

حکمان هامان تصدرهما المحكمة الخاصة بمجرمی الحرب فی یوغسلافیا السابقة

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الحكم الأول

قضية راديسلاف كرستيش

من القضايا التي نظرتها محكمة مجرمي الحرب في يوغسلافيا السابقة (*) قضية الجنرال كرستيش Krstic الذي اتهم بإرتكابه جرائم إبادة الجنس ، وبعض الجرائم ضد الإنسانية (كالقتل والمعاملة القاسية واللاإنسانية ، وأرهاب المدنيين المسلمين في البوسنة وترحيلهم) وانتهاك قوانين وأعراف الحرب عندما تم استيلاء الصرب على سربرينيتشا في يوليو ١٩٩٥ رغم إعلان تلك المنطقة "منطقة آمنة" . فقد تم ترحيل أكثر من ٢٥٠٠٠ مسلم إلى المناطق الأخرى الموجودة تحت سيطرة المسلمين ، وتم إعدام ما بين ٧٠٠٠ إلى ٨٠٠٠ مسلم من الرجال القادرين على حمل السلاح^(١) . وقد انتهت المحكمة إلى الحكم عليه بعقوبة السجن لمدة ٤٦ سنة .

(*) كانت دائرة المحكمة مشكلة من القاضى أليمرو رودر يجيز رئيسا ، والقاضى فواد رياض والقاضى بتريشيا والد .

(١) وصفت المحكمة ما حدث بقولها أنه لا يمكن وصفه ، وحرفيا قالت أن تلك الأحداث: "defy description in their horror and their implicatoins for mankind's capacity to revert to acts of brutality under the stresses of conflict" "International Tribunal for the prosecuion of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991, case No IT - 98 - 33- T, August 2001 , p. 1, 252 .

ويمكن من قراءة حكم المحكمة استنتاج العديد من المبادئ الهامة ،
وهي:

أولاً : أن خطورة الجرائم المرتكبة تحددها العديد من العوامل ، منها
مداها وكيفية تنظيمها والسرعة التي تم بها ارتكابهات (إذ تم ارتكاب الجرائم
المذكورة أعلاه فقط خلال عشرة أيام) (١) .

ثانياً : أن شغل المتهم لمنصب رفيع في الجيش (كونه الرجل الثاني) ،
يعد ظرفاً مشدداً an aggravating factor ، لأنه يفترض علمه بما يحدث ،
ولاستغلاله وضعه هذا في ارتكاب الجرائم التي وقعت (٢) .

قالت المحكمة الخاصة بمجرمي الحرب، في يوغسلافيا السابقة (قضية
كرستيش) أن الغرض من الحكم على مرتكبي الإنتهاكات الخطيرة للقانون
الدولي الإنساني ، يتمثل في أمرين :

“The need to punish an individual for the crimes committed and
the need to deter other individuals from committing similar crimes” (Case
No. IT – 98-33-T, 2 August 2001 , p. 243, para. 693).

ثالثاً : أن إصرار الشخصى وعناده obstinacy وعدم تسليمه بما ارتكبه
من جرائم خطيرة ، رغم وضوح الأدلة وتعددتها يدل على عدم توافر أى ندم
alack of remorse بخصوص ما ارتكبه من أفعال (٣) . ولا شك أن لذلك أثره
على تكوين عقيدة المحكمة وعلى العقوبة التي توقعها .

رابعاً : أن القائد يكون مسئولاً عن أفعال مرؤوسيه إذا أتخذ موقفاً سلبياً
أو آثر الصمت تجاه الجرائم التي يرتكبونها (٤) .

خامساً : أن تعدد الجرائم المرتكبة بهدف إجرامى واحد ، وخلال حملة

(٢) انظر نفس المرجع ، ص ٢٥٢ ، الفقرة ٧٢٠ .

(٣) نفس المرجع ، ص ٢٥٣ ، الفقرة ٧٢١ .

(٤) المرجع السابق ، ص ٢٥٣ ، الفقرة ٧٢٢ .

(٥) قالت المحكمة (نفس المرجع ، ص ٢٥٣-٢٥٤ ، الفقرة ٧٢٤) :

“General Krstic remained largely passive in the face of his
knowledge of what was going on .. he kept silent and even expressed
sentiments lionising the Bosnian serb campaign in serbrenica”

واحدة ، وفي منطقة جغرافية محددة وفي فترة زمنية قصيرة ، يستوجب إصدار حكم واحد بعقوبة إجمالية واحدة^(٦) .

الحكم الثانى

قضية كفوكا ، كوس ، راديش ، زيجيش ، برকাশ

نظرت هذه القضية أيضا نفس الدائرة التى نظرت القضية المذكورة أعلاه .

والقضية تتعلق بإرتكاب العديد من الجرائم مثل القتل والتعذيب ، والأغتصاب الجنسى ، والإذلال والاحتجاز فى أماكن غير لائقة إنسانيا .

ويمكن من قراءة الحكم استنتاج المبادئ التالية :

أولاً : أن التعاون مع المحكمة ، والإدلاء طواعيه بأدلة مؤيدة للإتهام ، تعد من الظروف المخففة للعقاب^(٧) .

ثانياً : أن كون الشخصيت ذا مركز هام ، ومشاركته فى ارتكاب الجرائم ، بل واعتباره أنها تسلمة an entertainment يستوجب تشديد العقاب عليه^(٨) .

ثالثاً : أن دخول المعسكر الذى يوجد فيه الأسرى أو المتجزين بغرض ارتكاب الجريمة يستوجب العقاب ولو كان تحت تأثير السكر والذى لا يمكن اعتباره ظرفا مخففا ، بل هو ظرف مشدد^(٩) .

(٦) نفس المرجع ، ص ٢٥٤ ، الفقرة ٧٢٥ .

(٧) راجع القضية رقم :

IT - 98-30/1-T,2 Nou. 2001, p. 199, para. 716 .

(٨) نفس المرجع ، المرجع ، ص ٢٠٣ ، الفقرات ٧٤١-٧٤٥ .

(٩) نفس المرجع ، ص ٢٠٣-٢٠٤ ، الفقرتان ٧٤٧-٧٤٨ .

مقتطفات من الحكم الأول

8. The Execution of the Bosnian Muslim Men from Srebrenica

66. The Bosnian Muslim men who had been separated from the women, children and elderly in Potoari (numbering approximately 1,000) were transported to Bratunac and subsequently joined by Bosnian Muslim men captured from the column. No discernible effort was made to keep the prisoners from Potocari and the men captured from the column in woods separate. These men were held in various locations, such as an abandoned warehouse,⁽¹⁰⁾ an old school⁽¹¹⁾ and even in the buses and trucks that had brought them there.⁽¹²⁾ During the nights, individual prisoners in Bratunac

were called out, and cries of pain and gunfire could be heard.⁽¹³⁾ After being detained in Bratunac for between one and three days, the prisoners were transported elsewhere, as the buses used to evacuate the women, children and elderly from Potocari became available.

67. Almost to a man, the thousands of Bosnian Muslim prisoners captured, following the takeover of Srebrenica, were executed. Some were killed individually or in small groups by the soldiers who captured them and some were killed in the places where they were temporarily detained. Most, however, were slaughtered in carefully orchestrated mass executions, commencing on 13 July 1995, in the region just north of Srebrenica. Prisoners not killed on 13 July 1995 were subsequently bussed to execution sites further north of Bratunac, within the zone of responsibility of the Zvornik Brigade. The large-scale executions in the north took place between 14 and 17 July 1995.

68. Most of the mass executions followed a well-established pattern. The men were first taken to empty schools or warehouses. After being detained there for some hours, they were loaded onto buses or trucks and taken to another site for execution. Usually, the execution fields were in isolated locations. The prisoners were unarmed and, in many cases, steps had been taken to minimise resistance, such as blindfolding them, binding their wrists behind their backs with ligatures or removing their shoes. Once at the killing fields, the men were taken off the trucks in small groups, lined up and shot. Those who survived the initial round of gunfire were individually shot with an extra round, though sometimes only after they had been left to suffer for a time.⁽¹⁴⁾ Immediately afterwards, and

(10) Witness N. T. 2801.

(11) Witness I, T. 2374

(12) Witness N. T. 2802; Witness I, T. 2374 (old school).

(13) Witness L, T. 2668; Witness N. T. 28(0)4; Witness Q. T. 2957; Witness I, T. 2377.

(14) See, e.g., Witness Q. T. 3033, 3035-3036; Witness L. T. 2690 (when a wounded man at the Orahovac site asked to be finished off, the Serb soldier replied "slowly, slowly").

sometimes even during the executions, earth moving equipment arrived and the bodies were buried, either in the spot where they were killed or in another nearby location.

69. At several of the sites, a few wounded people survived by pretending to be dead and then crawled away. The Trial Chamber heard from some of these survivors about their ordeals. It also heard from a member of the VRS who participated in one of the largest executions, which took place on 16 July 1995.⁽¹⁵⁾

70. In addition to being an unspeakable human evil, the decision to execute these Bosnian

Muslim men is unfathomable in military terms. As Mr. Richard Butler (Chief Warrant Officer Three All Source Intelligence Technician with the United States Army), the Prosecution's military expert, pointed out:

it is hard to envision a better bargaining chip in dealing with the political authorities of certainly the BiH government and of the International Community than having 10,000 to 15000 Muslim men in the middle of Potocari in a legitimate prisoner of war facility under the control or under the supervision of certainly the UN troops that were there and the ICRC at a point in time. That is the ultimate bargaining chip, to be able to get significant political leverage from people, one would think, and this chip was thrown away for another reason.

9. Forensic Evidence of the Executions

71. The extensive forensic evidence presented by the Prosecution strongly corroborates important aspects of the testimony of survivors from the various execution sites. Commencing in 1996, the Office of the Prosecutor (hereafter "OTP") conducted exhumations of 21 gravesites associated with the take-over of Srebrenica: four in 1996 (at Cerska, Nova Kasaba, Orahovac (also known as Lazete 2) and Branjevo Military Farm (Pilica)); eight in 1998 (Petkovci Dam, Cancari Road 12, Cancari Road 3, Hodzic'i Road 3, Hodzic'i Road 4, Hodzic'i Road 5, Lipje 2, Zeleni Jadar 5); five in 1999 (Kozluk, Nova Kasaba, Konjevic' Polje 1, Konjevic Polje 2, and Glogova 2);⁽¹⁶⁾ and four in 2000 (Lazete 1,

(15) See generally the discussion *Infra* paras. 195-253.

(16) See P 140 D. Manning, *Srebvenica Investigation: Summary of Forensic Evidence- Execution Points and Mass Graves*, 16 May 2000 (hereafter "Manning Report") p. 00950906

Lazete 2C,⁽¹⁷⁾ Ravnice and Glogova 1). of the 21 gravesites exhumed, 14 were primary gravesites, where bodies had been put directly after the individuals were killed. Of these, eight were subsequently disturbed and bodies were removed and reburied elsewhere, often in secondary gravesites located in more remote regions.⁽¹⁸⁾ Seven of the exhumed gravesites were secondary burial sites.⁽¹⁹⁾ The OTP retained ballistics, soil analysis and materials analysis, experts to comparatively examine materials and residues found in the primary and secondary gravesites.⁽²⁰⁾ As a result of these analyses, links were discovered between certain primary gravesites and certain secondary gravesites and these are considered in further detail below.

72. The Prosecution called eight witnesses to give evidence before the Trial Chamber about the exhumations and the resulting forensic findings.⁽²¹⁾ In addition, the Trial Chamber received volumes of written reports prepared by the experts who conducted the OTP investigations. In response, the Defence filed two reports by a forensic expert, Dr. Zoran Stankovic.⁽²²⁾

(17) This gravesite is part of the Lazete 2 site exhumed in 1996, but is treated as a separate site for present purposes.

(18) Manning Report, p. 00950925 and D. Manning, Srebrenica Investigation: Summary of Forensic Evidence-Mass Graves Exhumed in 2000, February 2001 (hereafter "Additional Manning Report") p 7601. The Additional Manning Report was filed as part of the "Motion to Reopen the Prosecutor's Case for the Limited Purpose of Introducing Four Expert Reports and a Summary Report of Fresh Exhumations Evidence" dated 15 March 2001. The Trial Chamber issued an oral order that these four expert's reports be admitted into evidence on 4 April 2001. See T. 9423. The Report was subsequently tendered as P 897.

(19) Additional Manning Report, p. 7601.

(20) See P 144 (Laboratory Report on Automated Ballistic Comparison, prepared by United States Bureau of Alcohol, Tobacco and Firearms, Forensic Science Laboratory, 24 February 2000); P 179 (Statement of Antony G. Brown, Palynologist 6 January 1998); P 180 (Statement of Antony G Brown, Palynologist 26 February 1999); P 143 (Report on Textile Investigation, prepared by Ing. S.E. Maljaars, Ministry of Justice, Netherlands Forensic Institute, 11 February 2000). See also Mr. Dean Manning (hereafter "Manning"), T. 3593.

(21) Professor Jose Baraybar (hereafter "Baraybar") T. 3781-3895; Professor Helge Brunborg, (hereafter "Brunborg") T. 4036-4100; Dr. John Clark, (hereafter "Clark") T. 3896-3972; Professor William Haglund, (hereafter "Haglund") T. 3723-3780; Dr. Christopher Lawrence, (hereafter "Lawrence") T. 3974-4034; Manning, T. 3542-3626, 41414150; Mr. Jean-Rene Ruez, (hereafter "Ruez") T. 3465-3541; and Professor Richard Wright, (hereafter "Wright"), T. 3632-3721.

(22) D 172 (Forensic Opinion dated 17 October 2000, by Doc. Dr. sc. Med. Zoran Stankovic, Specialist in Forensic Medicine, permanent Expert for the area of Forensic Medicine pursuant to Ruling No. 740/0373/98 of the Ministry of Justice of Serbia, Institute of Forensic Medicine-VMA (hereafter "Stankovic Report") and D 172 (Forensic Opinion dated 18 April 2001 by Doc. Dr. sc. Med. Zoran

73. The forensic evidence supports the Prosecution's claim that, following the take-over of Srebrenica, thousands of Bosnian Muslim men were summarily executed and consigned to mass graves. Although forensic experts were not able to conclude with certainty how many bodies were in the mass-graves, due to the level of decomposition that had occurred and the fact that many bodies were mutilated in the process of being moved from primary to secondary graves by mechanical equipment, the experts were able to conservatively estimate that a minimum of 2,028 separate bodies were exhumed from the mass-graves.⁽²³⁾

74. Identity documents and belongings, found in most of the exhumed graves, suggest that the victims were linked with Srebrenica. Among the items found were license cards and other papers with references to Srebrenica.⁽²⁴⁾ In some cases, investigators were able to positively identify bodies in the graves as former Srebrenica residents on the basis of distinctive personal items found with the bodies such as jewellery,⁽²⁵⁾ artificial limbs⁽²⁶⁾ and photographs.⁽²⁷⁾ Other artefacts found at the majority of the gravesites, such as verses from the Koran, suggest the presence of victims with Muslim religious affiliation.⁽²⁸⁾ It is also of note that the sex distribution of the persons listed as missing from Srebrenica, on the International Committee of the Red Cross (ICRC) list (crossreferenced with other sources), correlates with the sex distribution of the bodies exhumed from the graves.⁽²⁹⁾ Professor Helge Brunborg, a Prosecution demographics expert, testified that the overwhelming majority of people registered as missing from Srebrenica are men.⁽³⁰⁾ The forensic examinations of the gravesites associated with Srebrenica reveal that only one of the 1,843 bodies for which sex could be

Stankovic, Specialist in Forensic Medicine, permanent Expert for the area of Forensic Medicine pursuant to Ruling No. 740/0373/98 of the Ministry of Justice of Serbia, Institute of Forensic Medicine-VMA, (hereafter "Additional Stankovic Report").

(23) Additional Manning Report p. 7614.

(24) Manning, T. 3579-3580, 3588-3592. Identification items uncovered during the exhumations conducted in 2000 further revealed the presence of individuals listed as missing by the ICRC list cross-referenced with other sources. See Additional Manning Report, p. 7600-7597.

(25) P 132/95, and P 132/95A. See also Manning T. 3580-3582.

(26) P 132/93, and P 132/93A. See also Manning, T. 3583-3584.

(27) P 132/1, and P 132/18. See also Manning, T. 3589-3590, and 3592.

(28) p 132/110. See also Manning, T. 3588-3589. Artefacts demonstrating Muslim religious affiliation were also identified in three of the gravesites exhumed in 2000. Additional Manning Report pp. 7600-7597.

(29) Brunborg, T. 4071.

(30) Brunborg, T- 4070

determined was female.⁽³¹⁾ Similarly, there is a correlation between the age distribution of persons listed as missing and the bodies exhumed from the Srebrenica graves: 26.4 percent of persons listed as missing were between 13-24 years and 17.5 percent of bodies exhumed fell within this age group; 73.6 percent of persons listed as missing were over 25 years of age and 82.8 percent of bodies exhumed fell within this age group.⁽³²⁾

75. The results of the forensic investigations suggest that the majority of bodies exhumed were not killed in combat; they were killed in mass executions. Investigators discovered at least 448 blindfolds on or with the bodies uncovered during the exhumations at ten separate sites.⁽³³⁾ At least 423 ligatures were located during exhumations at 13 separate sites.⁽³⁴⁾ Some of the ligatures we made of cloth and string, but predominately they were made of wire.⁽³⁵⁾ These ligatures a blindfolds are inconsistent with combat casualties. The Prosecution also relied on forensic eviden that the overwhelming majority of victims located in the graves, for who a cause of death could determined, were killed by gunshot wounds.⁽³⁶⁾ The exhumations also revealed that some of t victims were severely handicapped and, for that reason, unlikely to have been combatants.⁽³⁷⁾

76. Upon reviewing the Prosecution's forensic evidence, the Defence forensic

(31)Baraybar, T.3811-3812. Additional Manning Report, p. 7613.

(32)P 276 (H. Brunborg and H. Urdal, The Report'on the Number of Missing and Dead from Srebrenica), p. 00926384, Figure 3. This figure only includes exhumations conducted up to the year 2000.

(33)The sites were: the primary grave at Branjevo Military Farm and the related secondary grave of Cancari Road 12; the primary grave at Orahovac (known as Lazete 2), and the three connected secondary graves at Hodzic'i Road 3, Hodzic'i Road 4 and Hodzic'i Road 5; and the Kozluk grave and the associated secondary grave at Cancari Road 3. Manning T.3569-3570. In addition, during the exhumations conducted in 2000, blindfolds were found at Lazete 2C and Lazete 1. Additional Manning Report, p. 7601.

(34)The sites were: the primary grave at Cerska; the primary grave of Nova Kasaba exhumed in 1996; the primary gra of Orahovac (Lazete 2) and its related secondary site of Hodzifi Road 5; the primary grave of Branjevo Military Farl and the related secondary grave at Cancari Road 12; the primary site of Petkovci Dam and its related site of Liplje 2; to primary grave of Kozluk and its associated secondary grave of Cancari Road 3; and the secondary site of Zeleni Jadar Manning, T. 3579-3576. In addition, during the exhumations conducted in 2000, ligatures were found at Lazete 2 and Glogova 1. Additional Manning Report, p 7601.

(35)Manning, T. 3576.

(36)Manning, T. 3565. The results of the additional exhumations conducted in 2000 continued to reflect this patter See Additional Manning Report.

