to forward the report to the Appeals Chamber.[49] The Appeals Chamber did not accept this offer. No attempt has been made to satisfy the Appeals Chamber that the requirements of Rule 115 have been met or that there is justification for extending the requisite time-limits. The report is therefore not admitted into evidence.

II. PROSECUTION'S APPEAL

A. Prosecution's first ground of appeal: denial of an opportunity to be heard

22. The prosecution's first ground of appeal is that the "Trial Chamber made an error of law under Article 25 of the Statute by not giving the Prosecution an opportunity to be heard on a *proprio motu* decision of the Trial Chamber under Rule *98bis*".[50]

23. This ground refers to the fact that, at the end of the case for the prosecution , the Trial Chamber, acting *proprio motu,* acquitted the respondent on count 1, genocide, without first hearing from the prosecution. The submission is that the Trial Chamber made its decision not only without hearing from the prosecution on the question of substance as to whether the evidence was insufficient to sustain a conviction, but also without granting it an oral hearing on its written procedural motion, the motion to be heard, which requested a hearing on the substantive motion . The Trial Chamber said that it was acting under Rule *98bis*(B). This provision reads:

> The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or

those charges.

24. On 19 October 1999, the Trial Chamber joined the decision on the written motion to be heard to the decision on the merits of acquittal (the Judgement) "adjudging that an indissociable link existed between the Motion submitted by the Prosecution and the Decision on the merits".[51]
25. The Appeals Chamber begins with the proposition that a party always has a right to be heard on its motion. But the hearing need not always be oral. In this regard , there is no provision in the Rules which provides for a right of a party to make oral submissions in connection with a written motion. Similarly, the practice of the Tribunal allows for a decision on a written motion without any supplementary oral arguments, the motion itself being regarded as affording to the moving party a sufficient right to be heard. In these circumstances, the Appeals Chamber can find no error in the fact that the Trial Chamber decided against the claim that the prosecution had a right to be heard orally on whether it had a right to be heard on the substantive merits of acquittal under Rule *98bis,* since all the basic arguments in support of a right to be heard before a substantive decision on acquittal was made were in fact set out in the written motion to be heard and needed no oral supplement. On this point, the impugned decision was therefore right.
26. However, as indicated above, the Trial Chamber also decided against the right of the prosecution to be heard on the substantive question of whether its evidence was insufficient to sustain a conviction. The Trial Chamber's decision was rendered orally on 19 October 1999, and then put in writing on 14 December 1999. Taking the two together, it is clear that the Trial Chamber considered that, where it was acting *proprio motu,* the prosecution had no right to be heard at all; such a right was not accorded by the Rules and could not be based upon the principle *audi alteram partem*.[52] Was this decision correct?
27. In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.[53] Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial.[54] The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.[55]
28. The prosecution therefore had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction;[56] it was denied that right. Counsel for the respondent rightly concedes this.[57]
29. The prosecution's first ground of appeal succeeds. The question of remedy is discussed

under the prosecution's third ground of appeal.

B. Prosecution's second ground of appeal: standard to be applied pursuant to Rule *98bis*(B) of the Rules.

30. In the prosecution's second ground of appeal, it submits that "the Trial Chamber erred in law by adopting the standard of guilt beyond a reasonable doubt for the purposes of a Rule *98bis* determination of the sufficiency of the evidence to sustain a conviction".[58]
31. This ground relies on the fact that, in entering a judgement of acquittal *proprio motu*, the Trial Chamber stated *inter alia*:

All things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Brcko 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 genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisic must be found not guilty on this count.[59]

32. On appeal, the prosecution submits that the Trial Chamber, in requiring that the prosecution evidence prove guilt beyond reasonable doubt at the end of the case –in-chief, was applying a different and more exacting test than that required by law. In its view, the correct test, at that stage, was whether, on the evidence (if accepted), a reasonable tribunal of fact *could* (not *should*) make a finding of guilt. It notes that the respondent did not make a "no case" motion , although it was asked by the Trial Chamber whether it proposed to do so. In reply , the respondent contends that the standard under Rule *98bis*(B) necessarily involves a determination whether the evidence was sufficient to prove guilt beyond reasonable doubt.[60]
33. The Appeals Chamber will first consider whether the references by the Trial Chamber to a test of proof of guilt beyond reasonable doubt were correct. In the view of the Appeals Chamber, the matter turns on an interpretation of Rule *98bis* (B). The situation was put very well in *Kordic*, in which Trial Chamber III stated:

Although the Prosecution has referred to the proceedings under this Rule as "no case to answer", using the description to be found in many common law jurisdictions , the Chamber considers that the better approach is not to characterise Rule *98bis* proceedings in that way, lest it be thought that the Rule must necessarily be applied in the same way as proceedings for "no case to answer" in those jurisdictions . It is true that Rule *98bis* proceedings, coming as they do at the end of the Prosecution's case, bear a close

resemblance to applications for no case to answer in common law jurisdictions. However, that does not necessarily mean that the regime to be applied for Rule *98bis* proceedings is the same as that which is applicable in the domestic jurisdictions of those countries. Ultimately, the regime to be applied for Rule *98bis* proceedings is to be determined on the basis of the Statute and the Rules, having in mind, in particular, its construction in the light of the context in which the Statute operates and the purpose it is intended to serve. That determination may be influenced by features of the regime in domestic jurisdictions with similar proceedings, but will not be controlled by it; and therefore a proper construction of the Rule may show a modification of some of those features in the transition from its domestic berth. [61]

34. In reading and interpreting the text of Rule *98bis*(B), it has to be borne in mind that the adversarial aspect of the Tribunal's procedure is an important one but not exclusive of other influences. The Tribunal is an international judicial body. Accused persons come from primarily civil law jurisdictions. Judges of the Tribunal come from different legal cultures, as do counsel appearing before it. The Trial Chamber in this case consisted wholly of non-common law judges; account must be taken of that fact in interpreting the language in which their judgement was cast. To require strict conformity with a common law verbal formula would not be appropriate; it is the substance which is important.
35. In the end, the matter depends on an interpretation of the text of Rule *98bis*(B), an interpretation aided by reference to particular municipal concepts but not controlled by them. When the Rule is so read, the question becomes: what does its reference to a test of whether "the evidence is insufficient to sustain a conviction" mean? Following the settled jurisprudence of the Tribunal, those words are to be "interpreted in good faith in accordance with the ordinary meaning to be given to [them] in their context and in the light of [their] object and purpose ", within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties 1969. So interpreted, it appears to the Appeals Chamber that those words must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a conviction" within the meaning of Rule *98bis*(B). Rule 87(A), confirms this interpretation by providing that a " finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt".
36. Consequently, the notion of proof of guilt beyond reasonable doubt must be retained in the operation of Rule *98bis*(B). This was recognised by Trial Chamber II's decision in *Kunarac*. The test applied in that case was correctly stated to be "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* convict - that is to say, evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. If the evidence does not reach that standard, then the evidence is, to use the words of Rule *98bis*

(B), 'insufficient to sustain a conviction'".[62] *Kunarac's* reference to the necessity of a reasonable tribunal being "satisfied beyond reasonable doubt" should be especially noted. So too in *Kvocka,* the Trial Chamber, in applying the same Rule, adopted "the standard that no reasonable chamber could find guilt beyond a reasonable doubt on the basis of the Prosecution's case-in-chief".[63] This interpretation appears in other formulations of the test for mid-trial acquittal to the effect "that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it".[64] A jury will not be "properly directed" if it is not told, verbatim or to the effect , that it cannot convict unless it is "satisfied beyond reasonable doubt" that the guilt of the accused has been proved by the evidence. Consequently, the reasonable doubt standard is adopted in the tests used in common law systems in the determination of a no case submission.

37. The next question is how should the test of guilt beyond reasonable doubt be applied in this situation. The Appeals Chamber considers that the reference in Rule *98bis* to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed,[65] is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalic* appeal judgement*,* where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".[66] The capacity [67] of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.
38. There are indeed elements in the impugned decision that indicate an interpretation that the Trial Chamber itself recognised that its task was not to make a final finding of guilt; but unfortunately these indications are overborne by other passages which seem to point strongly in the opposite direction, i.e., that what the Trial Chamber was in fact doing was making its own decision as to whether the evidence warranted a finding of reasonable doubt as to the accused's guilt.

For example, the Trial Chamber found 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 Brcko or elsewhere within which the murders committed by the accused would

allegedly fit.[68]

It also stated:

[t]he 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 genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisic must be found not guilty on this count.[69]

Counsel for the respondent concedes "that the Trial Chamber did apply the incorrect standard of proof to the stage at which the trial had reached".[70] However, he adds:

This complaint although well founded is one of form rather than substance. Had the Trial Chamber indicated at the close of the case for the prosecution that on the basis of the evidence then before them they could not see how they could be satisfied beyond a reasonable doubt that the case had been proved no complaint would be made.[71]

39. The Appeals Chamber does not agree. As will be seen in the following section , it is the opinion of the Appeals Chamber that the Trial Chamber's application of an erroneous standard in making its determination under Rule *98bis* led it to incorrectly assess evidence.
40. The prosecution's second ground of appeal succeeds. The question of remedy is discussed under the prosecution's third ground of appeal.