(37)See e.g. P 219 (an individual with a prosthetic leg and his hands tied behind his back). See generally, Lawrence, 3987-3989, and Clark, T. 3912-3913, 3939-3940.

expert, Dr. ZorC Stankovic', argued that "some mass graves originated from the bodies of the persons who lost the lives in mutual armed conflicts of the warring sides, and that in some graves, where the cases of sure execution were registered, there were also...bodies killed in combat..."⁽³⁸⁾ He particular criticised the methodology employed during some of the Prosecution's forensic investigations in cause of death.⁽³⁹⁾ Certainly, at those sites where no blindfolds or ligatures were found during exhumations, the evidence that the victims were not killed in combat was less compelling.⁽⁴⁰⁾ Significantly, some of the gravesites located in the Nova Kasaba and Konjevic Polje area, when intense fighting took place between the Bosnian Serb and Bosnian Muslim forces, on 12 and 13 July 1995, were amongst those where very few blindfolds and ligatures were uncovered.⁽⁴¹⁾ The Defence expert, Dr. Stankovic' did not however, fundamentally challenge the substantive findings of the Prosecution experts and accepted that the exhumations were conducted by experts with "substantial professional experience and adequate technical, scientific and moral integrity."⁽⁴²⁾

77. The Trial Chamber cannot rule out the possibility that a percentage of the bodies in the gravesites examined may have been of men killed in combat. Overall, however, the forensic evidence presented by the Prosecution is consistent with the testimony of witnesses who appear before the Trial Chamber and recounted the mass execution of thousands of Bosnian Muslim men at Cerska Valley, Kravica Warehouse, Orahovac, Branjevo Farm, Petkovci Dam and Kozluk.⁽⁴³⁾

78. Most significantly, the forensic evidence presented by the Prosecution also demonstrates that, during a period of several weeks in September and early October 1995, Bosnian Serb forces dug up many of the primary mass gravesites and reburied the bodies in still more remote locations.⁽⁴⁴⁾ Forensic tests have linked certain primary gravesites and certain secondary gravesites, namely: Branjevo Military Farm and Cancari Road 12; Petkovci Dam and Liplje 2;

(38)Stankovic Report, p 13. See also Additional Stankovic' Report, p 8174.

(39)Stankovic Report, p 10- 11.

(40)Clark, T. 3958.

(41)Manning Report, T. p. 00950924. See also the Additional Manning Report p. 7606 (regarding the Ravnice primary grave, which is also located close to the Konjevic Polje to Bratunac Road, and in which no ligatures or blindfolds were uncovered. In addition, this is an undisturbed primary gravesite, which further suggests that the victims may have been combat casualties. See the discussion *Infra* para. 78).

(42)Stankovic Report, at p. 11.

(43)The statistics relating to the forensic examinations conducted at these individual gravesites will be considered more closely in the Part IIB

(44)Ruez, T- 3534.

Orahovac (Lazete 2) and Hodzicti Road 5; Orahovac (Lazete 1) and Hodzicti Road 3 and 4; Glogova and Zeleni Jadar 5; and Kozluk and Cancari Road 3.⁽⁴⁵⁾

The reburial evidence demonstrates a concerted campaign to conceal the bodies of the men in these primary gravesites, which was undoubtedly prompted by increasing international scrutiny of the events following the take-over of Srebrenica. Such extreme measures would not have been necessary had the majority of the bodies in these primary graves been combat victims. The Trial Chamber also notes that General Krstic' himself did not contest the exhumation evidence presented by the Prosecution about the existence of the mass graves containing the bodies of "victims of Srebrenica".(46)

79. Overall the Trial Chamber finds that the forensic evidence presented by the Prosecution provides corroboration of survivor testimony that, following the take-over of Srebrenica in July 1995, thousands of Bosnian Muslim men from Srebrenica were killed in careful and methodical mass executions.

(45)Manning, T. 3614-3615 and see also Additional Manning Report p. 7601.

(46)Krstic T. 6489

1 n The Number of Men Executed by the Bosnian Serb Forces Following the Take-over of Srebrenica in July 1995

80. It is impossible to determine with precision the number of Bosnian Muslim men killed by Bosnian Serb forces following the take-over of Srebrenica in July 1995. During the course of the exhumations conducted by the OTP, the process of identifying the number of bodies was complicated by the fact that, in the course of being removed from primary gravesites to secondary gravesites, the corpses were broken up and body parts became intermingled. However, as already noted, experts were able to conservatively determine that the minimum number of bodies in the graves exhumed was 2028.⁽⁴⁷⁾ Although the Trial Chamber cannot dismiss the possibility that some of the exhumed bodies were killed in combat, it accepts that the majority of the victims were executed. Eighteen additional graves linked with Srebrenica have been located but not yet exhumed. Based on preliminary examinations conducted by the OTP, all of these sites contain human remains and it is expected that the total number of bodies found and linked with Srebrenica will significantly increase as these sites are exhumed.⁽⁴⁸⁾

81. The number of people still listed as missing from Srebrenica in July 1995 provides further guidance as to the likely number of men executed. Professor Brunborg testified that, conservatively estimated, a minimum of 7,475 persons from Srebrenica are still listed as missing, based on the cross-referencing of ICRC lists and other sources and that it is likely that the vast majority of these missing people are deceased.⁽⁴⁹⁾ In determining the number of people missing following the take over of Srebrenica, checks were made to ensure that people who were listed as missing prior to July 1995 were excluded. In particular, steps were taken to exclude ABiH soldiers who were reported as killed, wounded, captured or missing in action prior to July 1995 to the extent that was possible. In over 180 cases, however, this could not be done with certainty due to a lack of adequate

(47)As Baraybar (a Prosecution forensic expert) pointed out, the minimum number of individuals within the grave is a very conservative estimate. Baraybar, T. 3811

(48)Baraybar, T. 3844. Four additional gravesites were exhumed in 2,000, reducing the number of unexhumed sites from 22 to 18. Prosecution experts estimate that a minimum of 2,571 further bodies are located in sites yet to be exhumed. On the basis of their investigations to date, the Prosecution estimates that the total number of bodies detected in the mass graves is 4,805. See Additional Manning Report, p. 7614. This estimate was, however, contested by the Defence. See Additional Stankovic' Report, p. 8179.

(49)Brunborg, T. 4067. The final list prepared by the OTP refers to 7,481. This discrepancy is explained by the fact that information from the International Committee of the Red Cross revealed that six people on the list have been found alive, but the ICRC was not at liberty to disclose the names.

persona data about the missing persons. ⁽⁵⁰⁾

82. Nonetheless, the evidence given by witnesses, as corroborated by the forensic and demographics evidence presented by the OTP, strongly suggests that well in excess of 7,000 people went missing following the take-over of Srebrenica. The correlation between the age and sex of the bodies exhumed from the Srebrenica graves and that of the missing persons support the proposition that the majority of missing people were, in fact, executed and buried in the mass graves.

83. There are other indications on the Trial Record that Bosnian Serb forces executed thousand of Bosnian Muslim men following the take-over of Srebrenica. Estimates of the number of prisoners detained and killed at diverse locations throughout the Drina Corps zone of responsibility between 13 and 16 July 1995 will be considered in Part II B. There are also fragments of information from VRS communications about the possible magnitude of the executions. A intercepted conversation, at 1730 hours on 13 July 1995, indicates that about 6,000 men had been captured from the Bosnian Muslim column by that time. ⁽⁵¹⁾ Consistent with this, around 14 July Colonel Radislav Jankovic' (from the VRS Main Staff), during a conversation with a Dutch Bat officer about the attempted breakthrough by the 28th Division, stated that the VRS had already taken 6,000 prisoners of war. ⁽⁵²⁾ Other intercepted VRS conversations reveal that, on 15 July 1995, midway through the executions, at least 3,000-4,000 Bosnian Muslim prisoners were being detained by the VRS. ⁽⁵³⁾ Further, on 18 July 1995, two unidentified Bosnian Serbs were heard in an intercepted conversation reflecting on the recent events in Eastern Bosnia, including matters relating to the Bosnian Muslim column. ⁽⁵⁴⁾ One participant said that of the 10,000 military aged men who were in Srebrenica, "4,000-5,000 have certainly kicked the bucket". Mr. Butler pointed out that this number was too high to refer only to combat casualties and concluded that this figure must include the men who were executed in the zone of the Zvornik Brigade. ⁽⁵⁵⁾

84. The Trial Chamber is satisfied that, in July 1995, following the take-over of Srebrenica, Bosnian Serb forces executed several thousand Bosnian Muslim

(50) Brunborg, T. 4078-4079.

(51) p 523.

(52) Franken, T. 2050.

(53) P 478 (A conversation intercepted at 1000 hours in which Colonel Beara stated he still had 3,500 "parcels" to distribute.); P 675 (Interim Combat Report dated 18 July 1995, sent by the Commander of the Zvornik Brigade stating that "someone brought in 3,000 Turks of military age and placed them in schools in the municipality").

(54) P684.

(55) Butler, T. 5205

men. The total number is likely to be within the range of 7,000 -8,000 men.

11. A Plan to Execute the Bosnian Muslim Men of Srebrenica

85. A concerted effort was made to capture all Muslim men of military age. In fact, those captured included many boys well below that age and elderly men several years above that age that remained in the enclave following the take-over of Srebrenica. These men and boys were targeted regardless of whether they chose to flee to Potocari or to join the Bosnian Muslim column. The operation to capture and detain the Bosnian Muslim men was well organised and comprehensive. The Trial Chamber did, however, hear evidence of some exceptions to this general plan. In particular, on 15 and 16 July 1995, during intensive combat between the Bosnian Muslim column and the Zvornik Brigade, the Commander of that Brigade, Colonel Pandurevic', without consultation with his superiors, made a decision to let a portion of the men in the armed head of the Bosnian Muslim column through to Tuzla.⁽⁵⁶⁾ However, this decision was apparently made out of desperation and in light of the Zvornik Brigade's inability to contain the column.

86. There is also evidence that some wounded Bosnian Muslim men were accorded proper treatment and evacuated under medical supervision.⁽⁵⁷⁾ This, argued the Defence, was evidence that the Bosnian Serb forces did not intend to kill all of the military aged Bosnian Muslims of Srebrenica, but rather only those who posed a potential military threat.⁽⁵⁸⁾ The treatment accorded to these men stands out as an anomaly in the treatment of the Bosnian Muslim men following the take-over of Srebrenica in July 1995. It may perhaps be explained, to some degree, as a strategy on the part of the Bosnian Serbs to avoid attracting international suspicion, especially given that UN personnel were present in the enclave watching the treatment accorded to some of these wounded men in the first few days after the take-over of Srebrenica. For example, on 13 July, a report prepared by Colonel Jankovic' of the Main Staff noted that over 50 wounded Bosnian Muslims had been placed in the Bratunac hospital and that an UNPROFOR officer had stayed at the hospital to ensure the men were accorded proper treatment. Colonel Jankovic', however, was determined to "send him away tomorrow, under the pretext that his help is not necessary."⁽⁵⁹⁾ The

(56)Butler, T. 5105, 5128-5120, 5520-5522

(57).. Butler, T. 5513.

(58)Final Submissions of the Accused, 21 June 2001 (hereafter "Defence Final Brief"), para. 140.

(59)P 459. Colonel Jankovic' further noted "I think if we want to take over the enclaves of Zepa and Gorazde in the same way, it will be necessary to present the operation in Srebrenica in the media, so as to show that we had rendered adequate treatment to

evidence that a small number of wounded Bosnian Muslims were accorded proper treatment does not diminish the overwhelming evidence showing that the Bosnian Serb forces went to great lengths to seize Bosnian Muslim men at virtually every opportunity, whether or not they posed a military threat,⁽⁶⁰⁾ collected them together in detention centres and subsequently executed them.

87. The Trial Chamber finds that, following the take over of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave.

12. Widespread Knowledge of the Crimes

88. As early as 14 July 1995, reports of missing Bosnian Muslim men from Srebrenica began to surface in the international media.⁽⁶¹⁾ Around 15 July 1995, Witness DE, a Drina Corps officer, saw a television film clip showing captured men on a football pitch, presumably Nova Kasaba, while visiting Belgrade.⁽⁶²⁾ By 18 July 1995, news of the missing Bosnian Muslims from Srebrenica had become so widespread that the UN Secretariat wrote to the Special Representative of the Secretary

General in Bosnia stating:

You will, no doubt, have read and heard the extensive reports of atrocities committed by the Bosnian Serbs during their recent take-over of Srebrenica. While many of these reports emerge from refugees, they are widespread

the civilians, and even to soldiers who surrendered their weapons." There is evidence that, following the period of the mass-executions, wounded Bosnian Muslim men, who were in VRS custody, were properly treated. In a communication on 17 July 1995, the Commander of the Zvornik Brigade sought assistance from the Drina Corps Command to arrange for the removal of wounded Bosnian Muslim prisoners from the Bratunac health centre to Bijeljina. See P 370. Mr. Butler also testified that, by 22 July 1995, the policy of executing the Muslim prisoners had been abandoned. See Butler, T. 5233-5234, 5340, 5525-5526. Such a policy change is not surprising. By this time, word that the Bosnian Serbs had orchestrated mass executions of Bosnian Muslim men following the take-over of Srebrenica had been widely publicized

(60) See for example, the discussion *Infra* para. 216 about the capture of Bosnian Muslim men from buses at Tisc'a.

(61) See e.g. P 113-3, dated 14 July 1995 (story from China); P 114/1, dated 17 July 1995 (story from Banja Luka entitled "Zametica Denies Maltreatment of Srebrenica Muslims"); P 113/5, dated 24 July 1995, (story entitled "Mazowiecki on Serb Human Rights Abuses re Srebrenica Missing"; P 113/6 dated 27 July 1995 (story regarding Mazowiecki's resignation as UN envoy on the grounds that he could no longer take part in the "fictional" defence of human rights in the former Yugoslavia).

(62) Defence Witness DE, T. 7736

and consistent, and have been given credence by a variety of international observers, including UNHCR. ⁽⁶³⁾

89. Shortly thereafter, the missing Bosnian Muslim men became a factor in the negotiations between the VRS and the ABiH at Zepa, the other UN 'safe area' that had come under attack by the VRS on 14 July 1995, following the take-over of Srebrenica. During the course of negotiations between the opposing parties at Zepa, Bosnian Muslim representatives wanted guarantees that the men who were evacuated would be transported in safety and specifically cited the missing men of Srebrenica as an example of why the Bosnian Serb authorities could not be trusted.⁽⁶⁴⁾ The Bosnian Muslim representatives refused Bosnian Serb demands for an "all for all" prisoner-exchange until the Bosnian Serbs accounted for the 6,800 men they believed were missing from Srebrenica at that time.⁽⁶⁵⁾

13. The Impact of the Crimes on the Bosnian Muslim Community of Srebrenica

90. The impact of these events on the Bosnian Muslim community of Srebrenica has been catastrophic. Most families were dismembered and irreparably rent. In the words of one former Srebrenica resident:

With the fall of Srebrenica . . . from the face of the earth were wiped off three generations of men in the cruellest way possible. I can corroborate it by a fresh example from my family. My father-in-law, Omer Malagic', born in 1926, his three sons, one of whom was my husband, Salko Malagic', born in 1948. His two brothers, Osman Malagic', born in 1953; Dzafer Malagic' born in 1957. His three grandsons, that is my two sons Elvir Malagic' born in 1973; Admir Malagic' born in 1979- and my brother-in-law's son, Samir Malagic's son, born in 1975. There are hundreds of such families in Srebrenica...⁽⁶⁶⁾

91. In a patriarchal society, such as the one in which the Bosnian Muslims of Srebrenica lived,⁽⁶⁷⁾ the elimination of virtually all the men has made it almost impossible

(63) Secretary-General's Report, para. 390.

(64) Secretary-General's Report, para. 416.

(65) Secretary-General's Report, para. 400.

(66) Malagic', T. 1983-84.

(67) Witness DD, T. 5778 (testifying that her husband was the head of the household and was responsible for decision making on most matters, including the financial affairs of the family. Witness DD also testified that this system was typical of all families living in her community); Ms. Jasna Zecevic', (hereafter "Zecevic^"), T.5776, 5778-5779. (The witness, the director of Vive Zene (a non-governmental

for the Bosnian Muslim women who survived the take-over of Srebrenica to successfully re-establish their lives. Often, as in the case of Witness DD, the women have been forced to live in collective and makeshift accommodations for many years, with a dramatically reduced standard of living.⁽⁶⁸⁾ The pain and fear associated with having so many loved ones torn away makes it very difficult for those who survived to think of returning home (even if that were possible in practical terms) or even to exist as a cohesive family unit. In Witness DD's words:

...sometimes I also think it would be better if none of us had survived. I would prefer it.⁽⁶⁹⁾

The director of Vive Zene, a non-governmental organisation that provides psychosocial support for many women and children who survived the take-over of Srebrenica, testified that the vast majority of Bosnian Muslim women refugees have been unable to find employment.⁽⁷⁰⁾ Further, women forced to become the head of their households following the take-over of Srebrenica have great difficulties with the unfamiliar tasks of conducting official family business in the public sphere.⁽⁷¹⁾

92. Similarly, the adolescent survivors from Srebrenica face significant hurdles as they enter adult-hood. Few are employed⁽⁷²⁾ and returning to Srebrenica is not something these young people even talk about. As the Director of Vive Zene explained:

... their dream is just to go outside, far away from Bosnia. Just that.⁽⁷³⁾

Younger children who survived the take-over of Srebrenica have also developed adjustment problems, such as low levels of concentration, nightmares and flashbacks.⁽⁷⁴⁾ The absence of male role models is another factor that will inevitably have significant implications for Bosnian Muslim children from Srebrenica in years to come.⁽⁷⁵⁾

93. The Trial Chamber heard that the survivors of Srebrenica have unique impediments to their recovery and staff members at Vive Zene speak of the

organisation that provides psychosocial support for many Bosnian Muslim women and children who survived the take-over of Srebrenica) described the pre-war Srebrenica community as having a traditional patriarchal structure.)

(68) Witness DD, T. 5759-5760; Zecevic', T. 5779-5784.

(69) Witness DD, T. 5761. See also Zecevic', T. 5791-5793.

(70) Zecevic, T. 5783-5784

(71) Zecevic', T. 5787.

(72) Zecevic, T. 5791.

(73) Zecevic', T. 5797

(74) Ms. Teufika Ibrahimfendic' (hereafter "Ibrahimfendic), (coordinator of the Vive Zene multidisciplinary team), T. 5820-5826.

(75) Zecevic', T. 5797.

"Srebrenica Syndrome" as a new pathology category.⁽⁷⁶⁾ One of the primary factors giving rise to the syndrome is that, with few exceptions, the fate of the survivor's loved ones is not officially known: the majority of men of Srebrenica are still listed as missing. For Bosnian Muslim women it is essential to have a clear marital status, whether widowed, divorced or married: a woman whose husband is missing does not fit within any of these categories.⁽⁷⁷⁾ Moreover, on a psychological level, these women are unable to move forward with the process of recovery without the closure that comes from knowing with certainty what has happened to their family members and properly grieving for them.⁽⁷⁸⁾ The Trial Chamber also heard of the collective guilt experienced by women because they survived the events in Potocari and their husbands, brothers and fathers did not.⁽⁷⁹⁾ The level of trauma experienced by the women and children who were transported out of Srebrenica was assessed by Vive Zene as being "exceptionally high" and this, in large part, was attributed to the fact that the women and men had been separated following the take-over of Srebrenica.⁽⁸⁰⁾ This heartbreak and anguish is no better reflected than in the words of Witness DD whose young son was torn away from her in Potocari:

...I keep dreaming about him. I dream of him bringing flowers and saying, "Mother, I've come" I hug him and say, "Where have you been, my son?" and he says, "I've been in Vlasenica all this time".⁽⁸¹⁾

94. When asked why he thought the mass executions of Bosnian Muslim men took place

following the take-over of Srebrenica, General Halilovic' suggested that:

Methodologically speaking, Srebrenica is no different from some other parts of BosniaHerzegovina. It is true that it is significantly different in terms of the numbers of people that were executed. As to why it took place in the Drina River valley, I think the reasons can be found in the decisions issued by the Serbian Assembly in Banja Luka...I think that today there are more than 60 settlements of Bosniak population mainly who wish to go back to their homes, but those who were executed no longer have any chance of going back home, and that area was removed from the face of the earth. It was cleansed... and [it was] an area which was between two Serb

(76)Ibrahimfentic', T. 5817-5818.

(77) Zecevic', T. 5785-5786.

(78) Zecevic', T. 5792.

(79)Zecevic', T. 5793; Ibrahimfentic', T. 5841.

(80)Teufika Ibrahimfentic', T. 5814-5815.

(81)Witness DD, T. 5769

states.⁽⁸²⁾

14. Conclusions

95. Almost without exception, the witnesses who appeared before the Trial Chamber did not seriously contest that, following the take-over of Srebrenica, the mass killings described above actually occurred outside of combat activities and on the basis of orders given by high level Bosnian Serb officers or officials.⁽⁸³⁾ Nonetheless, in the words of Nuremberg Prosecutor Telford Taylor, it is "important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable...".⁽⁸⁴⁾ It is therefore imperative to document these "incredible events" in detail.

(82)Halilovic'. T. 9500

(83)Cy however, the comments of the Defence military expert, General Radinovic', "Mass casualties on the Muslim side are a result of actions which should be classified as combat activities, and not violence against civilians" D 160 (Prof. Dr. Radovan Radinovic', Military Expert Testimony of Srebrenica, 17 October 2000. (hereafter "Radinovic' Report"), para. 5.9.