C. Prosecution's third ground of appeal: intent to commit genocide

41. The prosecution's third ground of appeal has two parts. The Appeals Chamber will deal with each part separately.

1. First part of third ground

42. In the first part, the prosecution submits "that the Trial Chamber erred in law to the extent that it defined the requisite mental state for genocide as limited to the *dolus specialis* standard".[72] In effect, the prosecution submits that the Trial Chamber erred in law by limiting its application of Article 4 of the Statute, which defines the required *mens rea* for genocide as destroying, in whole or in part, a national, ethnical, racial or religious group, to only cases that meet a civil law *dolus specialis* standard . It submits that "[i]t cannot be assumed that the concept of *dolus specialis* has a fixed meaning even within the diverse

groups of civil law systems."[73] In referring to *dolus specialis,* the prosecution argues that the Trial Chamber attributed to it a definition as to the degree or quality of intent that exists in certain civil law jurisdictions.[74] It submits that that definition could be that the accused consciously desired the destruction, in whole or in part, of the group, as such.[75] The Appeals Chamber understands the prosecution submission to be that an accused has the required *mens rea* for genocide if: i) he consciously desired the committed acts to result in the destruction, in whole or in part, of the group, as such; or ii) he knew that his acts were destroying, in whole or in part, the group, as such;[76] or iii) he, acting as an aider or abettor, commits acts knowing that there is an ongoing genocide which his acts form part of, and that the likely consequence of his conduct would be to destroy, in whole or in part, the group as such.[77]

43. The respondent disagrees with the prosecution. He submits that the Trial Chamber only once used the phrase *dolus specialis* in its Judgement and that, contrary to the prosecution's position, it was intended as an alternative expression for "specific intent", that is "the intent to destroy, in whole or in part, a national , ethnical, racial or religious group, as such" and did not refer to the degree of the requisite intent as alleged by the prosecution.[78] Accordingly, the respondent considers that the Trial Chamber has properly identified the intent required for the crime of genocide.
44. Before discussing the Trial Chamber's interpretation of the term *dolus specialis* , the Appeals Chamber considers it necessary to clarify the requisite *mens rea* under Article 4 of the Statute, which provides:

1\. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2\. Genocide means any of the following acts committed with 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.

3. The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

complicity in genocide.

45. Article 4, paragraphs (2) and (3) of the Statute largely reflect Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide .[79] As has been seen, Article 4(2) of the Statute defines genocide to mean any of certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group , as such". The Statute itself defines the intent required: the intent to accomplish certain specified types of destruction. This intent has been referred to as, for example, special intent, specific intent, *dolus specialis,* particular intent and genocidal intent. [80] The Appeals Chamber will use the term "specific intent" to describe the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.[81]
46. The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.[82]
47. As to proof of specific intent, it may, in the absence of direct explicit evidence , be inferred from a number of facts and circumstances, such as the general context , the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.
48. The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[83]
49. The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the *Tadic* appeal judgement the Appeals

Chamber stressed the irrelevance and "inscrutability of motives in criminal law".[84]

50. The prosecution submits that the Trial Chamber erred in confining the mental state for genocide to include only *dolus specialis* and not "the broader notion of general intent" which has been set out above.[85] In this regard, the Trial Chamber held:

> All things considered, the Prosecutor has not established beyond reasonable doubt that genocide was committed in Brcko 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 genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisic must be found not guilty on this count.[86]

51. The Appeals Chamber considers that a question of interpretation of the Trial Chamber's Judgement is involved. Read in context, the question with which the Judgement was concerned in referring to *dolus specialis* was whether destruction of a group was intended. The Appeals Chamber finds that the Trial Chamber only used the Latin phrase to express specific intent as defined above.
52. Accordingly, the Appeals Chamber agrees with the respondent and holds that the prosecution's challenge to the Trial Chamber's finding on this issue is not well founded, being based on a misunderstanding of the Judgement. This part of the prosecution's third ground of appeal therefore fails.

2. Second part of third ground

53. It now remains to consider the second part of the prosecution's third ground of appeal. Assuming the meaning of intent set out above, the prosecution contended that the Trial Chamber was in error in holding that its evidence was insufficient to sustain a conviction for genocide. In particular, it pointed to several items of evidence to which the Trial Chamber had not referred.[87]
54. Counsel for the respondent argues, by reference to the *Tadic* appeal judgement,[88] that on the same set of facts, two reasonable triers of fact could both reach equally reasonable but different conclusions.[89] He submits that the Trial Chamber was not required to refer to every piece of evidence. Rather , it was entitled to select the evidence on which it would rely. In his contention , the question was whether, on the evidence on which the Trial Chamber relied, a reasonable trier of fact could have reached the conclusion reached by the Trial Chamber. He submits that the prosecution had not shown that this was not possible .
55. In the view of the Appeals Chamber, the *Tadic* principle applies to the evaluation of facts,

and has no bearing on the principal question here, i.e., whether the Trial Chamber was entitled to make its own evaluation of the relevant evidence . The *Tadic* principle applies only where the decision in question was one which the trier of fact was authorised to make; if, being authorised to make the decision, he makes it on the basis of material on which a reasonable trier of fact could have reached the same conclusion, his decision will not be overruled because another equally reasonable trier of fact would, on the same material, have reached a different but equally reasonable conclusion. The principle does not apply to issues of whether the Trial Chamber had the authority to make that evaluation of the evidence in the first place. The Appeals Chamber considers that the Trial Chamber was required to assume that the prosecution's evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at its highest and could not pick and choose among parts of that evidence.

56. The remaining issue is whether under the correct standard, that is, upon consideration of all relevant evidence submitted by the prosecution in its case-in-chief, the Trial Chamber was entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction, beyond reasonable doubt, for genocide .
57. Having reviewed the evidence in the appeal record, the Appeals Chamber cannot validate the Trial Chamber's conclusion that it was not sufficient to sustain a conviction. It is not necessary in explaining reasons for this conclusion that the Appeals Chamber evaluates every item of evidence in the record. Rather, the Appeals Chamber can first assess the Trial Chamber's own reasons for its conclusion that acquittal was required in light of the evidence on record which was relevant to those reasons and, secondly, the Appeals Chamber can assess other evidence on the record which was not specifically referred to by the Trial Chamber but to which it has been directed in the course of the appeal.
58. The Trial Chamber found that there were two elements to be considered in the proof of genocide. In paragraph 62 of the Judgement it stated:

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.

59. As to the first ingredient, the *actus reus* or "material element" of genocide, the Trial Chamber found that the evidence was sufficient to sustain a conviction. In paragraph 65 of its Judgement, it said:

Although the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisic 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.

60. As to the second ingredient or the *mens rea* of the offence, the Trial Chamber acknowledged that the respondent performed the *actus reus*, in this case the murder of Muslims, with a discriminatory intent. In paragraphs 73-77 of its Judgement it pointed out 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 [...]. A great majority of the persons detained in the collection centres and at Luka camp were Muslim [...]. 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 [...]. [a] large majority of the persons whom Goran Jelisic admitted having beaten and executed were Muslim. Additionally, many of the elements showed how Goran Jelisi c made scornful and discriminatory remarks about the Muslim population [...]. The Trial Chamber concludes that in this case the discriminatory intent has been proved .[90]

61. The Trial Chamber, however, then went on to find that, despite that discriminatory intent and the commission of acts within the definition of the *actus reus* of genocide, the respondent did not have the requisite intent to destroy in whole or in part the Muslim group from Brcko. First, it said that there was not sufficient evidence to show that he was acting pursuant to a plan created by superior authorities to accomplish that end, and, second, that even if he could be regarded as capable of committing genocide as a single perpetrator – which the Chamber thought “theoretically possible” – the evidence did not support the conclusion that he did so beyond a reasonable doubt.
62. The Trial Chamber admitted in paragraph 102 of its judgement that:

Goran Jelisic presented himself as the "Serbian Adolf" and claimed to have gone to Brcko to kill Muslims [...] [and] 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 [...] [and] 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 [...] [and] 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 [...] [and] 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 [...] [and] 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 [to] prevent any proliferation.

63. It also acknowledged in paragraph 103 that:

during the initial part of May, Goran Jelisic regularly executed detainees at Luka camp. According to one witness, Goran Jelisic 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 Jelisic 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, on 11 May that he had killed one hundred and fifty persons and finally on 15 May to another witness following an execution that it was his "eighty-third case".

64. Nonetheless, in succeeding paragraphs 104-108, the Trial Chamber cited other evidence it found convincing to show that "[a]ll things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Brcko during the period covered by the indictment [...] 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".[91] This other evidence consisted of testimony that the respondent had a "disturbed personality", "borderline, antisocial and narcissistic characteristic", "immaturity ", and "a concern to please superiors". It stated:

Goran Jelisic suddenly found himself in an apparent position of authority for which nothing had prepared him [...] this authority made it even easier for an opportunistic and inconsistent behaviour to express itself.[92]

65. Additionally, the Trial Chamber found that the respondent performed the executions "randomly", citing an episode where the respondent forced a leading Muslim to play Russian roulette in order to obtain a *laissez passer* to leave the camp; at other times the respondent let prisoners go after beating them.[93] On this basis, the Chamber concluded that "the acts of Goran Jelisic are not the physical expression of an affirmed resolve to destroy in whole or in part a group as such".[94]
66. The Appeals Chamber turns first to evidence on the record that was presented by the prosecution during the appeal to demonstrate both that the respondent believed himself to be following a plan sent down by superiors to eradicate the Muslims in Brcko and that, regardless of any such plan, he was himself a one-man genocide mission , intent upon personally wiping out the protected group in whole or part. Some of this evidence was

specifically cited by the Trial Chamber itself and summarised in its Judgement: threats by the respondent to kill 70%, to beat 30%, and spare only 5-10% of the Muslim detainees, statements by the respondent that he wanted to rid the world of the Muslims, announcements of his quota of daily killings, and his desire to sterilise Muslims in order to prevent proliferation of the group.[95]