(84)Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Volume I, p. 27.

D. Conclusions

419. Taking control of the Middle Podrinje area was a critical element of the Bosnian Serb strategy for military victory. At the time the removal of the Bosnian Muslim civilians from the enclave took place, General Krstic' was Chief of Staff of the Drina Corps, which was formed specifically for the purpose of pursuing Bosnian Serb territorial goals in Middle Podrinje. Despite his efforts to present himself as a soldier with no interest in politics and no ethnic hatreds, the Trial Chamber does not accept that General Krstic' was disinterested in measures being taken to cleanse the area of Bosnian Muslims. Certainly, General Krstic' was not a reluctant participant in the transportation of the Bosnian Muslim population out of the enclave, on 12 and 13 July 1995, although he appeared concerned to ensure that the operation was conducted in an orderly fashion. He simply wanted the civilian population out of the area and he had no interest in mistreating them along the way.

420. Additionally, the evidence presented to the Trial Chamber does not support the notion that General Krstic himself ever envisaged that the chosen method of removing the Bosnian Muslims from the enclave would be to systematically execute part of the civilian population. Rather, General Krstic' appears as a reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for the mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July 1995. Left to his own devices, it seems doubtful that General Krstic' would have been associated with such a plan at all. one Defence witness testified that, as news of the breakthrough by the Bosnian Muslim column filtered in, General Krstic' said to him "Let them pass, just so that this can be ended as it should."⁽¹¹¹⁰⁾

421. Nonetheless, in July 1995, General Krstic' found himself squarely in the middle of one of the most heinous wartime acts committed in Europe since the Second World War. The plan to execute the Bosnian Muslim men may not have been of his own making, but it was carried out within the zone of responsibility of the Drina Corps. Furthermore Drina Corps resources were utilised to assist with the executions from 14 July 1995 onwards. By virtue of his position as Drina Corps Commander, from 13 July 1995, General Krstic' must have known about this.

422. The Prosecution's case against General Krstic' was based on layer upon layer of circumstantial evidence as well as critical pieces of direct evidence, which reveals his developing knowledge of, and participation in, the executions. Although, on 11 or 12 July 1995, he had been appointed as Commander of the new VRS operation against Zepa, General Krstic' remained informed of events

(1110) Defence Witness DA, T.6928- 6929.

occurring back in Srebrenica. General Krstic' attended two meetings at the Hotel Fontana with General Mladic', relating to the fate of the Bosnian Muslim civilians from Srebrenica. Furthermore, he was involved in organising the transport of the Bosnian Muslim civilians from Potocari and, on 12 July 1995, was present in Potocari while the transportation operation was being carried out. General Krstic' remained fully informed of matters relating to the Bosnian Muslim column, including the capture and detention of the prisoners.

423. Although there is little evidence linking General Krstic' directly with the activity occurring in the Srebrenica area on 13 and 14 July 1995, the evidence shows that he was fully aware of these events. On 14 July 1995, General Krstic' was contacted about the crisis facing the Zvornik Brigade, which was simultaneously engaged in heavy combat with the armed head of the Bosnian Muslim column and trying to cope with the thousands of prisoners detained in schools throughout Zvornik. He immediately sent Colonel Pandurevic and his men back from Zepa to their zone of responsibility. General Krstic' knew frillll well the reasons for this urgent recall. In the following days, Colonel Pandurevic' reported back to the Drina Corps Command about the situation facing his Brigade, including matters relating to the prisoners and the executions. Furthermore, on 15 July 1995, when Colonel Beara contacted him to inform him that the Main Staff was unable to secure enough troops to continue with the executions, General Krstic' chose to farther assist in the commission of the crimes. On 15 July 1995, thousands of prisoners were still alive; had General Krstic' intervened at even that late date they might have been saved.

H. Criminal Responsibility of General Krstic

I. Introduction

600. The Prosecution alleges that General Krstic' is criminally responsible for his participation in the crimes charged in the indictment, pursuant to Article 7(1) of the Statute,⁽¹³³⁹⁾ which states that:

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

6(1). The Trial Chambers of the ICTY and the ICTR and the Appeals Chamber of the ICTY have identified the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute.⁽¹³⁴⁰⁾ The essential findings in the jurisprudence may be briefly summarised as follows:

"Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases⁽¹³⁴¹⁾;

- "Instigating" means prompting another to commit an offence;⁽¹³⁴²⁾

- "Ordering" entails a person in a position of authority using that position to convince another to commit an offence;⁽¹³⁴³⁾

"Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;⁽¹³⁴⁴⁾

- "Aiding and abetting" means rendering a substantial contribution to the commission of a crime;⁽¹³⁴⁵⁾ and

"Joint criminal enterprise" liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to

(1339) Para. 18 of the Indictment. In its Final Trial Brief (para. 27), the Prosecution makes reference to each head - except "committing" - mentioned in Article 7(1) as well as the "common purpose doctrine" (discussed below) as a basis for General Krstic's guilt.

(1340) See Article 6(1) of the Statute of the ICR. In its Final Trial Brief (para. 3), the Prosecution incorporates by reference its submissions on Article 7 in its Pre-Trial Brief (paras 13-86). Likewise, the Defence's submissions on Article 7 in its Pre-Trial Brief (paras 13-29) are incorporated in its Final Trial Brief (para. 2).

(1341) Akayesu Judgement, para. 480; Blaskic Judgement, para. 279; Kordic and Cerkez Judgement, para. 386.

(1342) Akayesu Judgement, para. 482; Blaskic' Judgement, para. 280; Kordic' and Cerkez Judgement, para. 387.

(1343) Akayesu Judgement, para. 483; Blaskic' Judgement, para. 281; Kordic' and Cerkez Judgement, para.388.

(1344) Tadic' Appeal Judgement, para. 188; Kunarac et al. Judgement, para.390.

(1345) Aleksovski Appeal Judgement, paras. 162-164.

commit a crime; ⁽¹³⁴⁶⁾

602. Since the Prosecution has not charged any specific head of criminal responsibility under Article 7(1) of the Statute, ⁽¹³⁴⁷⁾ it is within the discretion of the Trial Chamber to convict the Accused under the appropriate head within the limits of the Indictment and fair notice of the charges and insofar as the evidence permits ⁽¹³⁴⁸⁾ As to joint criminal enterprise liability, in its Final Trial Brief the Defence contends that it is not open to the Trial Chamber to apply this doctrine because it has not been pleaded in the Indictment. The Trial Chamber rejects this submission. The Prosecutor's Pre-trial Brief discussed this form of liability, specifically in the context of ethnic cleansing; ⁽¹³⁴⁹⁾ the Defence acknowledged this pleading in its Pre-trial Brief and did not object to the concept itself but only to some details of the legal submissions on the matter. ⁽¹³⁵⁰⁾ Moreover, the Trial Chamber finds that the "nature and cause of the charge against the accused" pleaded in the indictment contains sufficient references to his responsibility for the alleged crimes committed in concert with others. ⁽¹³⁵¹⁾

603. The Prosecution "also, or alternatively" alleges that General Krstic' incurs

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- (1346) Tadic' Appeal Judgement, paras. 185-229. The Appeals Chamber in the Tadic' Appeal Judgement interchangeably used several other terms, such as "common purpose" liability (Tadic' Appeal Judgement, para. 220), to denote the same form of participation. For reasons discussed below, the Trial Chamber proposes to apply the label "joint criminal enterprise" throughout this Judgement. Trial Chamber II recently discussed joint criminal enterprise liability in detail in Prosecutor v. Radoslav Brdanin and Momir Talic', Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-PT, 26 June 2001 (the "Talic'Decision").
- (1347) The Trial Chamber notes in this regard that the Appeals Chamber held that: "Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the nature and cause of the charge against him". Tfelebici Appeal Judgement, para. 351.
- (1348) Furundzija Judgement, para. 189; Kupreskic' Judgement, para. 746; Kunarac et al. Judgement, para. 388.
- (1349) Prosecutor's Pre-trial Brief, paras. 21-27. The Prosecution refers to joint criminal enterprise liability as "coperpetration"; the Appeals Chamber has in fact employed this term in this sense (Tadic' Appeal Judgement, paras. 196, 228; Furundzija Appeal Judgement, para. 118). The Prosecution further considers "co-perpetration" to be a form of "committing".
- (1350) Defence's Pre-trial Brief, paras. 18-19. See also para. 21 of the Prosecutor's Pre-trial Brief annexed to the Prosecutor's Submission of Agreed Matters of Law Presented During the Pre-trial Conference of 7 March 2000, dated 8 March 2000. On the Defence' s objection to the joint criminal enterprise doctrine, see para. ?? supra.
- (1351) See Indictment, e.g., paras. 6-11.

"command responsibility" for the crimes charged in the Indictment pursuant to Article 7(3) of the Statute.⁽¹³⁵²⁾ Pursuant to this provision:

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

604. According to the case law,⁽¹³⁵³⁾ the following three conditions must be met before a person can be held responsible for the acts of another person under Article 7(3) of the Statute:

- The existence of a superior-subordinate relationship ;
- The superior knew or had reason to know that the criminal act was about to be or had been committed; and

The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

605. The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime through his subordinates, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1).⁽¹³⁵⁴⁾ The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.

2. The criminal responsibility of General Krstic' for the crimes proved at trial

606. The Trial Chamber will now turn to the criminal responsibility of General Krstic' for the crimes proved at trial. The following discussion distinguishes between two sets of crimes:

- The humanitarian crisis and crimes of terror committed at Potocari and the subsequent forcible transfer of the women, children and elderly; and
- The mass executions of the military-aged Muslim men from Srebrenica.

(a) General Krstic's responsibility for the crimes committed at Potocari

607. The Trial Chamber characterises the humanitarian crisis, the crimes of terror and the forcible transfer of the women, children and elderly⁽¹³⁵⁵⁾ at Potocari

(1352) Para. 19 of the Indictment.

(1353) See, e.g., Blaskic'Judgement, para. 294; Kunarac et al. Judgement, para. 395.

(1354) Likewise, Kayishema and Ruzindana Judgement, para. 223; Blasvkić Judgement, para. 337.

(1355) Paras. 38-51, 337.

as constituting crimes against humanity, that is, persecution⁽¹³⁵⁶⁾ and inhumane acts.⁽¹³⁵⁷⁾

608. The evidence establishes that General Krstic', along with others, played a significant role in the organisation of the transportation of the civilians from Potocari. Specifically, the Trial Chamber has concluded that, on 12 July, General Krstic' ordered the procurement of buses and their subsequent departure carrying the civilians from Potocari. At some later stage, he personally Inquired about the number of buses already en rout. The Trial chamber has also found that General Krstic' ordered the securing of the road from Luke to Kladanj up to the tunnel where the people on the buses were to disembark. It has further been established that General Krstic' knew that this was a forcible, not a voluntary, transfer.⁽¹³⁵⁸⁾

609. The Trial Chamber has similarly concluded that General Krstic' was fully aware of the ongoing humanitarian crisis at Potocari as a result of his presence at the hotel Fontana meeting, on 11 July at 2300 hours, where General Mladic' and Colonel Karremans of Dutchbat discussed the urgency of the situation, and, at the meeting on 12 July, when General Mladic' decided that the VRS would organise the evacuation of the Bosnian Muslim women, children and elderly. Following this meeting, General Krstic was present himself at Potocari, for one to two hours, thus he could not help but be aware of the piteous conditions of the civilians and their mistreatment by VRS soldiers on that day.⁽¹³⁵⁹⁾

610. In light of these facts, the Trial Chamber is of the view that the issue of General Krstic's criminal responsibility for the crimes against the civilian population of Srebrenica occurring at Potocari is most appropriately determined under Article 7(1) by considering whether he participated, along with General Mladic' and key members of the VRS Main Staff and the Drina Corps, in a joint criminal enterprise to forcibly "cleanse" the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by Serbian forces.

611. According to the Appeals Chamber in the Tadic Appeal Judgement, for joint criminal enterprise liability to arise, three actus reus elements require proof:⁽¹³⁶⁰⁾

- (i) A plurality of persons;
- (ii) The existence of a common plan, which amounts to or involves the commission of a crime

(1356) Murder, cruel and inhumane treatment (including terrorization, destruction of personal property and forcible transfer) - count 6.

(1357) Forcible transfer - count 8.

(1358) Supra paras. 340, 344.

(1359) Supra paras. 340, 354

(1360) Tadic Appeal Judgement, para- 227

provided for in the Statute; the Appeals Chamber specified that ⁽¹³⁶¹⁾

There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

(iii) Participation of the accused in the execution of the common plan, ⁽¹³⁶²⁾ otherwise formulated as the accused's "membership" in a particular joint criminal enterprise. ⁽¹³⁶³⁾

612. The facts described in the preceding paragraphs compel the inference that the political and/or military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica, following the take-over of the enclave. From 11 through 13 July, this plan of what is colloquially referred to as "ethnic cleansing" was realised mainly through the forcible transfer of the bulk of the civilian population out of Potocari, once the military aged men had been separated from the rest of the population. General Krstić was a key participant in the forcible transfer, working in close co-operation with other military officials of the VRS Main Staff and the Drina Corps. ⁽¹³⁶⁴⁾ The *actus reus* requirements for joint criminal enterprise liability therefore have been met.

613. In defining the intent requirement, or *mens rea*, of joint criminal enterprise liability, the Appeals Chamber has distinguished between crimes committed in the execution of the agreed upon objectives of the criminal enterprise and crimes upon which the participants had not agreed but which were a natural and foreseeable consequence of the plan. ⁽¹³⁶⁵⁾ In this regard, the Trial Chamber notes that Trial Chamber II interpreted the relevant portion of the Tadić Appeal Judgement as follows: ⁽¹³⁶⁶⁾

(1361) Tadić Appeal Judgement, para. 227(ii). The Appeals Chamber reaffirmed this statement in the Furundžija Appeal Judgement, para. 119.

(1362) The Prosecution submits that it is not required that each participant fulfils different elements of the *actus reus* of the crime; it suffices that each participant makes an essential contribution to the execution of the crime (Prosecutor's Pre-Trial Brief, para. 23). In this respect, the Defence formulates its reservation to the joint criminal enterprise doctrine as follows: "it is necessary [...] to specify among the *actus reus* each individual act committed by each perpetrator." (Defence's Pre-Trial Brief, para. 18).

(1363) Talić Decision, para. 43.

(1364) *Supra* para. 344.

(1365) Tadić Appeal Judgement, para. 228.

(1366) Talić Decision, para. 31 (emphasis in original). Since members of the joint criminal enterprise may incur liability for crimes committed by other members which fall outside the object of the common plan, the Trial Chamber agrees that

The state of mind of the accused to be established by the prosecution accordingly differs according to whether the crime charged:

- (a) was within the object of the joint criminal enterprise, or
- (b) went beyond the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.

If the crime charged fell within the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged went beyond the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise.

614. In order to determine whether General Krstic' had the requisite mens rea for responsibility to arise under the joint criminal enterprise doctrine, the Trial Chamber must determine which crimes fell within and which fell outside the agreed object of the joint criminal enterprise to ethnically cleanse the Srebrenica enclave.

615. The object of the joint criminal enterprise implemented at Potocari on 12 and 13 July was firstly the forcible transfer of the Muslim civilians out of Srebrenica. That General Krstic' had the intent for this crime is indisputably evidenced by his extensive participation in it. Furthermore, the humanitarian crisis that prevailed at Potocari was so closely connected to, and so instrumental in, the forcible evacuation of the civilians that it cannot but also have fallen within the object of the criminal enterprise. When General Krstic' marched triumphantly into Srebrenica alongside General Mladic' on 11 July, he saw the town completely empty and soon found out, at least by the evening, that a huge number of the inhabitants had fled to Potocari and were crowded together in the UN compound and surrounding buildings. Although, by his own claim, he was the organiser of the military operation on Srebrenica, he had taken no action to provide food or water, nor to guarantee the security of the civilians inhabitants of the town. The Trial Chamber finds that General Krstic subscribed to the creation

the doctrine is best referred to as "joint criminal enterprise", rather than "common purpose" liability (Talic' Decision, para. 37). Furthermore, it is noteworthy that in regard to responsibility for a crime falling outside the object of the joint enterprise, the Talic' Decision explains that the requirement that such a crime be a "natural and foreseeable" consequence of the execution of the enterprise, "is an objective element of the crime, and does not depend upon the state of mind on the part of the accused". The requirement that the accused was aware that the commission of such a crime was a possible consequence of the execution of the enterprise, "is the subjective state of mind on the part of the accused which the prosecution must establish." Talic' decision, para. 30 (emphasis in original).

of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians. This is the only plausible inference that can be drawn from his active participation in the holding and transfer operation at Potocari and from his total declination to attempt any effort to alleviate that crisis despite his on the scene presence.

616. The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potocari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. Furthermore, given the circumstances at the time the plan was formed, General Krstic' must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women, children and elderly outside the enclave; General Krstic' was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by VRS or other armed forces.

617. In sum, the Trial Chamber finds General Krstic' guilty as a member of a joint criminal enterprise whose objective was to forcibly transfer the Bosnian Muslim women, children and elderly from Potocari on 12 and 13 July and to create a humanitarian crisis in support of this endeavour by causing the Srebrenica residents to flee to Potocari where a total lack of food, shelter and necessary services would accelerate their fear and panic and ultimately their willingness to leave the territory. General Krstic' thus incurs liability also for the incidental murders, rapes, beatings and abuses committed in the execution of this criminal enterprise at Potocari.

618. Finally, General Krstic' knew that these crimes were related to a widespread or systematic attack directed against the Bosnian Muslim civilian population of Srebrenica; his participation in them is undeniable evidence of his intent to discriminate against the Bosnian Muslims. General Krstic' is therefore liable of inhumane acts⁽¹³⁶⁷⁾ and persecution⁽¹³⁶⁸⁾ as crimes against humanity.

(b) General Krstic's criminal responsibility for the killing of the military-aged Muslim men from Srebrenica

619. The Trial Chamber has made findings that, as of 13 July, the plan to

(1367) Forcible transfer - count 8.

(1368) Murder, and cruel and inhumane treatment (including terrorisation, destruction of personal property and forcible transfer) - count 6.

ethnically cleanse the area of Srebrenica escalated to a far more insidious level that included killing all of the military-aged Bosnian Muslim men of Srebrenica. A transfer of the men after screening for war criminals the purported reason for their separation from the women, children and elderly at Potocari - to Bosnian Muslim held territory or to prisons to await a prisoner exchange was at some point considered an inadequate mode for assuring the ethnic cleansing of Srebrenica. Killing the men, in addition to forcibly transferring the women, children and elderly, became the object of the newly elevated joint criminal enterprise of General Mladic' and VRS Main Staff personnel. The Trial Chamber concluded that this campaign to kill all the military aged men was conducted to guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica and therefore constituted genocide.

620. The issue that remains to determine is whether General Krstic' was a member of the escalated joint criminal enterprise to kill the military-aged men and whether he thus incurred responsibility for genocide, including the causing of serious bodily and mental harm to the few men surviving the massacres. In this respect, the Trial Chamber will discuss the relationship between Article 7(1) and Article 4(3), and between "genocide" in Article 4(3)(a)⁽¹³⁶⁹⁾ and the alternative allegation of "complicity in genocide" in Article 4(3)(e).⁽¹³⁷⁰⁾ The Trial Chamber further will determine whether General Krstic' also incurs responsibility for the other crimes constituted by the killings, that is, persecutions,⁽¹³⁷¹⁾ extermination⁽¹³⁷²⁾ and murder⁽¹³⁷³⁾ as crimes against humanity, and murder as a violation of the laws or customs of war.⁽¹³⁷⁴⁾ Lastly, the Trial Chamber will consider whether the evidence suggests that General Krstic' incurs command responsibility for the crimes alleged under Article 7(3).

(i) Participation in the genocidal joint criminal enterprise to kill the military-aged men

621. The Trial Chamber has concluded that General Krstic' was involved in organising the buses for the transportation of the women, children and elderly from Potocari throughout 12 July. He personally saw that the military-aged men were being segregated at Potocari and that they were being detained at the White House in sordid conditions. He must have observed, further, that contrary to General Mladic"s statement at the Hotel

(1369) Count 1 of the Indictment.

(1370) Count 2 of the Indictment.

(1371) Count 6 of the Indictment.