67. However, during the appeal the prosecution has also pointed to other material on the record which in its view supplements this evidence considerably, including extended interviews with the respondent himself which, though often contradictory , contained critical evidence as to his state of mind in committing the murders. A lengthy Annex A[96] compiled by the prosecution contains citations from the evidence that the respondent operated from lists designating prominent Muslims to be killed; he referred to a "plan" for eradicating them; he wanted to "cleanse [...] the extremist Muslims and balijas like one cleans the head of lice".[97] Witness I said of him: "[h]e carried out orders but he also selected his victims through his own free will" [98] and that "[h]e could have not shot dead someone even if he were told to do so, but he did quite a few things on his own".[99] There is additional evidence of the regular visits of a Bimeks refrigerated truck to the camp to pick up 10-20 dead bodies a day; nightly killings in which the respondent commented after each one "[a]nother balija less";[100] his repeated references to himself as the "Adolf the second" and comments like " I've killed 80 Muslims so far, and I'll finish all of you too" and "as many Muslims as possible had to be killed and that Brcko should become a Serbian town".[101]

68. The Appeals Chamber considers that this evidence and much more of a similar genre in the record could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Brcko. To reiterate, the proper lens through which the Appeals Chamber must view such evidence is not whether it is convinced that the respondent was guilty of genocide beyond reasonable doubt but whether, giving credence to such evidence , no reasonable Trial Chamber could have found that he had such an intent. The Appeals Chamber is not able to conclude that that was the case.

69. The Appeals Chamber also considers whether the Trial Chamber reasonably concluded that, even on the basis of the evidence it cited and discussed, the respondent should be acquitted for lack of the requisite intent by any reasonable trier of fact.

70. The Trial Chamber essentially relied on the following evidence for its reasonable doubt conclusion: that the respondent had a disturbed personality; that he was immature , narcissistic, desirous of pleasing superiors and that, when placed in a position of authority, those traits manifested themselves in an obsession with power over the lives of those he commanded. This, the Trial Chamber said, was not the same as "an affirmed resolve" to destroy a protected group, in this case the Brcko Muslims .[102] It bears noting that the psychiatric underpinnings of this conclusion come from expert reports prepared for the

purpose of deciding whether the respondent was competent to stand trial (he was found to be) and in particular not for evaluating his mental capacity to commit the crimes with which he was charged. He did not plead a defence of insanity and indeed the Trial Chamber itself found him capable of a discriminatory intent in a separate finding. It is sufficient for our purposes here to point out that there is no *per se* inconsistency between a diagnosis of the kind of immature, narcissistic , disturbed personality on which the Trial Chamber relied and the ability to form an intent to destroy a particular protected group. Indeed, as the prosecution points out, it is the borderline unbalanced personality who is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual without personality defects. The Rules visualise, as a defence, a certain degree of mental incapacity and in any event, no such imbalance was found in this case.[103]

71. The Trial Chamber also placed heavy reliance on the randomness of the respondent's killings. It cited examples of where he let some prisoners go, played Russian roulette for the life of another, and picked his victims not just off lists allegedly given to him by others, but according to his own whim. Entitled though it may have been to consider such evidence, the Trial Chamber, in the view of the Appeals Chamber , was not entitled to conclude that these displays of "randomness" negated the plethora of other evidence recounted above as to the respondent's announced intent to kill the majority of Muslims in Brcko and his quotas and arrangements for so doing. A reasonable trier of fact could have discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against the protected group . Similarly, the fact that he took "pleasure" from the killings does not detract in any way from his intent to perform such killings; as has been mentioned above , the Tribunal has declared in the *Tadic* appeal judgement the irrelevance and "inscrutability of motives in criminal law" insofar as liability is concerned , where an intent – including a specific intent – is clear.
72. Thus, even if the Trial Chamber's conclusion that there was insufficient evidence to show an intent to destroy the group on the respondent's part is examined on the basis of the evidence specifically referred to by the Trial Chamber itself, it does not pass the approved standard for acquittal under Rule *98bis*(B) and, consequently , this part of the prosecution's third ground of appeal is sustained.
73. With regard to remedy, counsel for the respondent argues that the Appeals Chamber has a discretion, and that, in all the circumstances of this case, there should be no retrial. The Appeals Chamber agrees that the choice of remedy lies within its discretion. Article 25 of the Statute (relating to appellate proceedings) is wide enough to confer such a faculty; this discretion is recognised as well in the wording of Rule 117(C) of the Rules which provides that in "appropriate circumstances the Appeals Chamber may order that the accused be retried according to law".[104] Similarly, national case law gives discretion to a court to rule that there should be no retrial.[105] The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice,

the nature of the offences, the circumstances of the case in hand and considerations of public interest. These factors (and others) would be determined on a case by case basis. The question arises as to how the Appeals Chamber should exercise its discretion in this case .

74. For the purpose of determining that question, the Appeals Chamber considers the following factors to be of relevance. The respondent pleaded guilty to certain criminal conduct that was set out in the agreed factual basis. On the basis of that criminal conduct he was found guilty of 31 counts of violations of the laws or customs of war and crimes against humanity. The Trial Chamber imposed a sentence of 40 years' imprisonment. A potential retrial would deal with a count of genocide , charging the respondent with genocide by killing.[106] In respect of this count, the prosecution has brought no further charges of killing . The genocide count is therefore based on the killings to which he has already pleaded guilty.[107] Accordingly, a retrial would be limited to the question of whether he possessed the special intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such. The definition of specific intent has been clarified in the context of the prosecution appeal above.
75. Also, it was through no fault of the accused that the Trial Chamber erred in law – it was not the case that arguments advanced by the defence led to the Trial Chamber's decision to enter a judgement of acquittal. Considerable time will have elapsed between the date that the offences were committed in May 1992 and the date of any potential retrial. The *ad hoc* nature of the International Tribunal which, unlike a national legal system, means resources are limited in terms of man -power and the uncertain longevity of the Tribunal.
76. Furthermore, the respondent has been in the detention of the Tribunal since 22 January 1998. The Trial Chamber recommended that the respondent receive "psychological and psychiatric follow-up treatment".[108] Such treatment is currently provided by the United Nations Detention Unit. However , a prison would generally be in a better position to provide long-term consistent treatment.
77. Rule 117(C) of the Rules provides that in "appropriate circumstances the Appeals Chamber may order that the accused be retried according to law". The Appeals Chamber recognizes the prosecution's right to request a retrial as a remedy on appeal. However, as has been stated above, whether or not such a request is granted, lies within the discretion of the Appeals Chamber based on the facts of the case before it. It is not obliged, having identified an error, to remit for retrial. Considering the exceptional circumstances of the present case, the Appeal Chamber considers that it is not in the interests of justice to grant the prosecution's request and accordingly declines to reverse the acquittal entered by the Trial Chamber and remit the case for further proceedings. In this regard, the Appeals Chamber does not consider that the facts of this case constitute appropriate circumstances, as referred to in Rule 117(C) of the Rules.

III. CROSS-APPELLANT'S APPEAL

A. Cross-appellant's first ground of appeal: cumulative convictions

78. At the hearing on appeal the cross-appellant sought and obtained leave to amend his notice of appeal so as to argue that certain convictions should be quashed on the basis of the *Delalic* appeal judgement. In that judgement, the Appeals Chamber held that:

> reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. [109]

79. The Appeals Chamber went on to say:

> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision. [110]

80. In his oral argument on 22 February 2001, counsel for the cross-appellant invited the Appeals Chamber "to formally quash the lesser of each pair of offences for which [the cross-appellant] was sentenced"; but counsel did not say which of each pair he regarded as the lesser offence.[111] His submission referred to the following situation.
81. There were three separate allegations of causing bodily harm and twelve separate allegations of murder. Each of the three allegations of causing bodily harm was charged, first, as a violation of the laws or customs of war (cruel treatment), contrary to Article 3 of the Statute, and, secondly, as a crime against humanity (inhumane acts), contrary to Article 5 of the Statute. Each of the 12 allegations of murder was charged, first, as a violation of the laws or customs of war, contrary to Article 3 of the Statute, and, secondly, as a crime against humanity, contrary to Article 5 of the Statute.
82. The validity of cumulative convictions in relation to the same conduct, charged as a violation of the laws or customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute, is based on the notion that each crime has a special ingredient not possessed by the other. Following the reasoning of the Appeals Chamber in the *Delalic* appeal judgement,[112] the Appeals Chamber notes that, Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as

part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible. In such a situation, it is not possible to hold , as is submitted by the cross-appellant, that either offence is a "lesser included offence" of the other.

83. The cross-appellant's first ground of appeal concerning cumulative convictions accordingly fails. The Appeals Chamber affirms the cumulative convictions based on the same conduct for violations of the laws or customs of war charged under Article 3 and for crimes against humanity charged under Article 5 of the Statute.

B. Cross-appellant's second ground of appeal: the Trial Chamber erred in fact and in the exercise of its discretion when imposing sentence

1. Admissibility of evidence at trial on count of genocide

84. The cross-appellant argues that the sentence passed by the Trial Chamber for the counts in respect of which he pleaded guilty erroneously took into account prosecution evidence given at his trial for genocide; that the decision of the Trial Chamber to acquit at the close of the case for the prosecution meant that any evidence that the defence might have wished to adduce in rebuttal or qualification of the prosecution evidence was not available to the Trial Chamber; and that, although the prosecution witnesses were cross-examined, this was only from the point of view of conviction , and not from the point of view of sentence. Consequently, in the submission of the cross-appellant, the evidence taken on the trial for genocide should have been excluded for sentencing purposes.