(1372) Count 3 of the Indictment.

(1373) Count 4 of the Indictment.

(1374) Count 5 of the Indictment

Fontana meeting, no genuine efforts were taking place to screen the men for war criminals. General Krstic' knew, also on 12 July, that the buses exiting from Potocari were being stopped at Tisc'a where any men who had managed to get aboard were pulled off and taken to detention sites.⁽¹³⁷⁵⁾ on 13 July, when he was preparing the military operation at Zepa which commenced the next day, General Krstic' found out that thousands of Srebrenica men fleeing in the column through the woods toward Tuzla had been captured on the territory of the Drina Corps. As the then Corps' Chief of Staff, "the primary Coordinator of the Corps' activities",⁽¹³⁷⁶⁾ General Krstic' must have been aware that no adequate measures were being taken to provide for shelter, food, water and medical care for several thousand captured men and that no arrangements or negotiations were ongoing for their prisoner-of-war exchange.⁽¹³⁷⁷⁾

622. On that basis alone, the Trial Chamber must conclude that, by the evening of 13 July at the latest, General Krstic' knew that the Muslim men were being executed at a number of separate sites and that none had been allowed to enter government held territory along with the women, children and elderly. General Krstic' could only surmise that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all.

623. In terms of General Krstic's participation in the killing plan, the evidence has established that, from 14 July onwards, Drina Corps troops took part in killing episodes. The facts in relation to the Drina Corps' participation at each site may be summarised as follows:

- Zvornik Brigade units scouted for sites at Orahovac presumably to be used for detention and execution on 13 and 14 July;⁽¹³⁷⁸⁾ furthermore, Zvornik Brigade personnel were present at Orahovac immediately prior to, and during the killings; Zvornik Brigade military equipment was engaged in tasks relating to the burial of the victims from Orahovac between 14 and 16 July;⁽¹³⁷⁹⁾
- Drivers and trucks from the 6th Infantry Battalion of the Zvornik Brigade were

(1375) Supra, para. 470.

(1376) Richard Butler, VRS Corps Command Responsibility Report, Section Two, para. 2.6 (P401). In his Report, Prosecution military expert Mr Butler refers to, amongst others, para. 66 of the JNA Rules for Land Forces Corps (Provisional) (P402/4) and Article 11 of the JNA Regulations on the Responsibilities of the Land Army Corps Command in Peacetime (P402/10). on the applicability of these instruments of the former Yugoslav National Army to the Army of Republika Srpska, see Infra. On the responsibilities of the VRS Corps Chief of Staff, see also the testimony of Prosecution military expert General Dannatt, T.5578.

(1377) Supra paras. 363-379, 465-472.

(1378) Supra paras. 220-225

(1379) Supra para. 449.

used to transport the prisoners from the detention site at Petkovci Dam to the execution sites on 15 July; the Zvornik Brigade Engineer Company was assigned to work with earthmoving equipment to assist with the burial of the victims from Petkovci Dam;⁽¹³⁸⁰⁾

- Members of the Bratunac Brigade assisted in the killings on the site of the Branjevo Farm on 16 July; Drina Corps military police were engaged in guarding the Muslim prisoners in the buses that took them from several detention places to the Farm and Zvornik Brigade equipment was engaged in activities relating to the burial of the victims; Colonel Popovic', the Drina Corps' Assistant Commander for Security, was involved in organising fuel to transport the Muslim prisoners to the execution sites at Branjevo Farm and the allocation of fuel was Coordinated through the Drina Corps Command;⁽¹³⁸¹⁾

- The Bratunac Brigade assisted with the executions that took place at the Pilica Cultural Dom on 16 July,⁽¹³⁸²⁾ and

- Zvornik Brigade engineering work on 16 July was traced to the burial of bodies in the Kozluk grave.⁽¹³⁸³⁾

624. Thus, the Drina Corps rendered tangible and substantial assistance and technical support to the detention, killing and burial at these several sites between 14 and 16 July. The need for their involvement was unavoidable because the Main Staff had limited assets and resources of its own and had to utilise the Drina Corps resources and expertise for complicated operations like these detentions, executions and burials on Drina Corps territory.⁽¹³⁸⁴⁾ It is inconceivable that the involvement of Drina Corps troops and equipment could take place without some - even if hasty degree of planning which, moreover, required the involvement of the top levels of command.

625. The evidence shows that, following the capture of Srebrenica, the Drina Corps Command continued to exercise regular command competencies over its subordinate troops. The Corps' ordinary chain of command was not suspended as a result of the direct involvement of the Main Staff or the security organs in certain aspects of the Srebrenica follow up operation. The Trial Chamber has further held that General Krstic' became the de facto Corps Commander from the evening of 13 July onwards and de jure Corps Commander from 15 July onwards.⁽¹³⁸⁵⁾

(1380) Supra para 450

(1381) Supra para 451.

(1382) Supra para. 452.

(1383) Supra para. 453

(1384) Supra para. 266.

(1385) Supra para. 330.

626. Three military experts submitted reports and testified before the Trial Chamber on the responsibilities and authorities of the Commander of the Drina Corps in July 1995. The Prosecution called its in-house expert Richard Butler, as well as Major General F.R. Dannatt of the British Army.⁽¹³⁸⁶⁾ Professor Dr R. Radinovic, a retired General in the JNA, provided expert evidence for the Defence.⁽¹³⁸⁷⁾

627. The experts based their opinions on certain military regulations which the Army of Republika Srpska (VRS) adopted from the former Yugoslav National Army (JNA),⁽¹³⁸⁸⁾ as well as Republika Srpska legislation. These instruments define the responsibilities and corresponding authorities of VRS Corps Commanders.

628. According to Article 65 of the JNA Rules for Land Forces Corps (Provisional), the VRS Corps Commander:

bears the responsibility for the accomplishment of a mission. He takes decisions, gives assignments to his subordinates, organises co-ordination and co-operation, and controls the implementation of decisions.

The Commander accomplishes this through the exercise of "command and control", which Article 63 of the JNA Rules for Land Forces Corps (Provisional) defines as:

conscious and organised activities of the Commander of the Corps and the bodies of command, aimed at engaging and unifying the actions and activities of all units, commands, headquarters and other entities of All People's Defence and social self-protection in the zone of operation, as well as equipment used in combat, for the purpose of achieving the set goals in the optimal way.

Article 6 of the JNA Regulations on the Responsibilities of the Land Army Corps Command in Peacetime further provides that:

The right to command units and institutions of [the Corps] is under the exclusive responsibility of the Commander. Units and institutions outside the Corps' organic compound, those temporarily subordinated, are commanded and controlled by the Commander only within the limits of stipulated

(1386) Butler Report; Statement of Major General F.R. Dannatt, Military Expert (P385A)

(1387) Prof. Dr. Radovan Radinovic, Retired General, Military Expert Testimony of Srebrenica (DI60).

(1388) The Trial Chamber accepts that these JNA documents were the regulatory foundation of the VRS; it understands this to be the position of General Radinovic. See Butler Report, para. 1.4; Radinovic', T. 7997-7998.

authorities.

According to General Krstic' himself, the principle of "command and control" is "fundamental not only to military operations but also to the work of the commands and staffs in control and command of units".⁽¹³⁸⁹⁾ General Krstic' testified that he was well-versed in this principle and experienced in its execution.⁾¹³⁹⁰⁽ Furthermore, although General Radinovic' contested that the Instructions on How the 4th Corps Command is to Operate When Carrying out Priority Assignments in Peacetime and Wartime apply to the VRS Drina Corps,⁾¹³⁹¹⁽ he agreed with the following portion of the Butler Report which quotes from these Instructions:⁾¹³⁹²⁽

[The Corps Commander] is personally, directly and legally empowered to 'lead the operations of the Corps Command, assign tasks to his subordinate officers, ensure that they are carried out, and bear full responsibility for their completion.'

629. The military regulations confer the widest powers on the Corps Commander in order to enable him to carry out his command responsibilities. According to Article 173 of the RS Law on the Army,⁾¹³⁹³⁽ command in the army is based on:

the principles of a unified command regarding the use of forces and means, single authority, obligations to enforce decisions, command and orders issued by superior of fixers..

Article 4 of the RS Law on the Army defines a "Superior Officer" as:

a person in command of a military unit or a person managing a military institution [...], and in command of personnel serving in the military unit or institution, in compliance with the law and other regulations issued by the competent body.

The concept of "Superior Officer" is further defined in the Interim Provisions on the Service in the Army of the Serb Republic.⁾¹³⁹⁴⁽ Paragraph 17 of these Provisions provides that:

Members of the Army shall carry out the orders of their superiors without demur, in full, accurately and punctually.

(1389) Krstic T. 6341

(1390) Krstic, T. 6342.

(1391) Radinovic, T. 7809, 7999. P402/7 contains The Instructions on How the 4th Corps Command is to Operate When Carrying out Priority Assignments in Peacetime and Wartime

(1392) Butler Report, para. 2.0, referring to page 14 of the Instructions on How the 4th Corps Command is to Operate When Carrying out Priority Assignments in Peacetime and Wartime; Radinovic', T. 8011.

(1393) P142/40.

(1394) Signed into effect by the President of Republika Srpska on 18 August 1992. P142/24.

630. These sources show indisputably that as Commander of the Drina Corps, General Krstic had extensive formal powers over the assets and troops of the Drina Corps.⁽¹³⁹⁵⁾ The trial record confirms that General Krstic' exercised many of these powers from the evening of 13 July on - in matters affecting the entire Drina Corps, not just the Zepa operation - once General Mladic' had appointed him as Commander.⁽¹³⁹⁶⁾

- on the evening of 13 July, General Krstic' signed a search order as "Commander", which the Trial Chamber accepts to mean "Commander of the Drina Corps", as opposed to "Commander of the Zepa operation";⁽¹³⁹⁷⁾

Witness II stated that "at Zepa [i.e. from 14 July]...everybody addressed General Krstic as

Commander, meaning Corps Commander";¹³⁹⁸

A Radio intercept, at 2236 hours on 14 July, between "Malinic" (the commander of the Military Police Battalion of the 65~ Protection Regiment) and an unidentified individual contains a statement by the latter that:⁽¹³⁹⁹⁾

he [Krstic'] [will] look into it, and will assign someone to co-ordinate it [...] I'm up to speed...Zivanovic told me. Well, in short, now I have told Krle about that, about what should/be/done. I suggested what he should do, so he'll do something...

- The authority of General Zivanovic' - the outgoing Corps Commander - is seen to be fast fading away. Although he exercised a few command functions on 14 July, in an intercept at 0935 hours on that day, General Zivanovic' disclosed that he was slowly "packing his backpack" and that "they" (presumably the Main Staff) had already asked him to go somewhere else.⁽¹⁴⁰⁰⁾

631. The Trial Chamber concludes that from the evening of 13 July, General Krstic' exercised "effective control" over Drina Corps troops and assets throughout the territory on which the detentions, executions and burials were taking place. The Trial Chamber finds furthermore that from that time onwards,

(1395) See Radinovic Report, Chapter III, para. 3.7. General Radinovic' testified that "the [...] Corps Commander [...] does not share his command responsibility with anybody at all." (T. 8019). Mr Butler testified that "[the Commander] is legally empowered with the authorities and the responsibilities to command and direct the activities of his, in this case, corps." (T. 4754-4755). See also Dannatt Report, para. 26. The evidence does not establish that the 10'h Sabotage Detachment and the MUP were re-subordinated to the Drina Corps, however, and General Krstic's formal powers therefore did not extend to these troops (supra paras. 278-290).

(1396) Supra, pars 312

(1397) Supra, para. 318.

(1399) Supra para. 312.

(1400) Supra, pars 322

General Krstic participated in the full scope of the criminal plan to kill the Bosnian Muslim men originated earlier by General Mladic' and other VRS officers. In fact, by 13 July - when the mass killings started - General Krstic' had already organised the military attack on Zepa and as Drina Corps Chief of Staff and Commander-to-be ⁽¹⁴⁰¹⁾ he had to make provision for Drina Corps resources to be applied in the clean-up activities following the fall of Srebrenica. On 14 July, while some of his Drina Corps troops were participating in the Zepa operation, other troops under his effective control were engaged in capturing and assisting in the execution of Muslim men from Srebrenica.

632. On 15 July, General Krstic's participation in the killing plan reached an aggressive apex. According to an interchange intercepted early that day, Colonel Beara - a Main Staff officer whom General Krstic' himself identifies as personally engaged in supervising the killings - requests General Zivanovic' to arrange for more men to be sent to him. General Zivanovic' states he can not "arrange for that anymore" and refers Colonel Beara to General Krstic'.⁽¹⁴⁰²⁾ Colonel Beara subsequently urgently requests General Krstic's assistance in the "distribution of 3,500 parcels", a code term repeatedly used in military communications to signify captured Bosnian Muslim men that are slated to be killed. General Krstic' suggests that Colonel Beara solicit help from several units, including the Bratunac and Milic'i Brigades in the Drina Corps, and the MUP. Colonel Beara replies that these units were not available, saying: "I don't know what to do. I mean it, Krle". The intercept strongly implies that when the MUP troops declined to carry out the killings, General Krstic' agreed to fill the breach, stating: "I'll see what I can do".⁽¹⁴⁰³⁾ General Krstic' arranged for Bratunac Brigade members to assist in the killings at the Branjevo Farm and the Pilica Dom the next day.⁽¹⁴⁰⁴⁾

633. The Trial Chamber concludes beyond reasonable doubt that General Krstic' participated in a joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica from the evening of 13 July onward. General Krstic' may not have devised the killing plan, or participated in the initial decision to escalate the objective of the criminal enterprise from forcible transfer to destruction of Srebrenica's Bosnian Muslim military-aged male community, but there can be no doubt that, from the point he learned of the widespread and

(1401) Witness JJ was told by General Zivanovic that General Mladic had informed him between 15 and 20 June 1995 that General Krstic was going to replace him as Corps Commander. General Zivanovic also told the witness that General Krstic was anxious to be in command. T. 9683, 9708.

(1402) Supra, para- 323

(1403) Supra, para. 380.

(1404) Supra, paras. 386 and 401

systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets.

634. Finally, the Trial Chamber has concluded that, in terms of the requirement of Article 4(2) of the Statute that an intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively, the military aged Bosnian Muslim men of Srebrenica do in fact constitute a substantial part of the Bosnian Muslim group, because the killing of these men inevitably and fundamentally would result in the annihilation of the entire Bosnian Muslim community at Srebrenica. In this respect, the intent to kill the men amounted to an intent to destroy a substantial part of the Bosnian Muslim group. Having already played a key role in the forcible transfer of the Muslim women, children and elderly out of Serb-held territory, General Krstic' undeniably was aware of the fatal impact that the killing of the men would have on the ability of the Bosnian Muslim community of Srebrenica to survive, as such. General Krstic' thus participated in the genocidal acts of "killing members of the group" under Article 4(2)(a) with the intent to destroy a part of the group.

635. The Trial Chamber has further determined that the ordeal inflicted on the men who survived the massacres may appropriately be characterised as a genocidal act causing serious bodily and mental harm to members of the group pursuant to Article 4(2)(b). While the agreed objective of the joint criminal enterprise in which General Krstic' participated was the actual killing of the military aged Bosnian Muslim men of Srebrenica, the terrible bodily and mental suffering of the few survivors clearly was a natural and foreseeable consequence of the enterprise. General Krstic' must have been aware of this possibility and he therefore incurs responsibility for these crimes as well.

636. General Krstic' thus incurs responsibility for the killings and causing of serious bodily and mental harm as a co-participant in a joint criminal enterprise to commit genocide. However, the Prosecution has alleged alternatively that General Krstic' incurs responsibility for "genocide" under Article 4(2) and 4(3)(a), or for "complicity in genocide" under Article 4(3)(e). This requires a brief discussion as to the relationship between these provisions.

637. The Prosecution's submissions on this matter are limited to the distinction between "genocide" and "complicity in genocide" under Article 4(3). The Prosecution submits that the *mens rea* requirement for both forms of participation entails genocidal intent. The Prosecution further contends that this is not incompatible with the Akayesu Judgement of ICTR Trial Chamber I, according to which complicity in genocide is defined to include aiding and abetting the commission of genocidal acts with the knowledge of the principal's genocidal intent even if that intent is not shared. The Prosecution submits that

"knowledge" of the genocidal intent accompanied by substantial contribution to the genocidal plan or enterprise amounts to a shared intent.⁽¹⁴⁰⁵⁾

638. The Defence, on the other hand, submits that "Complicity is a form of accomplice liability and exists upon proof that a person planned, instigated or ordered an act or otherwise aided and abetted its performance."⁽¹⁴⁰⁶⁾ To be liable as an accomplice in genocide, it must be established that the accused rendered a substantial contribution to the commission of the act in the awareness of the principle's genocidal intent. Thus, according to the Defence, to establish that General Krstic' was an accomplice in genocide, the Prosecution need not prove that he had genocidal intent.⁽¹⁴⁰⁷⁾

639. The Trial Chamber's view on the relationship between the heads of criminal responsibility in Article 7(1) and Articles 4(3)(a) and (e) is as follows.

640. Article 7(1) entails a general provision on individual criminal responsibility applicable to all crimes in the Statute. Article 4(3) provides for heads of responsibility in relation to genocide only; it is taken verbatim from Article m of the Genocide Convention. Article 4(3) provides for a broad range of heads of criminal responsibility, including heads which are not included in Article 7(1), such as "conspiracy to commit genocide" and "attempt to commit genocide".⁽¹⁴⁰⁸⁾ By incorporating Article 4(3) in the Statute, the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law.⁽¹⁴⁰⁹⁾ The consequence of this approach, however, is that certain heads of individual criminal responsibility in Article 4(3) overlap with those in Article 7(1).

641. The question whether participation in a joint criminal enterprise under Article 7(1) corresponds to "genocide" or "complicity in genocide", pursuant to

(1405) Prosecutor's Pre-Trial Brief, .06-107. During closing argument, the Prosecution submitted that General Krstic "had the genocidal intent from the beginning, he maintained it throughout, and that complicity for genocide would require some leaps of faith based principally on General Krstic's testimony. We don't think that the interpretation should be given to the facts in this case that he is culpable of only complicity." T 10020.

(1406) Defence's Final Trial Brief, para. 123.

(1407) Defence's Final Trial Brief, paras. 124-128.

(1408) In this respect, it is noteworthy that the ICC Statute includes a single provision on individual criminal responsibility - Article 25 - which is applicable to all crimes within the jurisdiction of the ICC, including genocide.

(1409) The Report of the Secretary-General states that "the [Genocide] Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951." Report of the Secretary-General, para. 45 (footnote omitted).

Article 4(3), has not yet been answered in the case law.⁽¹⁴¹⁰⁾

642. In the Tadic' Appeal Judgement, the Appeals Chamber referred to "the notion of common design as a form of accomplice liability",⁽¹⁴¹¹⁾ a phrase upon which Trial Chamber II subsequently relied to distinguish "committing" from "common purpose liability" under Article 7(1).⁽¹⁴¹²⁾

However, this Trial Chamber views the comment in the Tadic Appeal Judgement as not part of the ratio decidendi of that Judgement and does not believe that Tadic characterization means that any involvement in a joint criminal enterprise automatically relegates the liability of an accused to that of "complicity in genocide" in Article 4(3)(e).⁽¹⁴¹³⁾ In the Celebici Appeal Judgement, the Appeals Chamber reaffirmed the meaning of the plain language of Article 7(1) that "liability under Article 7(1) applies to direct perpetrators of crimes and to accomplices",⁽¹⁴¹⁴⁾ and the Kordic' and Cerkez Trial Chamber stated that "[t]he various forms of participation listed in Article 7(1) may be divided between principal perpetrators and accomplices."⁽¹⁴¹⁵⁾ In short, the Trial Chamber sees no basis for refusing to accord the status of a co-perpetrator to a member of a joint genocidal enterprise whose participation is of an extremely significant nature and at the leadership level.

643. It seems clear that "accomplice liability" denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators. The Trial Chamber is of the view that this distinction coincides with that between "genocide" and "complicity in genocide" in Article 4(3). The question comes down to whether, on the face of the case, a participant in the criminal enterprise may be most accurately characterised as a direct or principal perpetrator or as a secondary figure in the traditional role of an accomplice.

644. In the present case, General Krstic' participated in a joint criminal enterprise

(1410) The Trial Chamber notes that in Akayesu and Musema ICTR Trial Chamber I pronounced on the elements of "complicity in genocide". However, the Trial Chamber interpreted "complicity" in accordance with the Rwandan Penal Code, which is why this jurisprudence is only of limited value to the present case. see Akayesu Judgement, paras. 537, 540; Musema Judgement, paras. 179, 183.

(1411) Tadic Appeal Judgement, paras. 220, 223 (emphasis provided).

(1412) Prosecutor v. Radoslav Brdanin and Momir Talic', Decision on Motion by Momir Talic' for Provisional Release, Case No. IT-99-3SPT, 28 March 2001, paras. 4ff/45.

(1413) According to the Appeals Chamber: "a proper construction of the Statute requires that the ratio decidendi of its decisions is binding on Trial Chambers". Aleksotski Appeal Judgement, para. 113.

(1414) Celebici Appeal Judgement, para. 338.

(1415) Kordic'and terkez Judgement, para. 373.

to kill the military-aged Bosnian Muslim men of Srebrenica with the awareness that such killings would lead to the annihilation of the entire Bosnian Muslim community at Srebrenica. His intent to kill the men thus amounts to a genocidal intent to destroy the group in part. General Krstic' did not conceive the plan to kill the men, nor did he kill them personally. However, he fulfilled a key coordinating role in the implementation of the killing campaign. In particular, at a stage when his participation was clearly indispensable, General Krstic' exerted his authority as Drina Corps Commander and arranged for men under his command to commit killings. He thus was an essential participant in the genocidal killings in the aftermath of the fall of Srebrenica. In sum, in view of both his mens rea and actus reus, General Krstic' must be considered a principal perpetrator of these crimes.⁽¹⁴¹⁶⁾

645. General Krstic' is guilty of genocide pursuant to Article 4(2)(a).

(ii) Participation in the other crimes constituted by the killings

646. The Trial Chamber finds that, by his participation in the joint criminal enterprise to kill the military-aged Bosnian Muslim men from Srebrenica, General Krstic' is also guilty of murders as violations of the laws or customs of war. Furthermore, as he cannot but have been aware that these murders were related to a widespread or systematic attack against the Bosnian Muslim civilian population of Srebrenica, General Krstic' is also guilty of murders as crimes against humanity and in view of the object of the joint criminal enterprise to kill all the military-aged Bosnian Muslim men of Srebrenica - extermination. Finally, General Krstic' is guilty of murders as acts of persecution: his intent to discriminate against the Bosnian Muslim population of Srebrenica is his participation in the killings of all the Bosnian Muslim men and the transfer of all the women, children and elderly from the territory of the Drina Corps.

(iii) Responsibility for the killings under Article 7(3)

647. The evidence also satisfies the three-pronged test established by the jurisprudence for General Krstic' to incur command responsibility under Article

(1416) The Trial Chamber notes in this respect that Article 141 of the Criminal Code of Republika Srpska (P402/98) provides with regard to genocide that he who orders the commission of genocidal acts or commits such acts shall be 'punished by imprisonment of at least five years or by the death penalty. This supports the finding that the category of principle perpetrators of genocide is not limited to those physically committing acts of genocide. On 21 July 1993, the National Assembly of Republika Srpska adopted - with minor amendments unrelated to the above provision - the Criminal Code of the Socialist Federative Republic of Yugoslavia and renamed it the "Criminal Code of Republika SrVska". See Law on Amendments to the Criminal Code of the Socialist Federative Republic of Yugoslavia (P402/58).

7(3) for the participation of Drina Corps personnel in the killing campaign.⁽¹⁴¹⁷⁾

648. First, General Krstic' exercised effective control over Drina Corps troops involved in the killings.⁽¹⁴¹⁸⁾ Second, in terms of mens rea, not only was General Krstic' fully aware of the ongoing killing campaign and of its impact on the survival of the Bosnian Muslim group at Srebrenica, as well as the fact that it was related to a widespread or systematic attack against Srebrenica's Bosnian Muslim civilian population, but the Drina Corps (and Main Staff) officers and troops involved in conducting the executions had to have been aware of the genocidal objectives. Third, General Krstic' failed to prevent his Drina Corps subordinates from participating in the crimes or to punish them thereafter.

649. In respect to this last issue, the Trial Chamber finds that General Krstic's effective control enabled him to prevent Drina Corps officers and troops from participating in the commission of crimes. Further, as to General Krstic's ability to punish subordinates, the Trial Chamber considers that, on 13 May 1992, President Karadzic' issued his Order on the Application of the Rules of the International Law of War in the Army of the Serbian Republic of Bosnia and Herzegovina.⁽¹⁴¹⁹⁾ General Krstic' testified that he was aware of the obligation enshrined in paragraph 2 of this Order,⁽¹⁴²⁰⁾ namely that:

It is the duty of the competent superior officer to initiate proceedings for legal sanctions against individuals who violate the rules of the international law of war.

The Guidelines for Determining Criteria for Criminal Prosecution, issued by the Military Prosecutor's Office of the Main Staff of the Armed Forces of Republika

(1417) Since it can not be concluded beyond reasonable doubt that Drina Corps troops - or other troops under the effective control of General Krstic' - were responsible for the terror crimes at Potocari (FM, para. 155), the Trial Chamber can not conclude that General Krstic' incurs liability for these crimes under Article 7(3).

(1418) This is the first test under Article 7(3) (telebic'i Appeal Judgement, paras 186-198, 266). In the case in point, there is no evidence to rebut the presumption that as Commander of the Drina Corps, General Krstic's de jure powers amounted to his effective control over subordinate troops (Celebici Appeal Judgement, para. 197). To the contrary, the evidence on the record confirms that as Corps Commander General Krstic' was firmly in charge of his troops. Conversely, it has not been established that General Krstic exercised formal powers over the 10'h Sabotage Detachment and the MUP. In the absence of other conclusive evidence that he in reality did exercise effective control over these troops, General Krstic can not be said to incur command responsibility for their participation in the crimes.

(1419) P402/76.

(1420) Krstic T. 6346-6347.

Srpska,⁽¹⁴²¹⁾ state in relation to "criminal offences against humanity and international law" that:

officers in all units must accept the obligation to draft reports on all incidents which might be regarded as criminal offences [...] In these cases, the commands have a duty to inform, among others, the military prosecutor's office, which will, after making an assessment, take appropriate action in keeping with the law and prosecution policy.

In a similar fashion, General Radinovic' testified, with regard to units not subordinated to the Drina

Corps, that:⁽¹⁴²²⁾

[i]f, in the command system and the system of informing, the command of the Drina Corps found out that these units committed something that was proscribed under regulations, then they would be obliged, the Drina Corps, and the command system would be obliged to act in accordance or exactly the same way that any officer or any member of an army would behave when they found out that somebody was acting against rules and regulations, meaning that procedures would have to be initiated and investigations which would be required in such a particular case.

General Radinovic also stated that, if an officer becomes aware that persons in the highest level in command are responsible for a violation of the law, this officer is duty bound to report the violation to the civil authorities above the army.⁽¹⁴²³⁾

650. The Trial Chamber has found that General Krstic did not punish a single Drina Corps officer or soldier who participated in the killings in the aftermath of the fall of Srebrenica.⁽¹⁴²⁴⁾ General Krstic' testified that, after the commission of these crimes, he only found out about the involvement of one Drina Corps officer. He unsuccessfully tried to have this person replaced and, as a result, was himself subsequently targeted by the Security Services for special surveillance. General Krstic' testified that, at the time, he feared for his safety and that of his family.⁽¹⁴²⁵⁾ He stated under cross-examination that:⁽¹⁴²⁶⁾

I must acknowledge here before you and this Trial Chamber that not in my wildest dreams was I able to undertake any measures. We weren't allowed to talk about anything like that let alone take steps against a commanding officer,

(1421) Exhibit 402/68; Guidelines, p. 8.

(1422) Radinovic, T. 8057.

(1423) Radinovic, T. 8466.

(1424) supra para. 477

(1425) Krstic T. 6350-6351 6358 7422.

(1426) Krstic T.6347

regardless of my knowledge that he or somebody else had perhaps committed a war crime. [...] It was my intention to report war crimes but that was not a possibility. I was not able to do so. [...] First of all, for security reasons, the security and safety of my family.

651. However, Mr. Butler, the Prosecutor's military expert, testified that VRS Corps Commanders did switch jobs throughout the war and that he had found no evidence that officers in general were operating in a climate of fear.⁽¹⁴²⁷⁾ Moreover, in the case of General Krstic', the fact is that he was publicly extolled by both General Mladic' and President Karadzic' for his leadership role in the conquest of the Srebrenica enclave, months after the massacres occurred. General Krstic' also appeared on public platforms as an enthusiastic supporter of General Mladic' in the following year and indeed signed a plea to President Karadzic' to keep General Mladic' on as Commander of the Main Staff of the VRS. ⁽¹⁴²⁸⁾ These facts tend to demonstrate General Krstic's solidarity with, rather than his fear of, the highest military and civilian echelons of the Republika Srpska.

652. Although the elements of Article 7(3) have thus been fulfilled, the Trial Chamber will not enter a conviction to that effect because in its view General Krstic's responsibility for the participation of his troops in the killings is sufficiently expressed in a finding of guilt under Article 7(1)

(c) Conclusions on General Krstic's criminal responsibility

653. The Trial Chamber's findings on the issue of cumulative convictions are discussed below. At this point, the Trial Chamber concludes that General Krstic' incurs criminal responsibility for his participation in two different sets of crimes that occurred following the attack of the VRS on Srebrenica in July 1995.

Firstly, on the basis of the humanitarian crisis and crimes of terror at Potocari and the forcible transfer of the women, children and elderly from Potocari to Bosnian Muslim held territory, from 11 to 13 July, General Krstic' incurs responsibility under Article 7(1) for inhumane acts (forcible transfer, count 8 of the Indictment) and persecution (murder, cruel and inhumane treatment, terrorization, destruction of personal property and forcible transfer, count 6 of the Indictment).

Secondly, on the basis of the killing of the military aged Muslim men from Srebrenica and the

(1427) Butler, T. 5474-5. General Dannatt testified likewise, stating that: "I don't believe I have come across an incident in the Balkans whereby a general who refused to follow orders has been shot. [...] I think there are cases of people being removed or dismissed from their position, which is quite common in military matters." Dannatt, T.5685.

(1428) Supra, paras. 334, 417.

causing of serious bodily and mental harm to the men surviving the massacres: General Krstic' incurs responsibility under Article 7(1) and Article 4(3)(a) for genocide (count 1), General Krstic' also incurs responsibility under Article 7(1) for the killings as extermination (count 3), murder (count 4) and persecution (count 6) as crimes against humanity, and murder as a violation of the laws or customs of war (count 5).

654. Having pronounced on the crimes for which General Krstic' may be held criminally responsible, the Trial Chamber now turns to address the issue of cumulative charging and convictions in order to decide upon which of these crimes, based on the same underlying conduct, it will enter convictions.

I. Cumulative charging and convictions

655. The Prosecutor and the Defence made submissions on the issue. They disagree on the standards regarding when an accused can be convicted of more than one offence under a single or several Article(s) of the Statute for the same underlying conduct.

1. Applicable Law

656. The Statute provides no guidance on cumulative convictions. The Rules indicate that the "Trial Chamber shall vote on each charge contained in the indictment."⁽¹⁴²⁹⁾ As recently amended,⁽¹⁴³⁰⁾ they further state that the Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused".⁽¹⁴³¹⁾

657. The jurisprudence of the Tribunal is however of assistance in the matter. In the Celebici case, the Appeals Chamber pronounced on the issue of cumulative charging and convictions in respect of Article 2 (Grave Breaches of the Geneva Conventions) and Article 3 (Violations of the Law and Customs of the War) violations.⁽¹⁴³²⁾ In the Jelasic case, the Appeals Chamber adopted the same approach as in the Celebici Appeals Judgement, in relation to charges under Articles 3 and 5.⁽¹⁴³³⁾ Both the Prosecutor and the Defence made submissions in this case based on the rulings of the Appeals Chamber in the Celebici case.⁽¹⁴³⁴⁾

(a) Cumulative Charging

658. The Prosecution submits that "cumulative charging is allowed and

(1429) Rule 87 (B.).

(1430) The Rule was last amended at the Twenty Third Plenary Session in December 2000 and, since it may be construed as more favourable to the accused than the previous one, is applicable in this case.

(1431) Rule 87 (D).

(1432) Celebici Appeal Judgement, paras. 400 et seq.

(1433) Jelasic'Appeal Judgement, para. 82.

(1434) The submissions were filed before the Jelasic Appeals Judgement was rendered.

customary under ICTY jurisprudence".⁽¹⁴³⁵⁾ The present Trial Chamber has already decided that "cumulative charging under different sub-sections of Article 5 is permissible".⁽¹⁴³⁶⁾

659. With regard to other cumulative charging under Articles 3, 4 and 5, the Trial Chamber adopts the approach taken by the Appeals Chamber in the Celebici case, which decided that:

Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.⁽¹⁴³⁷⁾

660. As a result, it is possible for the accused to be found guilty of more than one crime on the basis of the same criminal conduct. It thus becomes important to determine when more than one conviction is punishable under the Tribunal's jurisprudence and tenets of fundamental fairness.

(b) Cumulative Convictions

661. On the basis of the facts contained in paragraphs 21 to 26 of the Indictment, General Krstic' has been charged by the Prosecution with genocide under Article 4,⁽¹⁴³⁸⁾ also with murder under Article 5 (a), extermination under Article 5 (b), murder under Article 3 and persecutions under Article 5 (h).⁽¹⁴³⁹⁾ The Indictment also alleges facts in paragraphs 4, 6, 7, 11, 24.1, 24.3-24.6, 24.8, 24.9 and 24.11 on the basis of which it charges persecutions under Article 5 (h) and deportation under Article 5 (d) (or, in the alternative, other inhumane acts in the form of forcible transfer under Article 5 (i)). After stating the submissions made by the Prosecution and the Defence on this issue, the Trial Chamber will set out the test it will utilise.

(i) Submissions of the Parties

(1435) Prosecution Final Trial Brief, para. 472.

(1436) The Prosecutor v Krstic, Decision on Defence Preliminary Motion on the form of the Amended Indictment, Case No IT-98-33-PT, 28 January 2000, pp. 4-7.

(1437) Celebici Appeal Judgement, para. 400.

(1438) The genocide is perpetrated through the Sings of the group and through serious bodily or mental harm caused to members of the group.

(1439) The offence of persecutions is perpetrated through the murder of thousands of Bosnian Muslim civilians, including men, women, children and elderly persons, the cruel and inhumane treatment (including severe beatings) of Bosnian Muslim civilians, the terrorising, the destruction of personal property of Bosnian Muslim civilians and the deportation or forcible transfer of Bosnian Muslims from Srebrenica.

662. The Prosecutor argues that "[u]nder the Celebici framework, the Trial Chamber may choose to focus its attention on a "Count 4, Murder as a Crime Against Humanity" (under Article 5 of the Statute) conviction over a "Count 5, Murder as a Violation of the Laws or Customs of War (under Article 3 of the Statute) conviction because murder under Article 5 requires a materially distinct element not contained in murder under Article 39.⁽¹⁴⁴⁰⁾ The Prosecutor makes no other arguments as to the relation between other crimes cumulatively charged in the Indictment.

663. The Defence contends that under the Celebici framework, Article 3 and Article 5 both have materially distinct elements, but in contrast, acknowledges that General Krstic' can be convicted of both offences.⁽¹⁴⁴¹⁾ However, the Defence is of the view that "the dissenting opinion of Judges Hun and Bennouna more correctly define(s) the test for multiple convictions", because "only elements relating to the conduct and mental state of the accused should be taken into account when applying the "different elements" test".⁽¹⁴⁴²⁾ The Defence further states that "if the formulation of the dissent is applied to Counts 4 and 5 of the Amended Indictment, both charging murder, only one conviction could be imposed".⁽¹⁴⁴³⁾ Finally, the Defence submits that charges specified to be in the alternative cannot be cumulative, such as charges contained in Counts 1 and 2, (genocide or complicity in genocide) and in Counts 7 and 8 (deportation or forcible transfer).⁽¹⁴⁴⁴⁾ The Defence does not make any submission as to the relation between other crimes cumulatively charged in the indictment (e.g. genocide, extermination and persecutions).

(ii) The Test Laid down by the Appeals Chamber in the Celebici Case (<< the Test >>)

664. The Appeals Chamber in the Celebici case held that cumulative convictions are permissible to punish the same criminal conduct if the following two prong test is met:

[... M]ultiple 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

(1440) Prosecution Final Trial Brief, para. 473. It should be noted that the Prosecution seems to have misread the Celebici Test, which is detailed Infra in (ii) "the Test laid down by the Appeals Chamber in the Celebici case".

(1441) Final Submission of the Accused, para. 399.

(1442) Final Submission of the Accused, para. 400, p. 124.

(1443) Final Submission of the Accused, para. 400, p. 124.

(1444) Final Submission of the Accused, paras. 397, 398.

requires proof of a fact not required by the other.⁽¹⁴⁴⁵⁾

The Appeals Chamber further stated that:

[...] 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.⁽¹⁴⁴⁶⁾

665. Thus, the first inquiry to be made is whether, under the definitions of the separate offenses, the accused may be found liable for more than one offence based upon the same conduct. If this is

so, the Trial Chamber will then determine whether the definition of each offence provision has a materially distinct element not contained in the other. For instance, the Appeals Chamber in the Celebici case held that "the offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element [...]"⁽¹⁴⁴⁷⁾ In so ruling, the Appeals Chamber in the Celebici case reasoned that the requirement of Article 3 that victims not be taking an active part in the hostilities is not materially distinct from the requirement of Article 2 that victims are protected persons. Thus, cumulative convictions could not be entered under both Article 2 for wilfully causing great suffering and Article 3 for cruel treatment.

666. A subsidiary question is which requirements of the offences definitions must be compared. As mentioned above, the Statute requires that both war crimes and crimes against humanity be committed during an armed conflict but, according to the jurisprudence of the Tribunal, whereas Article 3 requires that the acts of the accused be committed in close connection with an armed conflict,

(1445) Celebici Appeal Judgement, para. 412.

(1446) Celebici Appeal Judgement, para. 413.

(1447) Celebici Appeal Judgement, para. 424. Also, on the question of whether entering cumulative convictions under Articles 2 and 3 is permissible, the Appeals Chamber in the Celebici case stated that "It should also be borne in mind that Article 2 applies to international conflicts, while Article 3 applies to both internal and international conflicts. However, this potentially distinguishing element does not come into play here, because the conflict at issue has been characterised as international as well". Footnote 652.

this is not a substantive requirement for the applicability of Article 5.⁽¹⁴⁴⁸⁾ The Appeals Chamber, in the Jelusic' case, did rule that Articles 3 and 5 of the Statute each contain a unique, materially distinct element not contained in the other, that is Article 3 requires a close nexus to an armed conflict and Article 5 requires that the act or omission be committed as part of a widespread or systematic campaign against a civilian population. In this sense, the Trial Chamber will consider only substantive requirements when comparing offenses.

667. Finally, if the application of this first prong of the Test requires that the Trial Chamber render only one conviction, the Trial Chamber will, in accordance with the second prong of the Test, select the most specific applicable criminal provision. For instance, applying the second prong of the Test, the Appeals Chamber in the Celebici case held that because the offence of wilfully causing great suffering sanctioned by Article 2 is more specific than the offence of cruel treatment sanctioned by Article 3, the Article 2 offence must be preferred, and the Article 3 offence must be dismissed.

2. Application of the Test to the Concurrent Offences Specified in the Indictment

668. The Trial Chamber has found that General Krstic' participated, first, in the campaign of terror that followed the attack on Srebrenica from 10 to 13 July 1995 and which led to the forcible transfer of Bosnian Muslim civilians and, secondly, in the murders of Bosnian Muslim military aged men, which took place from 13 July to 19 July 1995.

669. The Test will be applied to the cumulatively charged offences characterising each criminal conduct proved, first to offences charged under different Articles of the Statute, and then to different offences charged under Article 5.