85. Apart from its other arguments, the prosecution submits that it is not necessary to consider these complaints because there was no link, or no relevant link, between the testimony given in respect of the trial on the count of genocide and the sentence passed in respect of the counts on which the cross-appellant pleaded guilty.

86. The cross-appellant pleaded guilty to thirty-one counts including, *inter alia*, acts of killings. During the trial on the count of genocide, evidence was presented with regard to some of these acts, which constituted the underlying acts for the alleged genocide. Evidence was presented, *inter alia*, demonstrating the manner in which these killings had been committed. The Trial Chamber took the following aggravating factors into account; "the repugnant, bestial and sadistic nature of Goran Jelisic's behaviour,"[113] "[h]is cool-blooded commission of murders",[114] and his enthusiastic participation in the crimes.[115]

87. The Appeals Chamber opines that in imposing sentence it was open to the Trial Chamber to take into account evidence presented during the genocide trial, insofar as that evidence was presented to demonstrate facts or conduct to which the cross -appellant had pleaded guilty. The important point is that in considering evidence for the purpose of sentencing, the Trial Chamber should afford the cross-appellant an opportunity to test the evidence in

cross-examination and/or by way of evidence adduced by the cross-appellant himself.

88. The cross-appellant refers the Appeals Chamber to paragraph 129 as well as footnote 9 of the Judgement as examples of the Trial Chamber's reliance on facts from the genocide proceedings.[116] He further submits that the second amended indictment, to which he pleaded guilty , offered insufficient grounds for drawing the conclusions that the Trial Chamber did in paragraphs 129-134 of the Judgement concerning the gravity of the offences and his individual characteristics.[117]

89. Footnote 9 of the Judgement does not relate to sentencing. Paragraph 129 of the Judgement states that "[t]he Trial Chamber concludes that the statements attached to the factual basis and the testimony heard at the genocide trial show that Goran Jelisic's crimes were committed under particularly aggravating circumstances." As noted above, the Trial Chamber was at liberty, in imposing sentence, to consider information presented at the genocide trial to the extent that evidence was presented to demonstrate facts of the criminal conduct to which the cross-appellant pleaded guilty. As recalled in paragraph 3 above, at an earlier stage the cross-appellant had himself suggested that the witnesses called by the prosecution on the genocide case might present evidence that could be used in mitigation of sentence on the counts on which he had pleaded guilty. Therefore, it is reasonable to assume that he bore this in mind when evidence was given at the trial for genocide and that any requisite testing of that evidence for sentencing purposes was undertaken by him at that time or at the time of his sentencing hearing on the crimes to which he pleaded guilty. The Appeals Chamber is of the view that the cross-appellant has not demonstrated how any other evidence influenced the sentence. Accordingly , this part of the cross-appellant's second ground of appeal fails.

2. An unauthorised double conviction on counts 16-17 - killing of Huso and Smajil Zahirovic while the indictment alleged the killings in the alternative [118]

90. The second amended indictment reads in part as follows:

COUNTS 16-17

Killing of Huso and Smajil Zahirovic

22. On about 8 May 1992, at Luka camp, **Goran JELISIC** took two Muslim brothers from Zvornik, Huso and Smajil Zahirovic, outside of the main hangar building where he shot and killed one of them. By these actions, **Goran JELISIC** committed :

Count 16: a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR** recognized by Article 3 of the Tribunal Statute and Article 3(1)(a) (murder) of the Geneva Conventions ;

Count 17: a **CRIME AGAINST HUMANITY** recognized by Article 5(a) (murder) of the Tribunal Statute.

91. Despite its sub-title, it is evident from the text of paragraph 22 of the second amended indictment that the cross-appellant was charged with murdering one brother only. In fact, the Trial Chamber convicted him of murdering both. The prosecution accepts that the double conviction was an error and concedes that the cross-appellant should have been convicted on his guilty plea only for one of the murders. The Appeals Chamber accordingly quashes the conviction of the cross-appellant for the murder of one of the two brothers. The matter is stated that way because the record does not enable the Appeals Chamber to identify the particular brother in respect of whom alone the cross-appellant pleaded guilty. The agreed factual basis was that "on about 08 May 1992, he [Goran Jelisic] took two Muslim brothers, Huso and Smajil Zahirovic, outside of the main hangar at Luka Camp and shot and killed one of them."[119]
92. The Appeals Chamber considers that it is unsatisfactory that it has not been established which one of the two brothers the cross-appellant killed. However, as has been indicated above, the cross-appellant is not appealing against the conviction ; he emphasises that his appeal is directed to sentence only. His case is that the error in convicting him of murdering both brothers instead of one goes to sentence , the argument being that the sentence passed assumed guilt of the additional murder and was intended to reflect that circumstance. Accordingly, he contends that the sentence should appropriately be reduced.
93. The cross-appellant was convicted of 31 counts of violations of the laws or customs of war and crimes against humanity. The Trial Chamber passed a single sentence of 40 years' imprisonment in respect of convictions on counts of violations of the laws or customs of war and crimes against humanity. Apart from the particular murder in question, these counts involved 12 murders and other crimes. The global sentence passed rested on the view taken by the Trial Chamber of the totality of the criminal conduct of the accused. The question is whether the totality of that conduct is materially affected by the Trial Chamber's error of convicting the cross-appellant of one additional murder. In the *Delalic* appeal judgement, the Appeals Chamber agreed "with the Prosecution submission that a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes".[120]
94. The Appeals Chamber, in accordance with Article 25 of the Statute has the mandate to "affirm, reverse or revise the decisions taken by the Trial Chamber". The Trial Chamber held, when discussing the reasons for a single penalty of 40 years' imprisonment , that the crimes "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."[121] A sentence imposed should reflect the inherent gravity of the criminal conduct as stated in Article 24 of the Statute or as put by the Appeals Chamber in the *Aleksovski* case :

Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence.[122]

The Appeals Chamber is of the opinion that the additional murder of which the cross - appellant was convicted does not substantially influence the totality of his criminal conduct.

95. The Appeals Chamber finds that the Trial Chamber erred in finding the cross -appellant guilty of two murders under counts 16 and 17. The Appeals Chamber, therefore , quashes the conviction of one of the murders. In this respect, the cross-appellant's ground of appeal in this part succeeds.

3. The absence of a recognised tariff for sentencing

96. The cross-appellant argues that the Trial Chamber failed to have regard to a tariff of sentences discernible in the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("the ICTR"). The Appeals Chamber understands that what is being referred to is not a legally binding tariff of sentences but a pattern which emerges from individual cases, and that the argument is that a Trial Chamber has a duty to take that pattern into account. Whether the practice of the Tribunal is far enough advanced to disclose a pattern is not clear.[123] The Appeals Chamber agrees that a sentence should not be capricious or excessive , and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed , as prescribed by the Statute and set out in the Rules. But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case.
97. Further, the cross-appellant argues that a Trial Chamber when imposing a sentence must operate within a certain institutional framework which takes account of the relative situation of the accused compared to other accused convicted of similar crimes, so that consistent sentences are given.[124] The Trial Chamber in this particular case, by imposing a sentence of 40 years, allegedly abused its discretion, as it has to be exercised with reference to discernible principles of law derived from various cases of the ICTR and the Tribunal.[125] Counsel for the cross-appellant compares the sentence imposed in the present case with those imposed in other judgements of the International Tribunals, in particular the *Tadic* and *Erdemovic* cases. [126]
98. The cross-appellant raises several interrelated issues which in his submission show that the Trial Chamber erred when imposing sentence:[127] a) the Trial Chamber's failure to accept the remorse shown by the cross-appellant as genuine;[128] b) the fact that the cross-appellant

was not a commander;[129] and c) the Trial Chamber's failure to adequately consider the role of the cross- appellant in the broader context of the conflict in the former Yugoslavia.[130] Even though there is a slight difference between the argument of a recognised tariff of sentencing and errors relating to the Trial Chamber's discretion, the Appeals Chamber has found it suitable to deal with the cross-appellant's submissions relating to errors of discretion under this ground.

99. As recently stated in the *Delalic* appeal judgement,[131] the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless the Trial Chamber has committed a "discernible" error in the exercise of its discretion, or has failed to follow applicable law. Therefore, it falls on the appellant to show in what way the Trial Chamber has ventured outside its discretionary framework. The Appeals Chamber in the *Furundzija* appeal judgement found that:

> [t]he sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances ; otherwise a Trial Chamber is limited only by the provisions of the Statute and the Rules. [132]

100. In this case the cross-appellant has alleged an error in the exercise of the Trial Chamber's discretion. It falls on the cross-appellant to show that the Trial Chamber has erred by imposing a sentence outside the discretionary framework provided by the Statute and the Rules. The Statute provides in Article 24 that penalties shall be limited to imprisonment. Rule 101(A) of the Rules provides that "[a] convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life". Thus, it falls within the Trial Chamber's discretion to impose life imprisonment. The Trial Chamber has a broad discretion as to which factors it may consider in sentencing and the weight to attribute to them.