(a) The Concurrent Offences Characterising "the campaign of terror" in Potocari and the Subsequent Forcible Transfer of the Bosnian Muslim Civilians from 10 to 13 July 1995

670. Paragraphs 4, 6, 7, 11 and 22 to 26 of the Indictment describe, inter alia how thousands of Bosnian Muslim civilians, fled to Potocari, were terrorised and/or murdered there and were thereafter transported by buses and trucks, under the control of the VRS, to areas outside the enclave of Srebrenica. Counts 1, 3 to 6, and 8 characterise the acts described in these paragraphs as genocide, extermination, murder under Articles 3 and 5, persecutions and deportations (or, in the alternative, inhumane acts in the form of forcible transfer). With regard to the offense of persecutions, Count 6 of the Indictment states that persecutions

(1448) The armed conflict requirement in Article 5's chapeau has been characterised by the jurisprudence of the Tribunal as not a substantive requirement for cumulative convictions purposes. It is however a jurisdictional requirement for the application of Article 3 of the Statute. Jelusic' Appeal Judgement, para. 82. See also Tadic Jurisdiction Decision and Tadic Appeal Judgement, para. 249.

were committed not only through murder but also through "the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings", "the terrorising of Bosnian Muslim civilians", "the destruction of personal property of Bosnian Muslims" and "the deportation or forcible transfer of Bosnian Muslims". Murder is thus but one of the sub-crimes of the offence of persecutions.

671. The Trial Chamber has found that the events between 10 to 13 July 1995 in Potocari are appropriately characterised as murders and as persecutions committed through murder, cruel and inhumane treatment (including severe beatings), terrorising, destruction of personal property of Bosnian Muslim civilians and forcible transfer. While the cruel and inhumane treatments (including severe beatings), terrorising and destruction of personal property of the Bosnian Muslim civilians are solely covered by the persecutions count (Count 6), the murders committed at this time can also be legally characterised as murders under Article 3 and 5 (Counts 4-5) and persecutions (Count 6). The forcible transfer at this time can be characterised as a persecution committed by means of inhumane acts (Count 6) and as a separate Article 5 offence of other inhumane acts (Count 8).⁽¹⁴⁴⁹⁾

672. The Chamber has not found the accused guilty of genocide, complicity of genocide and extermination under Counts 1, 2 and 3 for the acts committed in Potocari from 10 to 13 July 1995 and has decided that the forcible transfers are most appropriately considered under other inhumane acts rather than deportation.

673. Thus, the Trial Chamber will apply the Test with a view to determining whether convictions for the offence of murder, under both Articles 3 and 5, and persecutions (Article 5 (h)), committed through murder, are permissible and whether convictions under both persecutions (Article 5 (h)), committed through other inhumane acts (forcible transfer), and other inhumane acts (Article 5 (i)), committed through forcible transfer, may be used to punish the same criminal conduct.

(i) Relationship between Offences under Article 3 and Offences under Article 5

674. The Test is first applied to determine whether murder sanctioned by Article 3 requires a materially distinct constituent element not required by murder sanctioned by Article 5 and vice versa, with a view to determining whether convictions under both the offence of murder under Article 3 and offences under Article 5, punishing the same conduct, is permissible. The application of the Test involves a comparison between the elements of the crimes as defined by the Trial

(1449) The Trial Chamber has found that the transfer of the Bosnian Muslim civilians from Potocari to areas controlled by Muslim forces is to be characterised as forcible transfer and not as deportation. See supra, para. XX (genocide part).

Chamber. Murder as a war crime is any illegal and intentional act or omission, which caused the death of a non-combatant person, and was committed in close connection with an armed conflict. Article 5 punishes any prohibited intentional acts or omissions committed within an armed conflict as part of a general and systematic attack upon a civilian population. Murder under Article 3 requires a unique and materially distinct element in the form of a close nexus between the acts of the accused and an armed conflict. Offences under Article 5 require a unique and materially distinct element in the form of a requirement that they be perpetrated as part of a widespread or systematic attack upon a civilian population. Because each category of offences contains an element not required by the other, the Test is satisfied and the Trial Chamber finds it permissible to enter a conviction under both Articles 3 and 5 to punish the same murders.

(ii) Relationship between Murder under Article 5 and Persecutions

675. The Test must also be applied to determine whether murder sanctioned by Article 5 (a) requires a materially distinct element not required by persecutions sanctioned by Article 5 (h) and vice versa. Thus, the Chamber has to determine whether entering both convictions under the offence of murder under Article 5 and persecutions perpetrated through murder under Article 5, to punish the same conduct, is permissible. Murder under Article 5 (a) punishes any illegal and intentional act or omission, which caused the death of one or more persons and was committed in an armed conflict, as part of a widespread or systematic attack upon a civilian population. Article 5(h) persecutions punishes any illegal and intentional act or omission, which has wronged one or more persons and was committed in an armed conflict, as part of a widespread or systematic attack upon a civilian population for political, racial or religious reasons. Persecutions require a discriminatory intent as an additional element not required by murder under Article 5. Because the offence of persecution requires a unique materially distinct element vis-a-vis murder under Article 5 (a), the Test is not met. The second prong of the Test must be applied. Since the offence of persecutions is more specific than the offence of murder, persecutions must be preferred. The Trial Chamber, accordingly, enters a conviction under the charge of persecutions and dismisses the charge of murder under Article 5 (a).

(iii) Relationship between Persecutions (forcible transfer) and Other Inhumane Acts (forcible transfer)

676. The offence of persecutions has been defined above. The offence of other inhumane acts is defined as any intentional act or omission, which caused injury to a human being in terms of physical or mental integrity, health or human dignity.⁽¹⁴⁵⁰⁾ The offence of persecutions requires a unique additional material element not required by the offence of other inhumane acts in the form of a

(1450) Tadic Judgement, para. 729 (citing the ILC Draft Code, p. 103).

requirement that the offence of persecutions must have been perpetrated on the basis of a discriminatory intent, the offence of other inhumane acts has no counterpart of a distinct material element. The Test is not satisfied and the second prong of the Test must be applied. Because persecutions require a unique additional materially distinct element vis-a-vis other inhumane acts (forcible transfer), the offence of persecutions applies with more specificity to the situation at hand. The Trial Chamber finds that it is not permissible to enter convictions both under persecutions by way of forcible transfer and under other inhumane acts (forcible transfer) to punish the same conduct. The Trial Chamber therefore dismisses the separate charge of other inhumane acts (forcible transfer) under Article 5 (i). General Krstic' can only be convicted for persecutions (count 6) for the acts of forcible transfer that took place on 10 and 13 July 1995.

(iv) Conclusions

677. In sum, the Trial Chamber enters convictions for charges of murder under Article 3 and for charges of persecution, murders, terrorising the civilian population, destruction of personal property, and cruel and inhumane treatment committed from 10 to 13 July 1995 in Potocari.

678. The Trial Chamber will now apply the Test on cumulative offenses with regard to the second category of murders charged against General Krstic', namely the killings that occurred between 13 and 19 July 1995.

(b) The Concurrent Offences Characterising the Murders Committed Against the Bosnian Muslim Civilians from 13 to 19 July 1995

679. Paragraphs 21 to 25 of the indictment describe, inter alia how thousands of Bosnian Muslim men were arrested by the Bosnian Serb forces, led to execution sites and executed. It has been decided that these acts fulfil the requirements of genocide sanctioned by Article 4, as well as murder under Article 3, murder under Article 5, extermination and persecutions under Article 5. For the reasons stated above, ⁽¹⁴⁵¹⁾ the Test is applicable only insofar as the offence of persecutions is perpetrated through murders.

(i) Relationship Between Offences under Article 3 (war crimes) and Article 4 (genocide) and between Article 3 (war crimes) and Article 5 (crimes against humanity)

680. The Trial Chamber has already found that it is permissible to enter convictions on charges of murder under both Article 3 and Article 5 to punish the same criminal conduct.⁽¹⁴⁵²⁾

681. The same reasoning applies to the relationship between murder under Article 3 and genocide under Article 4. The relationship between genocide and

(1451) Supra. pars 670.

(1452) Jelasic Appeal Judgement, para. 82.

murder as a war crime can be characterised as follows. The offence of genocide requires a special intent to destroy a national, ethnical, racial or religious group (or part thereof). Murder as a war crime requires a close nexus between the acts of the accused and an armed conflict, which is not required by genocide. The Test for separate convictions is satisfied. Accordingly, convictions must be entered on both charges in respect of the same criminal conduct because genocide and murder under Article 3 each contain an additional element not required by the other.

(ii) Relationship Between Offences under Article 4 (genocide) and Article 5 (crimes against humanity)

682. The Trial Chamber notes that Article 4 (genocide) demands proof of elements not required by Article 5 (crimes against humanity). Article 5 offences demand proof that they have been perpetrated in an armed conflict, as part of a widespread or systematic attack upon a civilian population. With regard to the first requirement that Article 5 offenses be committed in an armed conflict, it has been held that the requirement of an armed conflict is not a substantive requirement for this purpose. ⁽¹⁴⁵³⁾ The other Article 5 requirement that the acts be perpetrated against a civilian population prevents isolated or random acts being characterised as crimes against humanity. ⁽¹⁴⁵⁴⁾ Similarly, the notion of an intent to destroy a "group" in genocide would rule out isolated or random acts being characterised as genocide. However, the limitation to certain types of "group" as defined in the crime of genocide is far more specific than the "civilian population" defined in the crimes against humanity. The requirement in Article 5 that the crimes be part of a widespread or systematic attack against a civilian population is comprised within the genocide requirement that there be an intent to destroy a specified type of group. As discussed above, acts of genocide must be committed in the context of a manifest pattern of similar conduct, or themselves constitute a conduct that could in itself effect the destruction of the group, in whole or part, as such. Thus, Article 5's exclusion of random or isolated acts also characterises genocide. ⁽¹⁴⁵⁵⁾

(1453) Tadic'Jurisdiction Decision, para. 141: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and armed conflict at all...".

(1454) Prosecutor v Tadic', Decision on Defence Motion on the Form of the Indictment, Case No IT-94-1-PT, 14 November 1995, para. 11.

(1455) The question of whether genocide is an autonomous crime or an aspect of a crime against humanity was discussed during the drafting of the genocide Convention. Many delegates were firm in their views that the two concepts of genocide and crimes against humanity should be kept separate and the Ad Hoc Committee

683. While murder under Article 5 (a) does not require any additional materially distinct element than what is contained in the definition of extermination and persecutions, extermination under Article 5 (b) and persecutions under Article 5 (h) both contain an additional element, which must be considered with regard to Article 4 of the Statute. The Preparatory Commission for the ICC defined extermination as the killing of one or more persons as part of a mass killing of civilians.⁽¹⁴⁵⁶⁾ Persecutions is defined as any illegal and intentional act or omission which, as part of a massive or systematic attack on a civilian population, has wronged one or more individuals for political, racial Or religious reasons.

684. The offences of genocide and persecutions both require proof of a special intent, respectively an intent to destroy a particular type of group (or part of that group) as such and an intent to discriminate against persons on political, racial or religious grounds. Clearly, genocide has a distinct, mutual element in the form of its requirement of an intent to destroy a group, altogether, in whole or in part, over and above any lesser persecutory objective. The offence of persecutions, on the other hand, contains no element of intent or implementation that would not be subsumed in the destruction requirement of genocide. The Test is not satisfied. Since the crimes of persecutions and genocide do not have a mutually distinct element, it is not possible to cumulate convictions for both. When the application of the first prong demonstrates that it is impermissible to convict an accused of two offences based on the same conduct, the second prong of the Test must be applied to determine for which offence the accused should be convicted. Genocide requires a highly specialised intent in the destruction of a characterised

rejected the proposition to have the preamble describe genocide as "a crime against humanity". The Polish delegate expressed the view held by representatives of the Ad Hoc Committee that while it is true that genocide is a crime against humanity, to state that in the Genocide Convention would overreach the provisions of General Assembly Resolution 180 (II). See, W. Schabas, *Genocide in International Law*, p 64. Similarly, the ICTY in the Karadzic and Mladic case held that the genocidal "intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4 (2) but which are committed as part of the same pattern of conduct". Consideration of the Indictment within the framework of Rule 61, para. 94. The ICC Statute indicates clearly that genocide requires that "the conduct took place in the context of a manifest pattern of similar conduct", repeating the requirement that crimes against humanity are not perpetrated as isolated or random acts but are part of a pattern of similar acts. Report of the Preparatory Commission for the ICC.

(1456) *Supra*, para. 498.

group or part of a group, the discriminatory intent in persecutions is less specific. Genocide, the most specifically defined crime, is to be retained.

685. Extermination requires an intentional killing of one or more persons as part of the mass killing of a civilian population. Genocide, though it might also be committed by a single or a few murders, needs proof that the perpetrator intended to destroy a national, ethnical, racial or religious group, or part of the group, as such. ⁽¹⁴⁵⁷⁾ Thus, while neither crime has a substantiality threshold as such in term of the actual killings perpetrated, both require that the killings be part of an extensive plan to kill a substantial part of a civilian population. But genocide has a distinct additional requirement, in terms of the nature of the group targeted. In extermination, the killings may be indiscriminate. Thus, in this case, at least, where genocide is committed by killings, it cannot be supplemented by extermination for the same underlying acts. Because the Test is not satisfied, it is impermissible to convict the accused of the two offences of extermination and genocide based on the same conduct and the second prong of the Test must be applied to determine for which offence the accused should be convicted. Genocide requires a highly specialised intent in the destruction of a characterised group or part of a group, extermination does not. Genocide, the most specific crime, is to be retained.

686. The Trial Chamber thus finds that, based on the same conduct, it is permissible to enter cumulative convictions under both Articles 3 and 4 and under both Articles 3 and 5. But it is not permissible to enter cumulative convictions based on the executions under both Articles 4 and 5. The Article 4 offence, as the most specific offence, is to be preferred.

(1457) In the KaradzEc and Mladic case, the Trial Chamber considered that the definition of genocide requires "a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.", transcript on hearing on 27 June 1996, p. 15.

3. Conclusions

687. In conclusion, the Trial Chamber finds that, in respect of the conduct attributed to General Krstic' which took place from 10 to 13 July 1995, it is permissible to enter a conviction under persecutions (Article 5) and murder (Article 3), i.e., to retain Counts 5 and 6. In respect of the murder-type conduct, which took place from 13 to 19 July 1995, it is permissible to enter a conviction on both murder (Article 3) and genocide, i.e., Counts 5 and 6X8. As a result of the foregoing discussions, General Krstic' is to be found guilty of: - genocide; - persecutions; and - murder

689. Finally, the Trial Chamber turns to the question of the appropriate sentence to be imposed on General Krstic' in respect of the convictions entered.

IV. SENTENCING

690. The Prosecutor submits that General Krstic' should receive consecutive life sentences for each crime for which he is found guilty, pursuant to Article 24 of the Statute and Rule 101 of the Rules.⁽¹⁴⁵⁸⁾ The Defence submits that General Krstic' must be acquitted on all counts of the indictment and thus made no submission on sentencing.⁽¹⁴⁵⁹⁾

691. The sentence is to be determined by reference to the relevant provisions of Articles 23 and 24 of the Statute and Rules 87 (C) and 101 of the Rules of Procedure and Evidence. The Trial Chamber should also consider the general sentencing principles and practices of the Tribunal, as well as those of the ICTR.⁽¹⁴⁶⁰⁾

A. The Applicable Provisions

692. Articles 23 and 24 of the Statute and Rules 87(C) and 101 contain sentencing provisions. These provisions determine the objectives of sentencing, the factors to be taken into consideration for the determination of a sentence and the manner in which a sentence should be imposed.

693. Article 23 (1) of the Statute states that "the Trial Chamber shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law". The practice of the Tribunal, based on these provisions, reflects two objectives of a sentence: the need to punish an individual for the crimes committed and the need to deter other individuals from committing similar crimes.⁽¹⁴⁶¹⁾

694. Article 24 (1) of the Statute provides that "the penalty imposed by the Trial Chamber shall be limited to imprisonment" and further states that the appropriate

(1458) Prosecution Final Trial Brief, para. 467.

(1459) Defence Closing Argument, T. 10148.

(1460) Aleksovski Appeal Judgement, para. 107.

(1461) See in particular, Kunarac judgement, paras 836 et seq.; Nordic Judgement, para. 847.

term of imprisonment is to be determined by "recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". Article 24 (2) provides for the Trial Chambers to "take into account such factors as the gravity of the offences and the individual circumstances of the convicted person". These statutory provisions are to be read in conjunction with Rule 101, which provides that the Chamber shall take into account the factors mentioned in Article 24 (2) as well as such factors as any aggravating or mitigating circumstances and the general practice of the courts in the former Yugoslavia. ⁽¹⁴⁶²⁾

695. Rule 101 states also that the Trial Chamber must take into consideration "any penalty imposed by a Court of any State on the convicted person for the same act" and which has already been served, as well as the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal. On the other side, Rule 87(C) grants the Trial Chamber discretion to either impose a penalty "in respect of each finding of guilt" or a single sentence reflecting the totality of the criminal conduct of the accused. ⁽¹⁴⁶³⁾ in the case of multiple sentences, the Trial Chamber shall indicate

(1462) Rule 101 defines the weight to be placed upon the provisions of Article 24 when determining the appropriate sentence. Rule 101 provides in full that: (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

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

(i) any aggravating circumstances;

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

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

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

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

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

(1463) In particular, as to the sentence to be imposed for cumulative convictions, the Appeals Chamber in the Celebici cases held that "the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. S...C. The decision as to how this should be achieved lies within the discretion of the Trial Chamber", Celebici Appeal Judgement, para. 430.

whether they are to be served consecutively or concurrently (Rule 101 (c)).⁽¹⁴⁶⁴⁾

696. In accordance with the relevant sentencing provisions, the ICTY and the ICTR have developed a number of factors that should be examined when determining a proper sentence: the general practice on prison sentences in the former Yugoslavia, the gravity of the crimes and the individual circumstances of the convicted person.

B. General Sentencing Principles

1. General Practice on Prison Sentences in the former Yugoslavia

697. It is well established that the general sentencing practice of the former Yugoslavia is not binding on the Tribunal, although the Tribunal should have regard to it.⁽¹⁴⁶⁵⁾ Sentencing by the courts of the former Yugoslavia was based on the provisions of Chapter XVI, "Criminal Acts Against Humanity and International Law"⁽¹⁴⁶⁶⁾ and Article 41(1)⁽¹⁴⁶⁷⁾ of the SFRY criminal code. The death penalty could be imposed for war crimes and genocide, while a minimum prison sentence of ten years and a maximum of fifteen years were stipulated as

(1464) Most of the Trial Chambers of the ICTY have rendered judgements imposing multiple sentences, but the Jelisić, Blaskić, Kordić, Kunarac, Kambanda and Serushago Judgements imposed single sentences as in the cases before the Nuremberg and Tokyo Military Tribunals.

(1465) Tadić Sentencing Judgement II, para. 12; Furudžija Judgement, para. 285; Aleksovski Judgement, para. 242; Kordić Judgement, para. 849; Kunarac' Judgement, para. 859. The ICTR adopts, mutatis mutandis, a similar position: Kambanda Judgement, para. 23; Akayesu Sentence, para. 12-14; Kayishema Sentence, paras. 5-7

(1466) See Chapter XVI of the criminal code of the former Yugoslavia "Crimes Against Humanity and International Law: Articles 141 and 142(1) dealt with the crimes of genocide and other war crimes committed against civilians. See also Articles 142-156 and Articles 38 "Imprisonment", 41 "Sentences", and 48 "Coincidence of several offences." Crimes against peace and international law, including the crime of genocide and war crimes against a civilian population, were punishable by a sentence of 5-15 years in prison, by the death penalty or by 20 years in prison if a prison sentence was substituted for the death penalty, or in cases of aggravated homicide.

(1467) Article 41(1) of the criminal code of the SFRY states: "The court shall determine the sentence for the perpetrator of a given crime within the limits prescribed by the law for this crime, bearing in mind the purpose of the punishment and taking into account all the circumstances that could lead to this sentence being more or less severe, in particular: the degree of criminal responsibility, the motives of the crime, the degree of the threat or damage to protected property, the circumstances under which the crime was committed, the background of the perpetrator, his personal circumstances and behaviour after the commission of the crime as well as other circumstances which relate to the character of the perpetrator".

the penalty to be imposed for aggravated murders. Article 38(2) of the SFRY criminal code permitted courts to hand down a sentence of twenty years in prison in lieu of the death penalty.⁽¹⁴⁶⁸⁾ In 1998, Bosnia and Herzegovina abolished the death penalty and introduced in its place a long-term imprisonment of 20-40 years "for the gravest forms of criminal offenses [...] committed with intention".⁽¹⁴⁶⁹⁾ In accordance with the recommendation of the Secretary General's Report, the Tribunal cannot impose the death penalty.⁽¹⁴⁷⁰⁾ "The penalty imposed by the Trial Chamber shall be limited to imprisonment" (Article 24-1 of the Statute). The sentence imposed by the Trial Chamber in this case thus falls near the range of sentence afforded by the FRY for the most severe war crimes.

2. Gravity of the Crime

698. The gravity of the offence is a primary factor to be taken into account in imposing a sentence. The Trial Chamber in the Celebici case stated that it was "by far the most important consideration, which may be regarded as the litmus test for the appropriate sentence".⁽¹⁴⁷¹⁾ The seriousness of the crime must weigh heavily in the sentence imposed irrespective of the form of the criminal participation of the individual.⁽¹⁴⁷²⁾ Taking into consideration the seriousness of the crime avoids excessive disparities in sentences imposed for the same type of conduct.⁽¹⁴⁷³⁾

699. The Prosecutor argues that the gravity of crimes with which General Krstić may be convicted is self-evident and that genocide "constitutes the crime of crimes, which must be taken into account when deciding the sentence".⁽¹⁴⁷⁴⁾ The Prosecutor also argues that the number of victims and their suffering are factors to be taken into account in assessing the gravity of the crimes committed.

700. Assessing the seriousness of the crimes is not a mere matter of comparing and ranking the crimes in the abstract. It has been argued that crimes against humanity and war crimes are equally serious and that "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime [...]".⁽¹⁴⁷⁵⁾ No Chamber has yet ruled on the ranking of crimes in a case

(1468) Kordić' Judgement, pars 849

(1469) Tadić Sentencing Judgement II, para. 12.

(1470) Report of the Secretary General, paras 111-112.

(1471) Celebici Judgement, para. 1225.

(1472) Celebici Appeal Judgement, para. 741.

(1473) Celebici Appeal Judgement, paras. 756-758

(1474) Prosecution Final Trial Brief, para. 468 (citing Blaskić' Judgement, para. 800, itself citing Kambanda judgement, para. 9, 16).

(1475) Tadić Sentencing Judgement III, para. 69 and the Separate Opinion of Judge Shahabuddeen. The Appeals Chamber, and subsequently Trial Chambers confirmed this assertion. Furundžija Judgement, paras 240 to 243; Kunarac

where an individual has been found guilty of genocide. It can also be argued, however, that genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy. However, this does not rule out the Trial Chamber's duty to decide on the appropriate punishment according to the facts of each case. Genocide embodies a horrendous concept, indeed, but a close look at the myriad of situations that can come within its boundaries cautions against prescribing a monolithic punishment for one and all genocides or similarly for one and all crimes against humanity or war crimes.

(1476) A murder, whether qualified as a crime against humanity, a war crime or an act of genocide, may be a graver offence than imposing serious bodily or mental harm upon an individual. In this regard, the Trial Chamber ascribes to the approach taken by the Appeals Chamber that "[t]he level [of penalty] in any particular case [be] fixed by reference to the circumstances of the case." (1477)

701. Thus, the Trial Chamber must assess the seriousness of the crimes in the light of their individual circumstances and consequences. This presupposes taking into account quantitatively the number of victims and qualitatively the suffering inflicted on the victims. (1478)

702. In this sense, the Trial Chamber agrees with the Prosecutor that the number of victims and their suffering are relevant factors in determining the sentence

Judgement, para. 851. In the opposite sense, see Separate Opinion of Judge Cassese appended to the Tadic Sentencing Judgement III, para. 14, where it is stated that crimes against humanity are more serious than war crimes because of "a whole pattern of criminality" within which they are committed and the intent of the perpetrator of the crime who must be aware of the said pattern. Also see the Joint Separate Opinions of Judge McDonald and Judge Vohrah appended to Erdemovic Appeal Judgement, paras 20 et seq. and Separate and Dissenting Opinion of Judge Li appended to the Erdemovic Appeal Judgement, paras 19 et seq. see also the Declaration of Judge Vohrah appended to the Furundzija Appeal Judgement, in particular paras 5 et seq.

(1476) In this regard, the Trial Chamber in the Tadic' case held that "... What is to be punished by penalty is the proven criminal conduct...". Prosecutor v. Tadic, Decision on Defence Motion on the Form of the Indictment, IT-94-1-PT, 14 November 1995.

(1477) Tadic' Sentencing Judgement III, para. 69

(1478) (elebici Judgement, parka 1226

(1479) and that the mistreatment of women (1480) or children is especially significant in the present case. However, the Prosecutor also contends that the "overwhelming scope of the crimes", the manner in which the crimes were committed, the fact that some of the victims were elderly men and young boys, the fact that many of the executed were blindfolded and had their hands tied behind their back when they were murdered, and the "long-term damage to their surviving family members and the Bosnian Muslim community" are aggravating circumstances.⁽¹⁴⁸¹⁾ As such, the Prosecutor does not draw any clear line between factors relevant to assess the gravity of the crimes committed and factors relevant as aggravating circumstances.

703. The Trial Chamber considers that the circumstance that the victim detainees were completely at the mercy of their captors, (1482) the physical and psychological suffering inflicted upon witnesses to the crime, (1483) the "indiscriminate, disproportionate, terrifying" or "heinous" means and methods used to commit the crimes (1484) are all relevant in assessing the gravity of the crimes in this case. (1485) Appropriate consideration of those circumstances gives "a voice" to the suffering of the victims. (1486)

3. Personal Situation of the Accused

704. The Trial Chamber must also take into account factors pertaining to the "individual circumstances of the convicted person" (Article 24-2 of the Statute), to "bring to light the reasons for the accused's criminal conduct" and to assess "the possibility of rehabilitating the accused."⁽¹⁴⁸⁷⁾ The prospect of rehabilitating the accused and the extent to which the accused is a great danger to the

(1479) Prosecutor's Final Brief, para. 469; See also Erdemovic' Appeal Judgement, para. 15, the Kambanda Judgement, para.42, Kayishema Sentence, para. 26; Kordic' Judgement, para. 852.

(1480) Furundzija Judgement, para. 283.

(1481) Prosecution Final Trial Brief, para. 471.

(1482) (elebici Judgement, para- 1268

(1483) Jelisid Judgement, para. 132.

(1484) Kayishema Sentence, para. 18; BlasVkic Judgement, para. 787; Kordic Judgement, para. 852.

(1485) In the opposite sense, Kunarac judgement, which refers to the fact that some crimes stretch over a long period or are committed repeatedly as an aggravating circumstance, para. 865. This fact seems to enter in the quantitative assessment of the crimes.

(1486) Tadic Judgement; the telebici (paras.1226, 1260, 1273), Furundzija (paras 281 et seq.) and Blaskic (para. 787) Judgements.

(1487) Blasvkic Judgement, paras. 779 and 780.

community as a whole should be taken into account. ⁽¹⁴⁸⁸⁾ Thus, in general, factors peculiar to the person who committed the crimes, and not those pertaining to the crimes committed, are considered as aggravating or mitigating circumstances.

(a) Aggravating Circumstances

705. The Statute and the Rules do not stipulate which factors are to be considered as aggravating circumstances. In finding whether there are any aggravating circumstances, the Trial Chamber proceeds with caution. ⁽¹⁴⁸⁹⁾ Factors identified as potentially aggravating by the Trial Chamber are the level of criminal participation, the premeditation and the motive of the convicted person.

(i) Criminal Participation

706. The Prosecutor argues that General Krstic's "direct, conscious and deliberate participation in creating and furthering the criminal plan as the Chief of Staff and Commander of the Troops which committed the offenses, which evidences his intent and willingness to participate in the commission of the crimes, serves as an aggravating factor". The Prosecutor argues that General Krstic's 'penultimate command after General Mladic', and/or the fact that he was in a position to order the prevention, cessation or punishment" of the crimes serve as aggravating factors. ⁽¹⁴⁹⁰⁾

707. The Trial Chamber has already examined the criminal responsibility of the accused in order to decide on his guilt. The same elements should not be reviewed a first time as a constitutive element of the crime and a second time as an aggravating circumstance.

708. Direct criminal participation under Article 7 (1), if linked to a high-rank position of command, may be invoked as an aggravating factor. In determining a sentence, both Tribunals have mentioned the three most direct forms of participation, "planning, ordering, instigating", as possible aggravating circumstances in the case of a highly placed accused. ⁽¹⁴⁹¹⁾ so it is in the case of

(1488) Erdemovic Sentencing Judgement, para. 110, and Erdemovic Sentencing Judgement II, para. 16(1).

(1489) In many national jurisdictions, the law specifically identifies those aggravating circumstances, e.g. Criminal Law (Sentencing) Act of South Australia, (1988), Section 10; United States of America Federal Sentencing Guidelines. In some jurisdictions, the judge cannot consider any other aggravating circumstances than those provided by the law, e.g. French Criminal Code, articles 132.71 et seq. (in general) for instance; Dutch Criminal Code, Articles 10, 57, 421-423 for instance.

(1490) Prosecution Final Trial Brief, para. 471.

(1491) Kambanda Judgement, para. 44, Kupreskic Judgement, para. 862; Rutaganda Judgement, para. 470 and Akayesu Judgement, para. 36.

genocide. Because an accused can commit genocide without the aid and cooperation of others, provided he has the requisite intent, a one-man genocidal agent could be viewed differently from the commander of an army or the president of a State, who has enlisted the resources of an army or a nation to carry out his genocidal effort. The Trial Chamber finds that the direct participation of a high level superior in a crime is an aggravating circumstance, although to what degree depends on the actual level of authority and the form of direct participation.

709. A high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own. The consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes.⁽¹⁴⁹²⁾ It must be noted though that current case law of the Tribunal does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors.⁽¹⁴⁹³⁾

(ii) Premeditation and Motives of Crimes

710. The Prosecutor also argues that the "premeditation involved in the genocide and deportation is clearly an aggravating circumstance in the case, given General Krstic's critical role in planning this massive crime".⁽¹⁴⁹⁴⁾

711. Premeditation⁽¹⁴⁹⁵⁾ may "constitute an aggravating circumstance when it is particularly flagrant" and motive "to some extent [is] a necessary factor in the determination of sentence after guilt has been established."⁽¹⁴⁹⁶⁾ When a genocide or a war crime, neither of which requires the element of premeditation, are in fact planned in advance, premeditation may constitute an aggravating circumstance.⁽¹⁴⁹⁷⁾ Premeditated or enthusiastic participation in a criminal act

(1492) Rutaganda Judgement, para. 469: "the fact that a person in a high position abused his authority and committed crimes is to be viewed as an aggravating factor." Kambanda Judgement, para. 44. In this regard, the Appeals Chamber reduced the sentence imposed on Dusko Tadic' from 25 to 20 years stating that "there is a need for sentences to reflect the relative significance of the role of the SaccusedC and S...to take into accountC his level in the command structure, SwhichC was law.", Tadic Sentencing Judgement III, paras 55-57.

(1493) Sentences imposed by the ICTY on subordinates are of an average of 15 years imprisonment as opposed to sentences imposed on superiors, which are of an average of 17 years imprisonment.

(1494) Prosecution Final Trial Brief, para. 471.

(1495) The Defense submits that the true motive for the murders of the Bosnian Muslim men, were vengeance and punishment, for failing to surrender following General Mladic's invitation to do so. Defence Closing Arguments, T. 10157.

(1496) Blaskic Judgement, para. 785.

(1497) Serushago Sentence, para. 30.

necessarily reveals a higher level of criminality on the part of the participant. ⁽¹⁴⁹⁸⁾ In determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm. Indeed, reluctant participation in the crimes may in some instances be considered as a mitigating circumstance.

712. The Trial Chamber agrees with the Prosecutor on the relevance of premeditation as an aggravating factor in the abstract but, based on the sequence of General Krstic's delayed participation in the genocidal scheme initiated by General Mladic' and others, finds it not applicable to the situation.

(b) Mitigating Circumstances

713. Neither the Statute, the Rules nor the jurisprudence of the Tribunals define "mitigating" circumstances. ⁽¹⁴⁹⁹⁾ A definition of what is a mitigating circumstance is provided in fact by the SFRY Criminal Code. Article 42(2) of the SFRY Criminal Code stated that the judge may determine whether "there are mitigating circumstances which are such that they indicate that the objective of the sentence may be achieved equally well by a reduced sentence." Mitigating circumstances, concomitant or posterior to the crimes, vary from case to case. The Prosecution submits that there are no mitigating circumstances in the present case. ⁽¹⁵⁰⁰⁾ However, the Trial Chamber has the discretion to consider any factors it considers to be of a mitigating nature.

(i) Mitigating Circumstances Concomitant with the Commission of the Crimes

714. Indirect participation is one circumstance that may go to mitigating a sentence. An act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission. ⁽¹⁵⁰¹⁾ Similarly, in some cases, forced participation in a crime can be a mitigating circumstance. The jurisprudence of

(1489) Jelisić Judgement, paras 130-131; see also the Tadić Sentencing Judgement, para. 57 and the Tadić Sentencing Judgement II, para. 20: the enthusiastic support for the attack launched against the non-Serbian civilian population.

(1499) Kordić Judgement, para. 848.

(1500) Prosecution Closing Arguments, T. 10011.

(1501) Tadić Furundžija Judgement, para. 282. For instance, participation as an aider or abettor e.g. in the crime of genocide, may range from providing information, resources, or covering-up the crimes, to leading the execution squads.

the Tribunal established that, while duress⁽¹⁵⁰²⁾ cannot afford a "complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives",⁽¹⁵⁰³⁾ it may be taken into account as a mitigating circumstance. The Trial Chamber may also take into account the particular personal circumstances of the accused at the time the crimes are committed, if they illustrate the character and the capacity of the convicted person to be reintegrated in society. For instance, the fact that an accused has no prior convictions for violent crimes may be considered relevant.⁽¹⁵⁰⁴⁾ In contrast, personality disorders ("borderline, narcissistic and anti-social characteristics") are not relevant factors,⁽¹⁵⁰⁵⁾ although significant mental handicap⁽¹⁵⁰⁶⁾ can constitute a mitigating circumstance. Good character⁽¹⁵⁰⁷⁾, "keen sense for the soldiering profession", or "poor family background" in combination with youth and an "immature and fragile" personality are also elements that may constitute mitigating circumstances.⁽¹⁵⁰⁸⁾

(ii) Mitigating Circumstances Postrior to the Commission of the Crimes

715. The behaviour of the accused after commission of the criminal acts is also relevant to the Trial Chamber's assessment of the appropriate sentence. The behaviour of the accused in the proceedings instigated against him is of particular importance. The fact that an accused is co-operating with the court, or that he or she voluntarily surrendered, admits guilt and expresses remorse before convictions are all relevant factors and can constitute mitigating circumstances provided the accused is acting knowingly and sincerely.⁽¹⁵⁰⁹⁾

716. The only mitigating circumstance explicitly provided for in Rule 101(B)(ii) is co-operation with the Prosecutor. "The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on

(1502) Defined as: "imminent threats to the life of an accused if he refuses to commit a crime", Joint Separate Opinion of Judges McDonald and Vohrah appended to the Erdemovic Appeal-Judgement, para. 66.

(1503) 503 Joint Separate Opinion of Judges McDonald and NTohrah appended to the Erdemovic Appeal Judgement, para. 88.

(1504) Jelasic Judgement, para. 124, Furundzija, para. 284.

(1505) Jelasic Judgement, para. 125.

(1506) Rules of Procedure and Evidence, Rule 67 (A)(ii)(b): "diminished or lack of mental responsibility".

(1507) Erdemovic Judgement, para. 16(i); A/cayesu Sentencing Judgement, para. 35 (iii), but not in the telebici Judgement, para. 1256.

(1508) eelebici Judgement, para. 1283.

(1509) Kupresvkic Judgement, para. 853; Serushago Sentence, para. 35; see also the Musema Judgement, para. 1007; see also on contrary Kambanda Judgement, para. S1; Akayesu Sentencing Judgement, para. 35(i), Serushago Sentence, paras 40 and 41, Ruggiu Judgement, paras 69-72, Kunarad Judgement, para. 869; Blasvkic Judgement, para. 780. 15i0 Blaswkc Judgement, para- 780

these grounds".⁽¹⁵¹⁰⁾ This co-operation often becomes a question of the quantity and quality of the information provided by the accused.⁽¹⁵¹¹⁾ The providing of statements by the accused, which elucidate the details of the crimes or implicate other persons, may be considered a mitigating circumstance.⁽¹⁵¹²⁾ Such statements may increase the speed of a trial.⁽¹⁵¹³⁾ Co-operation that continues during the hearings may also be relevant.⁽¹⁵¹⁴⁾ In this regard, the Prosecution emphasises the fact that General Krstic' gave a voluntary statement but that the information he provided was not wholly true.⁽¹⁵¹⁵⁾ In contrast, the "health" of the convicted person may also be a mitigating circumstance and the Defence stressed the bad health of General Krstic' throughout the trial.⁽¹⁵¹⁶⁾

717. The Trial Chamber turns now to determine the appropriate sentence to be imposed upon General Krstic' in view of the factors examined above: the general sentencing practice of the former Yugoslavia for persons convicted of genocide, crimes against humanity and war crimes, the gravity of the crimes committed by General Krstic' and the existence and the weight of any aggravating and/or mitigating circumstances. The Trial Chamber has already alluded to the fact that genocide, being the gravest offence under Yugoslav law, would have permitted its highest sentence, up to forty years, and that the sentence will fall near that range.

C. Determination of General Krstic's Sentence

718. General Krstic' was 47 years old at the time of Srebrenica. At the beginning of the ten fateful days, which are 10 to 19 July 1995, he held the position of Chief of the VRS Drina Corps Staff and, during the ten days, he was promoted to the rank of commander of the VRS Drina Corps. As a military professional, General Krstic was well aware of the extent of his obligations laid out in the military codes of the former JNA and then of the VRS. He was congratulated for the manner in which he launched the military attack on Srebrenica. On 2 December 1998, when he was arrested by SFOR, he was in command of the VRS 5th Corps in Sokolac. Since that date, he has been detained in the UN

(1510) Blaskic Judgement, para. 774.

(1511) Blaskic Judgement, para. 774, the Erdemovic Sentencing Judgement, paras 99-101 and the Erdemovic Sentencing Judgement II, para. 16 iv, and the Kambanda Judgement, para. 47.

(1512) Kunarac Judgement, para. 868

(1513) Musema Judgement, para. 1007. Idem in the Ruggiu Judgement, para. 53: a guilty plea accelerates the proceedings and makes it possible to save resources.

(1514) Idem and in the contrary sense, Celebici Judgement, para. 1244: Mucic's lack of respect for the judicial process, attempts to fabricate evidence and influence witnesses are taken to be aggravating circumstances.

(1515) Prosecution Closing Arguments, T. 10011.

(1516) Celebici Judgement, part 1270

Detention Unit in Scheveningen at The Hague in the Netherlands.

719. The Trial Chamber found that General Krstic' participated in two criminal plans, initially to ethnically cleanse the Srebrenica enclave of all Muslim civilians and later to kill the military aged men of Srebrenica. For his participation in these crimes, General Krstic' has been found guilty of murder (under Article 3), persecutions (under Article 5) and genocide (under Article 4). The commission of those crimes would have justified the harshest of sentences in the former Yugoslavia.

720. The extreme gravity of the crimes committed by General Krstic' is established by their scale and organisation and the speed with which they were perpetrated in a ten day period. The Trial Chamber has already described in detail how all Bosnian Muslims in Srebrenica were uprooted, how up to 25,000 Bosnian Muslim women, children and elderly persons were expelled toward Bosnian Muslim controlled territory and how 7,000 to 8,000 Bosnian Muslim men and boys were executed in the most cruel manner. The Trial Chamber notes the physical and psychological suffering inflicted on the victims and the obvious psychological suffering of the survivors. The survivors lost their male family members; three generations of Muslim men from the Srebrenica area disappeared in a single week. To date, most of the women and children survivors have not been able to return to their homes and many suffer what is now known as the "Srebrenica Syndrome": an inability to get on with their lives because of the lack of definite news on the fate of their lost sons, husbands and fathers.⁽¹⁵¹⁷⁾

721. As to the role of the accused, the Trial Chamber has affirmed General

(1517) *Supra*, paras. 90-94. See also Witness I, T. 2420-22: "And 8.000 Srebrenica inhabitants are missing, and we must all know that. We must all know that there must have been children, poor people, between 16.000 and 20.000, and one needs to feed them all, to bring them up. There are so many fathers without sons and sons without fathers. I had two sons, and I don't have them any more. why is that? And I lived and I worked in my own home, nobody else's, and that was -- that same held true for my father and my grandfather, but what they seized, what they took away, what they grabbed. I had two houses. One they burnt down. It could burn. They burnt it down, but the other one they couldn't burn, so they came and put a mine to it because the house was new and I hadn't finished it yet. The roof was still missing, but it was all made of concrete and bricks, so it wouldn't burn. And I thought. Well, it will survive at least. But no, they came and planted mines, and it just went down; nothing but bust. But, right. Never mind that. I had it, so it's gone. They took it. They seized it. But why did they have to kill my sons? "And I stand today as dried as that tree in the forest. I could have lived with my sons and with my own land, and now I don't have either. And how am I supposed to live today? I don't have a pension or anything. Before that, I relied on my sons. They wouldn't have left me. They wouldn't have let me go hungry. And today, without my sons, without land, I'm slowly starving."