101. As stated above, the Appeals Chamber considers that the sentence imposed by the Trial Chamber must be individualised and it is generally not useful to compare one case to another unless the cases relate to the same offence committed in substantially similar circumstances. The present case differs considerably from the *Erdemovic* case as to the offences and circumstances, and from the *Tadic* case as to circumstances. For example, *Erdemovic* was found guilty of only one count, namely a count of violations of the laws or customs of war. For the purpose of sentencing, duress, substantive cooperation with the prosecution and remorse were factors taken into account by the Chamber, which are not relevant in the present case. *Tadic* was found guilty of more than one crime, including two murders . A comparison between the present case and these two cases, as well as other cases , is, in this instance, of limited guidance. Further, the Appeals Chamber in the *Delalic* appeal judgement[133] and the *Aleksovski* appeal judgement[134] endorsed the

following finding by the Trial Chamber in *Kupreskic:*

> The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[135]

102. As to the alleged failure to consider the remorse of the cross-appellant as genuine, the Trial Chamber was not convinced that "the remorse which Goran Jelisi c allegedly expressed to the expert psychiatrist was sincere" and therefore did not consider it a mitigating factor.[136] Counsel for the cross-appellant submits that the Trial Chamber "misdirected itself as to the burden that the accused had to discharge in order to convince them that he [the cross-appellant] had remorse". He submits that it was not for the cross -appellant to have to satisfy the Court that the remorse was genuine and the Trial Chamber should have accepted expressions of remorse that were accepted by an expert psychiatrist.[137] The prosecution disagrees and submits that the report referred to in the Judgement did not state that the cross-appellant showed remorse but rather that he "would appear more than in the past to demonstrate remorse".[138]
103. The Trial Chamber's finding must be interpreted in two steps. First, the content of the report has to be examined as the Trial Chamber found that the cross-appellant "allegedly expressed remorse." The Appeals Chamber is of the opinion that the report clearly states that the psychiatrist believed that the cross-appellant was expressing remorse.[139] Therefore, the only reasonable conclusion that could be drawn from the report is that the cross-appellant did express remorse and the Trial Chamber erred in finding that the cross-appellant "allegedly" expressed remorse. The second question is whether the Trial Chamber's finding as to the sincerity of the remorse expressed was erroneous. On this point , counsel for the cross-appellant submitted that the Trial Chamber could not reject expressions of remorse as insincere "unless it was convinced that the expressions of remorse were false".[140] The Trial Chamber has the discretion to give little or no weight to a particular piece of evidence. Having considered the evidence which was presented to the Trial Chamber , the Appeals Chamber is satisfied that the Trial Chamber's finding that the remorse was not sincere is not unreasonable. Therefore, the Trial Chamber did not err in the exercise of its discretion.
104. The cross-appellant has also submitted that the Trial Chamber erred in finding in paragraph 95 of the Judgement that he was a commander and that the Tribunal has recognised a distinction for sentencing purposes between those in command and those who are not.[141]
105. In paragraph 95 of the Judgement the Trial Chamber found:

It has also not been established beyond reasonable doubt whether the accused killed at Luka camp under orders. Goran Jelisic allegedly presented himself to the detainees as the Luka camp commander. 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 who appeared to be afraid of him. The Trial Chamber does not doubt that the accused exercised a *de facto* authority over the staff and detainees at the camp.[142]

106. The agreed factual basis on which the cross-appellant pleaded guilty clearly does not contain any suggestion that he was the commander of the Luka camp nor does the prosecution submit that he was. [143] During the hearing on appeal the prosecution stated:

There was never any suggestion that he was the actual commander of the Luka camp . Yes, one or two witnesses assumed he was, and there may have even been words said to suggest that he was. But the clear body of evidence both from him and from the victim witnesses was to the effect that he was working together with others – the inspectors who carried out brief interrogations in particular will come to mind – and that showed that they were all working within a regime of which it was not suggested he was the commander.[144]

107. Although the evidence does not suggest that the cross-appellant was the actual commander of the camp, the Appeals Chamber sees no reason to reject the finding of the Trial Chamber that the cross-appellant "exercised *de facto* authority over the staff and detainees at the camp". In this respect, the Appeals Chamber is of opinion that the cross-appellant has failed to show any error in the Trial Chamber's exercise of its discretion.

108. It is further submitted by the cross-appellant that the Trial Chamber failed to adequately consider the role of the cross-appellant in the broader context of the conflict in the former Yugoslavia.

109. The Appeals Chamber held in the *Tadic* sentencing appeal that sentences need:

to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia. [...] Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors , i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.[145]

110. The Trial Chamber in this case found:

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 Jelisic.[146]

It is noted that the Trial Chamber took into account and discussed the role of the cross-appellant in the context of the conflict in the former Yugoslavia. The weight to be attached to this finding is within the Trial Chamber's discretion and the cross-appellant has failed to demonstrate any error in the Trial Chamber's exercise of its discretion.

111. This part of the cross-appellant's second ground of appeal fails.

4. Insufficient account was given to the general practice of prison sentencing in the courts of the former Yugoslavia

112. The cross-appellant argues that the Trial Chamber was obliged to, but did not , consider the general practice regarding prison sentences in all the courts of the former Yugoslavia; further, "in order properly to give full effect to Article 24(1)[...] regard ought properly to have been had to the development of sentencing law in ***all*** the entities that emerged after the dissolution of the SFRY so that a balanced approach to such developments can properly be made ".[147]
113. Article 24(1) of the Statute, on which the cross-appellant relies, states:

The penalty imposed by the Tribunal 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.

114. Two sub-issues are involved. First, does the provision require a Trial Chamber to have recourse to the general practice regarding prison sentences of the courts in entities emerging from the dissolution of the former Yugoslavia? It appears to the Appeals Chamber that the answer is no, because courts in entities emerging from the dissolution of the former Yugoslavia are not "courts of the former Yugoslavia " within the meaning of Article 24(1) of the Statute.
115. The second sub-issue is whether paragraph 1 of Article 24 of the Statute requires the Trial Chamber to consider the position in each of the constituent republics of the former Yugoslavia. As has been seen, that provision provides that "the Trial Chambers shall have regard to the general practice regarding prison sentences in the courts of the former Yugoslavia".[148] The state representing the former Yugoslavia was the Socialist Federal Republic of Yugoslavia ("the SFRY"). The courts of the former Yugoslavia were bound by the law of the SFRY. In the *Delalic* appeal judgement, it was to that law that the Appeals

Chamber looked.[149]

116. No doubt, the Tribunal may be informed in an appropriate case by the sentencing practices of the courts of one or more of the constituent republics of the former Yugoslavia where it has reason to believe that such specific consideration would aid it in appreciating “the general practice [...] in the courts of the former Yugoslavia ”. The latter phrase is obviously to be taken as a whole; individual divergences from the norm in particular republics do not show the “general practice”. There was no reason in this case to undertake a full-scale consideration of the position in each of the several republics which constituted the former Yugoslavia.
117. In passing, the Appeals Chamber notes that, in keeping with the settled jurisprudence , the cross-appellant correctly recognised that “general practice” provides general guidance and does not bind a Trial Chamber to act exactly as a court of the former Yugoslavia would. For example, even if the general practice were otherwise, this would not prohibit the imposition of a sentence of life imprisonment; *a fortiori* , it would not stand in the way of a sentence of 40 years’ imprisonment.
118. The Appeals Chamber finds that this part of the cross-appellant’s second ground of appeal fails.

5. No credit was given to the accused for his guilty plea

119. The cross-appellant argues that in imposing sentence, the Trial Chamber failed to give him any credit for his guilty plea, to which he is entitled under the jurisprudence of both Tribunals.[150] Further, he argues that a plea of guilty in most jurisdictions in the world attracts a reduction in sentence.[151] In his contention , this is largely based on pragmatic reasons since most criminal justice systems are only able to effectively operate if a significant number of defendants admit their guilt and hence avoid the need for a trial.[152]
120. Under the heading of mitigating circumstances, the Trial Chamber stated that :

> photographs attached to the Agreed Factual Basis or produced at trial which the accused was fully aware had been taken show Goran Jelisic committing crimes. It therefore accords only relative weight to his plea.[153]

121. In the present case, the cross-appellant has argued, not that the Trial Chamber disregarded applicable law, but rather that it erred in the exercise of its discretion when weighing the significance of his guilty plea. The Statute and Rules leave it open to the Trial Chamber to consider the mitigating effect of a guilty plea on the basis that the mitigating weight to be attached to the plea lies in the discretion of the Trial Chamber.
122. In this case the Appeals Chamber notes that the Trial Chamber did consider the guilty plea in mitigation. The weight to be attached to it is at the discretion of the Trial Chamber and it falls on the cross-appellant to convince the Appeals Chamber that the Trial Chamber erred

in the exercise of its discretion resulting in a sentence outside the discretionary framework provided in the Statute and the Rules.

123. The cross-appellant has failed to discharge the burden to demonstrate an error . Therefore, the Appeals Chamber finds that this part of the cross-appellant's second ground of appeal fails.

6. No credit was given for his cooperation with the prosecution

124. Rule 101(B)(ii) requires the Trial Chamber to consider "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person ". The cross-appellant submits that his cooperation with the prosecution fell within the meaning of this Rule.[154] What constitutes "substantial cooperation" is not defined in the Rules and is left to the discretion of the Trial Chamber. It was for the Trial Chamber to weigh the circumstances relating to any cooperation.

125. The Trial Chamber found:

> Furthermore, his [Goran Jelisic's] 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.[155]

126. The Appeals Chamber notes that the determination of whether the cooperation should be considered as substantial and therefore whether it constitutes a mitigating factor is for the Trial Chamber to determine. It falls on the cross-appellant to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion.

127. The Appeals Chamber is not satisfied that the cross-appellant has demonstrated an error in the exercise of the Trial Chamber's discretion. This part of the cross -appellant's second ground of appeal therefore fails.

7. Inadequate consideration of the youth of the cross-appellant

128. In the skeleton argument, a ground of appeal was advanced concerning "[h]is youth, maturity, the impact of propaganda on him and [his] mental state".[156] Subsequently during the hearing on appeal, counsel for the cross-appellant addressed the Appeals Chamber on the cross-appellant's youth and immaturity, but advanced no argument specifically on the impact of propaganda on him and his mental state .[157] The cross-appellant submits that he was only 23 years old when he committed the crimes and that the Tribunal has consistently accepted youth as a mitigating factor.[158]

129. The Appeals Chamber agrees with the cross-appellant that the youth of an accused is a factor that should be taken into account in sentencing.

130. The Trial Chamber found:

> 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.[159]

131. The Appeals Chamber notes that the Trial Chamber did consider the age of the accused. The weight to be attached to that circumstance is within the discretion of the Trial Chamber to determine and it falls on the cross-appellant to demonstrate to the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion . The cross-appellant has failed to discharge the burden.
132. The Appeals Chamber therefore finds that this part of the cross-appellant's second ground of appeal fails.
133. The cross-appellant's second ground of appeal succeeds to the extent that the Trial Chamber erred in finding the cross-appellant guilty of two murders under counts 16 and 17 of the second amended indictment when he in fact pleaded guilty to only one of the murders, but otherwise fails.

DISPOSITION

The Appeals Chamber unanimously allows the prosecution's first ground of appeal.

The Appeals Chamber by majority (Judge Pocar dissenting) allows the prosecution's second ground of appeal.

In respect of the prosecution's third ground of appeal -

(i) the Appeals Chamber unanimously dismisses the prosecution's appeal with regard to the alleged error of law by the Trial Chamber in its application of the term *dolus specialis;*

(ii) the Appeals Chamber by majority (Judge Pocar dissenting) allows all other aspects of the prosecution's third ground of appeal.

However, the Appeals Chamber by majority (Judge Shahabuddeen and Judge Wald dissenting) considers that, in the circumstances of this case, it is not appropriate to order that the case be remitted for further proceedings, and declines to reverse the acquittal .

The Appeals Chamber unanimously dismisses the cross-appellant's first ground of appeal.

In respect of the cross-appellant's second ground of appeal -

(i) the Appeals Chamber unanimously finds that the Trial Chamber erred in finding the cross-appellant guilty of two murders under counts 16 and 17 of the second amended indictment when he in fact pleaded guilty to only one of the murders;

(ii) the Appeals Chamber unanimously dismisses the other aspects of the cross-appellant's second ground of appeal.

The Appeals Chamber unanimously affirms the sentence of 40 years of imprisonment as imposed by the Trial Chamber.

In accordance with Rule 103(C) of the Rules, the cross-appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.

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

Mohamed Shahabuddeen (Presiding)
Lal Chand Vohrah
Rafael Nieto-Navia
Patricia M. Wald
Fausto Pocar

Dated this fifth day of July 2001
At The Hague,
The Netherlands.

Judge Nieto-Navia appends a separate opinion to this judgement.
Judge Shahabuddeen, Judge Wald and Judge Pocar append partial dissenting opinions to this judgement.

(Seal of the Tribunal)

IX. Annex A - Glossary of Terms

agreed factual basis	*Prosecutor v. Goran Jelisic,* Case No.: IT-95-10-T, Agreed factual basis for guilty pleas to be entered by Goran Jelisic, 9 September 1998
Aleksovski appeal judgement	*Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, Judgement, 24 March 2000
appeal transcript	Transcript of hearing on appeal in the present case. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Blaskic trial judgement	*Prosecutor v. Tihomir Blaskic,* Case No.: IT-95-14-T, 3 March 2000
cross-appellant	Goran Jelisic
cross-appellant's brief	Appellant's brief on appeal against sentence, public redacted version, 2 March 2001 (the confidential version, 7 August 2000)
cross-appellant's reply	Appellant's reply to prosecution respondent's brief, public redacted version, 2 March 2001 (the confidential version, 6 October 2000)
cross-appellant's response	Appellant's reply to prosecution appeal brief, 14 August 2000
Delalic appeal judgement	*Prosecutor v. Zejnil Delalic et al,* Case No.: IT-96-21-A, Judgement, 20 February 2001 (*Celebici*)
Furundzija appeal judgement	*Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000
Furundzija trial judgement	*Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998
hearing on appeal	Oral argument in the present case held on 22 and 23 February 2001

ICTR	International criminal tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
International Tribunal	International tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991
Judgement	*Prosecutor v. Goran Jelisic,* Case No.: IT-95-10-T, Judgement, 14 December 1999
Kunarac decision	*Prosecutor v. Dragoljub Kunarac et al*, Case No.: IT-96-23-T, IT-23-1-T, Decision on motion for acquittal, 3 July 2000
Kupreskic trial judgement	*Prosecutor v. Zoran Kupreskic et al.,* Case No.: IT-95-16-T, Judgement, 14 January 2000
Kvocka decision	*Prosecutor v. Miroslav Kvocka et al*, Case No.: IT-98-30/1-T, Decision on defence motions for acquittal, 15 December 2000
motion to be heard	Prosecutor's motion to be heard, 15 October 1999
oral judgement	*Prosecutor v Goran Jelisic*, Case No.: IT-95-10-T, 19 October 1999
prosecution	Office of the Prosecutor
prosecution's brief	Prosecution's appeal brief, public redacted version, 14 July 2000
prosecution's reply	Prosecution's brief in reply, public redacted version, 29 August 2000
prosecution's response	Respondent's brief of the prosecution, public redacted version, 15 February 2001
respondent	Goran Jelisic
response to prosecution's brief	Reply to prosecution appeal brief, 14 August 2000
Rules	Rules of procedure and evidence of the International Tribunal

second amended indictment	*The Prosecutor v. Goran Jelisic; and Ranko Cesic*, "Brcko", Case No.: IT-95-10, second amended indictment, 19 October 1998
SFRY	Socialist Federal Republic of Yugoslavia
skeleton argument	Appellant's skeleton submissions, 16 February 2001
Statute	Statute of the International Tribunal
Tadic appeal judgement	*Prosecutor v. Dusko Tadic,* Case No.: IT-95-1-A, Judgement, 15 July 1999
Tadic sentencing appeal	*Prosecutor v. Dusko Tadic,* Case No.: IT-94-1-A and IT-94-1-A*bis*, Judgement in sentencing appeals, 26 January 2000
trial transcript	Trial transcript of the proceedings in *Prosecutor v. Goran Jelisic,* Case No.: IT-95-10-T. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public
Tribunal International	Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

1 - *Prosecutor v. Goran Jelisic*, Case No.: IT-95-10-A.
2 - The initial indictment was confirmed on 21 July 1995. At the request of the prosecution, all the charges based on Article 2 of the Statute, grave breaches of the Geneva Conventions of 1949, were withdrawn and an amended indictment was filed on 13 May 1998.
3 - Agreed factual basis for guilty pleas to be entered by Goran Jelisic, 9 September 1998.
4 - Second amended indictment against Goran Jelisic and Ranko Cesic, 19 October 1998, paras 14-36.
5 - Provisional transcript of the trial proceedings in *Prosecutor v. Goran Jelisic*, Case No.: IT-95-10-T ("the trial transcript"), 18 March 1999, pp. 275-280.
6 - *Ibid.*, p. 280.
7 - *Ibid.*, p. 286.
8 - *Ibid.*, 22 September 1999, p. 2311 (closed session).
9 - Prosecutor's motion to be heard, 15 October 1999.
10 - Trial transcript, 19 October 1999, pp. 2321-2342.
11 - *Ibid.*, pp. 2328-2330.
12 - *Prosecutor v. Goran Jelisic*, Case No.: IT-95-10-T, Judgement, 14 December 1999 (English version filed 14

January 2001), para. 139, p. 43.
13 - Prosecution's notice of appeal, 21 October 1999.
14 - Notice of cross-appeal, 26 October 1999.
15 - Notice of appeal, 15 December 1999.
16 - Prosecution motion for clarification of the right of the appellant Goran Jelisic to file two notices of appeal and for a scheduling order in relation to the appeal, 20 December 2000. On 21 January 2000, the cross-appellant filed: Response to prosecution motion filed 20th December 1999. On 28 January 2000, the prosecution filed Prosecution reply to defence's Response to prosecution motion filed 20th December 1999. The prosecution also requested that the Appeals Chamber classify the time limits with regard to Rule 111 of the Rules. In its scheduling order of 14 January 2000, the Appeals Chamber ordered that the time limit for the filing of the briefs pursuant to Rule 111 should commence from 15 December 1999, the day following the pronouncement of the written Judgement. On 7 March 2000, the Appeals Chamber ordered that the briefs in relation to the cross-appellant's appeal be filed by 15 May 2000. Following subsequent decisions this deadline was varied.
17 - Order, 21 March 2000.
18 - Prosecutor's appeal brief (public redacted version), 14 July 2000. On the same date a confidential version was filed: Prosecutor's appeal brief (confidential), as well as the book of authorities for the prosecution's appeal brief.
19 - Reply to prosecution appeal brief, 14 August 2000.
20 - Prosecutor's brief in reply (public redacted version), 29 August 2000. On the same date a confidential version was filed: Prosecutor's brief in reply (confidential).
21 - On 3 May 2000, the cross-appellant filed: Motion for extension of time, whereby he requested an extension of time for filing the cross-appellant's brief due to a delay in providing the cross-appellant's counsel with a full set of audiotapes from the Trial Chamber proceedings in a language he could understand. On 11 May 2000, the Appeals Chamber granted an extension of time until 10 July 2000. On 7 July 2000, the cross-appellant requested an extension of time for the filing of his brief until 7 August 2000. On 17 July 2000, the Appeals Chamber issued: Order for provisional extension of time, which provisionally extended the time for filing of the cross-appellant's brief until 21 July 2000, in order to enable the Appeals Chamber to deliberate on the 7 July motion. On 19 July 2000, in: "Decision on urgent motion requesting extension of time," the 7 July motion was granted, as the recently appointed legal assistant needed more time to identify passages of the trial proceedings to be annexed to the appellant's brief. The filing time was extended to 7 August 2000. On 11 September 2000, the cross-appellant requested an extension of time for the filing of the response to the prosecution's brief. On 15 September 2000, in: "Decision on motion requesting extension of time," the Appeals Chamber found that, by themselves, the grounds raised by the cross-appellant did not justify an extension of time. However, with regard to the special circumstances of the case, it found that it was appropriate to allow further time to enable counsel to explain the case to the cross-appellant. Hence, the time limit was extended to 6 October 2000.
22 - Appellant's brief on appeal against sentence (confidential), 7 August 2000. A public redacted version was filed on 2 March 2001, upon the request of the Appeals Chamber in an order dated 30 January 2001, which was reiterated during the hearing on appeal, appeal transcript, 23 February 2001, p. 246.
23 - Respondent's brief of the prosecution (confidential), 6 September 2000. On 15 February 2001, a public redacted version was filed.
24 - Appellant's reply to prosecutor's respondent's brief (confidential), 6 October 2000. A public redacted version was filed on 2 March 2001.
25 - Decision by the Registrar, 5 February 2001.
26 - Appellant's skeleton submissions, 16 February 2001.
27 - Appeal transcript, 22 February 2001, p. 37 and 23 February 2001, pp. 198-199.
28 - The prosecution's grounds of appeal were set out in the prosecution's brief and prosecution's reply, as well as during the hearing on appeal.
29 - Prosecution's brief, para. 2.1, p. 9.
30 - Prosecution's brief, para. 3.5, p. 27.

31 - *Ibid.*, para. 4.6, p. 53.
32 - *Ibid.*, para. 5.7, p. 86.
33 - *Ibid.*, para. 5.6(a), p. 85. Appeal transcript, 22 February 2001, p. 9.
34 - Skeleton argument, para. 6.1, p. 6.
35 - Appeal transcript, 23 February 2001, p. 198.
36 - *Ibid.*, pp. 164-165.
37 - These were as follows: a) the factual basis for the Trial Chamber's conclusion with regard to the nature and seriousness of the offences was based upon a document which the Trial Chamber erroneously concluded had been agreed to between the parties; b) the Trial Chamber's Judgement included an unauthorised double conviction on counts 16-17 - killing of Huso and Smajil Zahirovic - while the indictment alleged that "he shot and killed one of them"; c) the Trial Chamber reversed the burden of proof; d) the cross-appellant was given no credit for his guilty plea, for having made early admissions to the offences charged and for his co-operation with the prosecution; e) the Trial Chamber failed properly to consider the defence case on sentence; f) the Trial Chamber failed properly to consider the sentencing practice in the former Yugoslavia; g) the Trial Chamber made inappropriate use of medical evidence; h) the 40 years' sentence reflects a disparity between this case and other cases before the Tribunals; and i) the Trial Chamber inappropriately passed a single sentence, cross-appellant's brief, pp. 114-145.
38 - Appeal transcript, 22 February 2001, p. 37, and 23 February 2001, pp. 198-199.
39 - Skeleton argument, para. 6.2, p. 6.
40 - *Prosecutor v. Zejnil Delalic et al*, Case No.: IT-96-21-A, Judgement, 20 February 2001 ("the *Delalic* appeal judgement").
41 - Appeal transcript, 22 February 2001, pp. 32-35 and 245-246, referring to the *Delalic* appeal judgement.
42 - *Ibid.*, pp. 33-35. The Appeals Chamber decided the prosecution would have 10 days to respond and the cross-appellant would have 10 days from the filing of the response to file his reply, appeal transcript, 22 February 2001, p. 35 and 23 February 2001, pp. 245-246. Subsequently, on 6 March 2001, the "Prosecution response to the oral motion and the additional ground of appeal of Goran Jelisic regarding cumulative convictions" and the "Appellant's written submission in support of the oral motion to quash cumulative convictions" were filed.
43 - The defence's brief for the presentation of the additional evidence, 8 September 2000.
44 - Prosecution response to the defence's brief for the presentation of the additional evidence, 18 September 2000.
45 - Decision on request to admit additional evidence, 15 November 2000.
46 - General practice of courts in the former Yugoslavia and the newly emerged states on the territory of the former Yugoslavia in determining prison sentences, 7 March 2001.
47 - Prosecution objection to the admission of document filed on 7 March 2001 on behalf of Goran Jelesic (sic(, 9 March 2001.
48 - Evidence may also be admitted in certain circumstances under Rule 89 of the Rules, see for example *Prosecutor v. Zejnil Delalic et al*, Case No.: IT-96-21-A, Order on motion for the extension of the time-limit and admission of additional evidence, 31 May 2000, and Order on motion of Esad Landzo to admit as additional evidence the opinion of Francisco Villalobos Brenes, 14 February 2000, *Prosecutor v. Zoran Kupreskic et al*, Case No.: IT-95-16-A, Redacted Decisions of the Appeals Chamber of 26 February 2001 and 11 April 2001, 30 May 2001. See equivalent, *Jean-Paul Akayesu v. The Prosecutor*, Case No.: ICTR-96-4-A, Decision (on the consolidation or summarization of motions not yet disposed of), 22 August 2000, applying Rule 89 of the ICTR Rules.
49 - Appeal transcript, 23 February 2001, pp. 190-191.
50 - Prosecution's brief, para. 2.1, p. 9.
51 - Judgement, para. 16, p. 4.
52 - Trial transcript, 19 October 1999, p. 2330. (*Audi alteram partem* means to hear the other side.)
53 - See generally *R. v. Barking and Dagenham Justices*, ex parte *Director of Public Prosecutions* [1995] Crim LR 953 ("*Barking* case"), and *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000 ("*Cosier* case").
54 - See *Cosier* case, *supra*.
55 - See *Cosier* case, *supra*. For a more general observation on the importance of not deciding without first hearing

counsel's arguments, see Judge *ad hoc* Barwick's dissenting opinion in *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 442.
56 - See *Barking* and *Cosier* cases, *supra*.
57 - Skeleton argument, paras 2.1-2.4, pp. 2-3.
58 - Prosecution's brief, para. 3.5, p. 27.
59 - Judgement, para. 108, pp. 33-34.
60 - Response to prosecution's brief, pp. A-1135-1136 as given by the Registry.
61 - *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No.:IT-95-14/2-T, Decision on defence motions for judgement of acquittal, 6 April 2000, para. 9, p. 5.
62 - *Prosecutor v. Dragoljub Kunarac et al*, Case Nos.: IT-96-23-T, IT-23-1-T, Decision on motion for acquittal, 3 July 2000 ("the *Kunarac* decision"), para. 3, p. 3 (emphasis in original). And see, *Ibid.*, paras 7 - 8, pp. 4-5.
63 - *Prosecutor v. Miroslav Kvocka et al*, Case No.: IT-98-30/1-T, Decision on defence motions for acquittal, 15 December 2000, ("the *Kvocka* decision") para. 12.
64 - *R. v. Galbraith*, 73 Cr. App. R. 124, at p. 127, C.A., per Lord Lane, C.J.
65 - As to the permissibility of drawing inferences at the close of the case for the prosecution, see *Monteleone v. The Queen* [1987] 2 S.C.R. 154, in which McIntyre J., for the court, said: "It is not for the trial judge to draw inferences of fact from the evidence before him". And see the reference to "inferences" in *Her Majesty v. Al Megrahi and Another*, *infra.* Cf. *Kvocka* decision, para. 12, p. 5, in which the Trial Chamber said: "The Chamber prefers an objective standard, under which it is entitled at this stage to apply any reasonable inferences and presumption or legal theories when reviewing the Prosecution evidence". The issue thus posed is not passed upon here.
66 - *Delalic* appeal judgement, para. 434, p. 148 (emphasis in original). Or, as it was correctly put by Trial Chamber II in the Kunarac decision, para. 10, p. 6, the "prosecution needs only to show that there is evidence upon which a reasonable tribunal of fact *could* convict, not that the Trial Chamber itself *should* convict" (emphasis in original).
67 - According to MacKinnon A.C.J.O. in *R. v. Syms* (1979) 47 C.C.C. (2d) 114 at 117, a trial judge should withdraw a case from the jury only where "the evidence was so slight or tenuous that it would be incapable of supporting a verdict of guilty".
68 - Judgement, para. 98, p. 31.
69 - *Ibid.*, para. 108, pp. 33-34.
70 - Skeleton argument, para. 3.1, p. 3.
71 - *Ibid.*, para. 3.2, p. 3.
72 - Prosecution's brief, para. 5.5, p. 85.
73 - *Ibid.*, para. 4.22, p. 59.
74 - *Ibid.*, states "[i]n German law, for example, the term 'Absicht' is used to capture what is often being referred to as dolus specialis in literature, whilst Norwegian law uses the term 'hensikt'".
75 - *Ibid.*, para. 4.21, p. 58.
76 - This proposition does not contain any element of probability. It refers to knowledge of the actual destruction, in whole or in part. Appeal transcript, 22 February 2001, pp. 68-69.
77 - Prosecution's brief, para. 4.9, p. 54. The specification that category iii) only relates to conduct as an aider or abettor was made during oral argument, see appeal transcript, 22 February 2001, pp. 69 and 77.
78 - Cross-appellant's reply, pp. 1135-1134. The Appeals Chamber notes that the respondent during oral argument addressed this issue more generally and did not elaborate on the degree of intent required. Appeal transcript, 22 February 2001, pp. 119-130.
79 - United Nations Treaty Series, vol. 78, p. 277, General Assembly Resolution 260A (III).
80 - See for example: *Prosecutor v. Alfred Musema*, Case No.: ICTR-96-13-T, Judgement and sentence, 27 January 2000, paras 164-167, p. 56-58, which refer to specific intent and *dolus specialis* interchangeably; *Prosecutor v. Jean-Paul Akayesu*, Case No.: ICTR-96-4-T, 2 September 1998, Judgement, para. 498, which refers to genocidal intent. The International Law Commission refers to specific intent (A/51/10), p. 87.
81 - The Appeals Chamber does not attribute to this term any meaning it might carry in a national jurisdiction.

82 - The Appeals Chamber notes it is speaking here solely in the context of the commission of genocide within the meaning of Article 4 of the Statute.
83 - This was also held in the oral decision by the Appeals Chamber for the ICTR in *Obed Ruzindana and Clément Kayishema v. Prosecutor*, Case No.: ICTR-95-1-A, 1 June 2001.
84 - *Prosecutor v. Dusko Tadic*, Case No.: IT-95-1-A, Judgement, 15 July 1999 ("the *Tadic* appeal judgement"), para. 269, p. 120.
85 - Prosecution brief, paras 4.6 and 4.8, pp. 53-54.
86 - Judgement, para. 108, pp. 33-34.
87 - Appeal transcript, 22 February 2001, pp. 94-97.
88 - *Tadic* appeal judgement, para. 64, pp. 27-28.
89 - Appeal transcript, 22 February 2001, p. 144.
90 - Judgement, paras 73-75 and 77, pp. 23-24 (footnotes excluded).
91 - *Ibid.*, para. 108, p. 33.
92 - *Ibid.*, para. 105, p. 33.
93 - *Ibid.*, para. 106, p. 33.
94 - *Ibid.*, para. 107, p. 33.
95 - *Ibid.*, para. 102, p. 32.
96 - Annex A, filed confidentially as an annex to the confidential version of the prosecution's brief.
97 - Trial transcript, 13 September 1999 (witness M), p. 1462.
98 - Annex A, referring to Witness I in trial transcript, 7 September 1999, p. 1112.
99 - *Ibid.*.
100 - Trial transcript, 1 December 1998, p. 81.
101 - Trial transcript, 9 September 1999, p. 1306, 14 September 1999, p. 1556 and exhibit 66 (transcript of interview with the respondent on 4 June 1998), p. 49.
102 - Judgement, para. 107, p. 33.
103 - Rule 67 of the Rules. With regard to diminished mental responsibility, see the Appeals Chamber's finding in Delalic appeal judgement, paras 580-590, pp. 200-204.
104 - Cf. *Rigby v. Woodward* [1957] 1 WLR 250, and *Griffith v. Jenkins and another*, (1991) 156 JP 29.
105 - For a solution of this kind, *see inter alia*, *Cosier* case, *Barking* case. See also *United States v. Hooper*, 432 F.2nd 604, 139 U.S.App.D.C.171 (1970), *United States v. Lindsey*, 47 F.3d 440, 310 U.S. App.D.C.300 (1995).
106 - Second amended indictment, para. 14, p. 3 stated: "[…] Goran JELISIC personally killed the victims described in paragraphs 16-25, 30 and 33 (the killings the cross-appellant pleaded guilty to(. By these actions, Goran JELISIC committed or aided and abetted: Count 1: GENOCIDE, a crime recognized by Article 4(2)(a) of the Tribunal Statute."
107 - Prosecutor's pre-trial brief, 19 November 1998, para. 2.2, p. 4 stated: "In perpetrating the acts outlined in the indictment, the accused committed genocide by killing members of the group, contrary to Article 4(2)(a) of the Statute".
108 - Judgement, para. 140, p. 43.
109 - *Delalic* appeal judgement, para. 412, p. 138.
110 - *Ibid.*, para. 413, p. 138.
111 - Appeal transcript, 22 February 2001, p. 33.
112 - Also applied in *Prosecutor v. Dragoljub Kunarac et al*, Case Nos.: IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 556, pp. 198-199.
113 - Judgement, para. 130, p. 40.
114 - *Ibid.*.
115 - *Ibid.*, paras 131 and 133, p. 40.
116 - Cross-appellant's reply, p. 12. Appeal transcript, 23 February 2001, p. 241.
117 - Cross-appellant's reply, pp. 17-18.

118 - Cross-appellant's brief, pp. 121-123, skeleton argument, para. 6.2(v), p. 6, appeal transcript, 23 February 2001, p. 241.
119 - Agreed factual basis, p. 4.
120 - *Delalic* appeal judgement, para. 771, p. 275.
121 - Judgement, para 137, p. 41.
122 - *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, Judgement, 24 March 2000 ("the *Aleksovski* appeal judgement"), para. 182, p. 75.
123 - See generally *Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000, ("the *Furundzija* appeal judgement"), paras 236-239, pp. 73-74, and *Delalic* appeal judgement, paras 715-718, pp. 252-253.
124 - Appeal transcript, 23 February 2001, pp. 165-168.
125 - *Ibid.*, pp. 165, 178-180.
126 - *Ibid.*, pp. 165-168. Cross-appellant's reply pp. 24-29.
127 - The Appeals Chamber understands, from the skeleton argument and the oral hearing, the cross-appellant to be advancing these factors.
128 - Appeal transcript, 23 February 2001, pp. 176-177, 183-185.
129 - Cross-appellant's reply, pp. 23-24. Appeal transcript, 23 February 2001, pp. 173-175, 189-190.
130 - Appeal transcript, 23 February 2001, p. 166.
131 - *Delalic* appeal judgement, para. 725, p. 256. See also *Furundzija* appeal judgement, para. 239, p. 74, *Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, Sentence, 5 February 1999, para. 32, *Aleksovski* appeal judgement, para. 187, pp. 77-78 and *Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-A and IT-94-1-A*bis*, Judgement in sentencing appeals, 26 January 2000 ("the *Tadic* sentencing appeal"), paras 20-22, pp. 12-13.
132 - *Furundzija* appeal judgement, para. 250, p. 77, also referred to in *Delalic* appeal judgement, para. 720, p 254.
133 - *Delalic* appeal judgement, para. 731, pp. 258-259.
134 - *Aleksovski* appeal judgement, para. 182, p. 75.
135 - *Prosecutor v. Zoran Kupreskic et al.*, Case No.: IT-95-16-T, Judgement, 14 January 2000, ("the *Kupreskic* trial judgement"), para. 852, p. 318.
136 - Judgement, para. 127, p. 39.
137 - Appeal transcript, 23 February 2001, pp. 176-177.
138 - *Ibid.*, pp. 219-220, citing the Report by Doctor van den Bussche of 8 November 1999 ("the report"), p. 17. Notice of filing, 15 November 1999, included the report.
139 - Report, pp. 10, 17. The Trial Chamber referred to p. 22 of the French translation. It corresponds to p. 17 of the English translation, which has not been properly reflected in the English translation of the Judgement.
140 - Appeal transcript, 23 February 2001, pp. 176-177.
141 - *Ibid.*, pp. 173-175.
142 - Judgement, para. 95 (footnotes omitted).
143 - Appeal transcript, 23 February 2001, pp. 216-217.
144 - *Ibid.*, p. 217.
145 - *Tadic* sentencing appeal, paras 55-56, pp. 24-25.
146 - Judgement, para. 133, p. 40.
147 - Cross-appellant's brief, pp. 139-141 (emphasis in original).
148 - *Aleksovski* appeal judgement, para. 178, p. 73. See also *inter alia*, *Kupreskic* trial judgement, 14 January 2000, para. 841, p. 314, *Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998 ("the *Furundzija* trial judgement"), para. 240, pp. 91-92, *Prosecutor v. Tihomir Blaskic*, Case No.: IT-95-14-T, 3 March 2000 ("the *Blaskic* trial judgement"), para. 760, pp. 248-249.
149 - *Delalic* appeal judgement, para. 814, p. 292.
150 - Cross-appellant's brief, pp. 129-138. He refers specifically to *Prosecutor v. Drazen Erdemovic*, Case No.: IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, and *Prosecutor v. Georges Ruggiu*, Case No.: ICTR-97-32-I,

Judgement and Sentence, 1 June 2000.
151 - Appeal transcript, 23 February 2001, p. 175.
152 - *Ibid.*.
153 - Judgement, para. 127, p. 39 (footnote omitted).
154 - Appeal transcript, 23 February 2001, pp. 193-195 (closed session).
155 - Judgement, para. 127, p. 39.
156 - Skeleton argument, para. 6.2(iv), p. 6.
157 - Appeal transcript, 23 February 2001, p. 177.
158 - *Ibid.*. Counsel cited *Landzo* (aged 19), *Erdemovic* (aged 23) and F*urundzija* (aged 23) in support as well as *Blaskic* trial judgement, para. 778, p. 255, and *Furundzija* trial judgement, para. 284, p. 107.
159 - Judgement, para. 124, p. 38.