Krstic's conscious and voluntary participation in the crimes of which he has been found guilty. General Krstic' held a high rank in the VRS military hierarchy and was even promoted after the perpetration of the aforementioned crimes. At the time of the crimes, he was third, then second in command after General Mladic'. In this regard, the Trial Chamber finds that the fact that General Krstic' occupied the highest level of VRS Corps commander is an aggravating factor because he utilised that position to participate directly in a genocide.

722. The Trial Chamber also notes that the conduct of General Krstic' during the course of the trial has not been altogether forthcoming. General Krstic' testified under oath before the Trial Chamber. While this could be viewed as a sign of cooperation with the Tribunal, the evidence clearly established that he put up a false defence on several critical issues, most notably, his denial that he or anyone from the Drina Corps was involved in the forcible transfer of Muslim women, children and elderly from Potocari; the date upon which he became commander of the Drina Corps, or became aware of the mass executions. General Krstic's manner was one of obstinacy under cross-examination. He continually refused to answer directly or forthrightly legitimate questions put to him by the Prosecution or even Judges. Overall, his conduct during the proceedings evidences a lack of remorse for the role he played in the Srebrenica area in July 1995.

723. The Trial Chamber finds no other relevant circumstances. Although sympathetic to General Krstic's discomfort throughout the trial because of medical complications he suffered, ⁽¹⁵¹⁸⁾ the Trial Chamber considers that this circumstance is not related to the objectives of sentence.

724. The Trial Chamber's overall assessment is that General Krstic' is a professional soldier who willingly participated in the forcible transfer of all women, children and elderly from Srebrenica, but would not likely, on his own, have embarked on a genocidal venture; however, he allowed himself, as he assumed command responsibility for the Drina Corps, to be drawn into the heinous scheme and to sanction the use of Corps assets to assist with the genocide. After he had assumed command of the Drina Corps, on 13 July 1995, he could have tried to halt the use of Drina Corps resources in the implementation of the genocide. His own commander, General Mladic', was calling the shots and personally supervising the killings. General Krstic's participation in the genocide consisted primarily of allowing Drina Corps assets to be used in connection with the executions from 14 July onwards and assisting

(1518) In late December 1994, General Krstic' was seriously injured when he stepped on a landmine. He was evacuated to a military hospital in Sokolac, and subsequently transferred to the Military Medical Academy in Belgrade. As a result of the injuries he sustained from the landmine, part of his leg was amputated and he remained in rehabilitation and on leave until mid May 1995.

with the provision of men to be deployed to participate in executions that occurred on 16 July 1995. General Krstic' remained largely passive in the face of his knowledge of what was going on; he is guilty, but his guilt is palpably less than others who devised and supervised the executions all through that week and who remain at large. When pressured, he assisted the effort in deploying some men for the task, but on his own he would not likely have initiated such a plan. Afterwards, as word of the executions filtered in, he kept silent and even expressed sentiments lionising the Bosnian Serb campaign in Srebrenica. After the signing of the Dayton Accords, he co-operated with the implementers of the accord and continued with his professional career although he insisted that his fruitless effort to unseat one of his officers, whom he believed to have directly participated in the killings, meant he would not be trusted or treated as a devoted loyalist by the Bosnian Serb authorities thereafter. His story is one of a respected professional soldier who could not balk his superiors' insane desire to forever rid the Srebrenica area of Muslim civilians, and who, finally, participated in the unlawful realisation of this hideous design.

725. The Prosecutor submits that General Krstic' should be sentenced to consecutive life sentences for each count of the Indictment under which General Krstic' is found guilty. However, in view of the fact that General Krstic' is guilty of crimes characterised in several different ways but which form part of a single campaign or strategies of crimes committed in a geographically limited territory over a limited period of time, the Trial Chamber holds it preferable to impose a single sentence, bearing in mind that the nearly three years spent in the custody of the Tribunal is to be deducted from the time to be served. ⁽¹⁵¹⁹⁾

726. In light of the above considerations, the Trial Chamber sentences General Krstic' to Forty six years of imprisonment.

V. DISPOSITION

727. Based upon the facts and the legal findings as determined by the Trial Chamber and for the foregoing reasons, the Trial Chamber:

FINDS Radislav Krstic GUILTY of:

- Genocide;

- Persecution for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians;

• Murder as a violation of the Laws and Customs of War;

SENTENCES Radislav KRSTIC to Forty six years of imprisonment and STATES that the full amount of time spent in the custody of the Tribunal will be deducted from the time to be served.

Done on second of August 2001 in English and French, the English text being

authoritative.

At The Hague, The Netherlands

for

Judge Fouad Riad Judge Almiro Rodrigues Presiding Judge Patricia Wald

مقتطفات من الحكم الثاني

(ii) Massacre of Muslims from Hambarine

95. One afternoon during the second half of July, two bus loads of detainees from the Muslim village of Hambarine, which had been captured by the Serbs in late May,⁽²³³⁾ arrived in Omarska from the Keraterm camp. The detainees were taken to the white house. That night, Witness AM was awakened by pistol shots and rose to see guards walking among a large number of bodies, firing into their heads, apparently to "finish them off." The witness vividly recalled the event:

remember well when this bullet was fired, the brain would come out as if the bullet had hit milk, and it came out like white dust.⁽²³⁴⁾

96. The corpses were so numerous they covered "some 50 or 70 metros". A truck arrived to dispose of the bodies and two detainees were ordered to load them onto the truck. The witness described how, after filling the truck with bodies, it would drive away, returning a quarter of an hour later. It took 5 or 6 round trips for all the bodies to be removed. Witness AM estimated that the truck had 7 or 8 cubic metres of loading space.⁽²³⁵⁾

97. The Trial Chamber finds that the Petrovdan and Hambarine incidents occurred as recounted, resulting in the death of an unknown number of detainees.

(i) Sexual Violence

98. Approximately thirty-six of the detainees held at Omarska camp were women. The women detained at Omarska were of different ages; the oldest were in their sixties and there was one young girl. The Trial Chamber heard compelling evidence from several female detainees who testified that it was commonplace for women to be subjected to sexual intimidation or violence in Omarska.⁽²³⁶⁾ For example, Sifeta Susic' felt threatened by Zeljko Meakic' when he said to her that someone had "asked whether it was true that Sifeta Susic' was raped by 20 soldiers...and I said 'Yes, it is. I was the 20th in line.'"⁽²³⁷⁾ Several witnesses told of an occasion when a man approached a female detainee in the eating area, unbuttoned her shirt, drew a knife over one of her breasts, and threatened to cut it off.⁽²³⁸⁾ Many others testified that women were frequently called out from the administration building or the cafeteria at night and were

(233) See slzprbl: "Background, context and formation of the camps".

(234) Witness AM, T.3931.

(235) Witness AM, T. 3930-3933. The witness later heard that these people had arrived from Keraterm and were supposed to be "exchanged".

(236) Witness J. T. 4774-4775; Witness F. T. 5382-5383; Witness B. T. 2338, 2430; Nedzija Fazlic, T. 5102; Sifeta Susic, T. 3018-3019.

(237) Sifeta Susic, T. 3020-3021.

(238) Witness J. T. 4769; Zlata Cikota, T. 3337-3338.

subsequently raped or subjected to other forms of sexual violence.⁽²³⁹⁾

99. Witness J testified that on one occasion Nedeljko Grabovac, known as "Kapitan", called her out. she was afraid he might kill her and described how he started touching her on her genitals and grabbing her breasts. Despite her pleas, he took out his penis and attempted to rape her, finally ejaculating on her before she managed to escape.⁽²⁴⁰⁾ The witness incurred bruises on her thighs and breasts as she struggled to get away.⁽²⁴¹⁾

100. Witness F testified that she was often taken away by a guard named Gruban.⁽²⁴²⁾ The witness described how this guard took her on several occasions, at any time of the day or night, to a room upstairs in the administration building where he forced her to have sex with him.⁽²⁴³⁾ Another guard, named Kole, called her out twice during the night where he took her to the same room where Gruban had raped her and then raped her himself.⁽²⁴⁴⁾ She further testified that she was taken to the "Separacija" building (a kitchen outside the Omarska camp) where she was forced to have sexual intercourse with Mirko Babic' and Dule Tadic.⁽²⁴⁵⁾

101. Witness U testified that she was detained with another woman in one room of the white house. There they heard cries of pain and terror emanating from male detainees and heard interrogators or guards yelling and cursing at the detainees.⁽²⁴⁶⁾ on one occasion, a guard prevented other guards at the white house from assaulting the two female detainees.⁽²⁴⁷⁾

102. Witness U however also testified that, when she was detained in the administration building with the other women, a guard took her from her room several times at night to a room at the end of the corridor, where she was systematically raped by a string of perpetrators:

...He would rape me...He would leave, and then all the time, one after the other, others would come in, I don't know the exact number. . .they also raped me.

103. She was also taken twice during the day to that same room by another guard, where she was again subjected to repeated rapes by multiple assailants:

.. First he raped me, and then afterwards again others entered...three or four men who raped me.

(239) Witness J. T. 4774-4775; Witness AT, T. 6083; Witness K, T. 4983; Witness A, T. 5486; Witness F. T. 5382; Sifeta Susic', T. 3018.

(240) Witness Jo T. 4779-4782.

(241) Witness J. T. 4782-4783.

(242) Witness F. T.5383.

(243) Witness F. T.5385-5386.

(244) Witness F. T. 5386-5387.

(245) Witness F. T.5389-5390.

(246) Witness U. T. 6201, 6202-6203.

(247) Witness U. T. 6203.

Q. Did you experience bleeding due to the multiple rapes that you endured at the Omarska camp?

A. Yes, throughout [the time] I was there.⁽²⁴⁸⁾

104. Witness B was taken to one of the offices in the administration building by a young guard who attempted to rape her:

He lay on top of me and started physically abusing me. I tried to defend myself, and I did for as long as my strength lasted, and at one point, he threatened to kill me if I wouldn't let him have his way...I felt a very strong pain in the neck area of my spine...

Witness B continued to struggle and the guard finally stopped when she said that she would report him to Radic'.⁽²⁴⁹⁾

105. Nedzija Fazlic testified that on one occasion a guard called Lugar called her to a room at the end of the corridor and ordered her to take off her clothes. She told him that she could not have sexual intercourse with him as she was menstruating. He forced her to prove it to him and then told her that he would sleep with her later.⁽²⁵⁰⁾ Nedzija Fazlic' continued to be threatened by Lugar until she complained to Zeljko Meakic'.⁽²⁵¹⁾

106. The women testified that they spoke little amongst themselves about the sexual violence they were forced to endure. Defense witness Vinka Andic', who cleaned the administration building, testified that the female detainees never complained about mistreatment to her.⁽²⁵²⁾ The Trial Chamber notes however that, as the female detainees were reluctant to talk about the abuses among themselves, it would be unlikely they would discuss it with a cleaning lady of Serb ethnicity employed by the camp authorities.

107. The testimony given by female detainees did suggest that they had their suspicions about what was happening to the other women.⁽²⁵³⁾ Witness J testified that during her stay in the administration building, women were very often called out at night. When they returned they appeared absent-minded and did not speak to the others.⁽²⁵⁴⁾ Similarly, Witness F testified that during the time she spent at Omarska, almost every woman from her room was taken out at night. She said

(248) Witness U. T. 6229-6230

(249) Witness B. T. 2383-2384

(250) Nedzija Fazlic', T. 5096-5097.

(251) Nedzija Fazlic', T. 5098-5099.

(252) Vinka Andic', T. 9133.

(253) Sifeta Susic', T. 3104-3105. Nedzija Fazlic' testified that on one occasion she went down to the cafeteria with other women and found a detainee called Mirsada there crying because she had been taken out that night by a guard named Lugar. When the women approached Mirsada to help her, Lugar went up to them, stuck out his rifle and said that nobody should go near her. Nedzija Fazlic', T. 5102-5103.

(254) Witness J 4774-4776.

that when a woman came back to the room, she would usually be withdrawn or crying.⁽²⁵⁵⁾ Witness A described an occasion when guards took her and another woman to the 'Separacija' building.

The other woman was forced to go off with a man called Mirko Babic' and when she returned she was in tears.⁽²⁵⁶⁾ Witness B reported how one woman would often be taken out for interrogation and when she returned showed signs of "physical abuse." ⁽²⁵⁷⁾ Zuhra Hmic' was kept in a room above the cafeteria with seventeen other women and she testified that their "room leader" was separated from them during the night. The witness later noticed that the "room leader" had an enormous bruise on her right thigh and that she kept crying all the time.⁽²⁵⁸⁾

108. The Trial Chamber finds that female detainees were subjected to various forms of sexual violence in Omarska camp.

109. The Trial Chamber turns now to examine the conditions of detention in the Keraterm and Trnopolje camps where Zigic' allegedly committed crimes, in addition to the ones he is charged with in Omarska.

(255) Witness F, T. 5382-5383.

(256) Witness A, T. 5488-5489

(257) Witness B. T. 2338.

(258) Zuhra Hmic, T. 3138-3139. Witness U testified that Radic took a female detainee out and when she returned, she looked afraid, was quiet, and her face was all red. Witness U. T. 6217.

B. THE SENTENCING PRINCIPLES

700. Sentencing by the courts of the former Yugoslavia was based on the provisions of Chapter XVI, "Criminal Acts Against Humanity and International Law"⁽¹¹⁵⁷⁾ and Article 41(1)⁽¹¹⁵⁸⁾ of the SFRY criminal code. The Prosecution submits that Article 142(1) of this code provided in particular that "it is a criminal offence, when committed during an armed conflict or occupation, to submit the civilian population to killing, inhuman treatment, great suffering or injury to body and health, forced prostitution or rape". A violation of this Article was to be "punished by imprisonment of no less than five years or by death - with the exception that the death penalty may be replaced by twenty years of imprisonment".⁽¹¹⁵⁹⁾ Indeed, Article 38(2) of the SFRY criminal code permitted courts generally to hand down a sentence of twenty years in prison in lieu of the death penalty.⁽¹¹⁶⁰⁾ For aggravated murders, a minimum prison sentence of ten years and a maximum of fifteen years were stipulated as the penalty.

701. The Tribunal has often reiterated in its Judgements that the primary factor to be taken into account in imposing a sentence is the gravity of the offense, including the impact of the crimes.⁽¹¹⁶¹⁾ The seriousness of the crimes must weigh heavily in the sentence imposed irrespective of the form of the criminal participation of the individual.⁽¹¹⁶²⁾ In this regard, the Trial Chamber subscribes

(1157) See Chapter XVI of the Criminal Code of the former Yugoslavia "Crimes Against Humanity and International Law: Articles 141 and 142(1) dealt with the crimes of genocide and other war crimes committed against civilians. See also Articles 142-156 and Articles 38 "Imprisonment", 41 "Sentences", and 48 "Coincidence of several offences." Crimes against peace and international law, including the crime of genocide and war crimes against a civilian population, were punishable by a sentence of 5-15 years in prison, by the death penalty or by 20 years in prison if a prison sentence was substituted for the death penalty.

(1158) Article 41(1) of the Criminal Code of the SFRY states (in translation): "The court shall determine the sentence for the perpetrator of a given crime within the limits prescribed by the law for this crime, bearing in mind the purpose of the punishment and taking into account all the circumstances that could lead to this sentence being more or less severe, in particular: the degree of criminal responsibility, the motives of the crime, the degree of the threat or damage to protected property, the circumstances under which the crime was committed, the background of the perpetrator, his personal circumstances and behaviour after the commission of the crime as well as other circumstances which relate to the character of the perpetrator".

(1159) Prosecution Final Trial Brief, para. 510.

(1160) Kordic Trial Chamber Judgement, para. 849.

(1161) The Trial Chamber in the Celebici case stated that the gravity of the offence was "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence", Celebici Trial Chamber Judgement, para. 1225.

(1162) Celebici Appeals Chamber Judgement, para. 741.

to the approach taken by the Appeals Chamber that the level of penalty in each particular case should "be fixed by reference to the circumstances of the case."⁽¹¹⁶³⁾ In general, the Trial Chamber will assess the seriousness of the crimes by taking into account quantitatively the number of victims and the effect of the crimes on the broader targeted group and qualitatively the suffering inflicted on the victims and survivors.⁽¹¹⁶⁴⁾

702. The Trial Chamber notes the following should be taken into consideration: the victim detainees were totally vulnerable and at the mercy of their captors,⁽¹¹⁶⁵⁾ the repetitious and continuing nature of most of the crimes, the psychological suffering inflicted upon victims and witnesses of the crimes and the very real fears of witnesses that they would be next,⁽¹¹⁶⁶⁾ the "indiscriminate, disproportionate, terrifying" or heinous" means and methods used to commit the crimes,⁽¹¹⁶⁷⁾ the sexual violence inflicted upon the women,⁽¹¹⁶⁸⁾ and the discriminatory nature of the crimes. All are relevant factors in assessing the gravity of the crimes.⁽¹¹⁶⁹⁾ Appropriate consideration of those circumstances gives "a voice" to the suffering of the victims.⁽¹¹⁷⁰⁾

703. In general, factors peculiar to the person who participated in the crimes are considered as aggravating or mitigating circumstances.⁽¹¹⁷¹⁾ Neither the Statute nor the Rules stipulate which factors are to be considered as aggravating or mitigating circumstances, except that Rule 101(B)(ii) requires the Chamber to take into account any "significant cooperation" with the Prosecutor as a mitigating factor.

704. The Trial Chamber may also take into account factors pertaining to the individual circumstances of the convicted person in order to determine any "reasons for the accused's criminal conduct". Such information enables the

(1163) Tadic Appeals Sentencing Judgement III, para. 69.

(1164) Celebici Trial Chamber Judgement, para. 1226; Erdemovic Appeals Sentencing Judgement, para. 15; Kambanda Trial Chamber Judgement, para. 42; Kayishema Trial Chamber Judgement, para. 26; Kordic Trial Chamber Judgement, para. 852.

(1165) Celebici Trial Chamber Judgement, para. 1268.

(1166) Jelusic Trial Chamber Judgement, para. 132.

(1167) Kayishema Sentencing Judgement, para. 18; Blaskic Trial Chamber Judgement, para. 787; Kordic Trial Chamber Judgement, para. 852.

(1168) Krstic Trial Chamber Judgement, para. 702.

(1169) Kunarac Trial Chamber Judgement, which refers to the fact that some crimes stretch over a long period or are committed repeatedly, are aggravating circumstances, para. 865.

(1170) Tadic Trial Chamber Judgement; the Celebici Trial Chamber Judgement, paras. 1226, 1260, 1273; Furundzija Trial Chamber Judgement, paras. 281 et seq; and Blaskic Trial Chamber Judgement, para. 787.

(1171) Krstic Trial Chamber Judgement, para. 704.

Chamber more accurately to assess the possibility of rehabilitating those convicted by the Tribunal. ⁽¹¹⁷²⁾ Relevant individual factors may include cooperation with the Court, voluntary surrender, demonstrations of remorse, ⁽¹¹⁷³⁾ or no history of violent behavior. ⁽¹¹⁷⁴⁾

705. The jurisprudence of the Tribunal has identified potentially aggravating factors to include the level of criminal participation, premeditation, and the motive of the convicted person. ⁽¹¹⁷⁵⁾ Indirect or forced participation on the part of the perpetrators have also been identified as factors to be weighed. ⁽¹¹⁷⁶⁾ Similarly, the level of participation, the physical perpetration of a crime, and the zealotry with which a crime is committed should also be taken into account in determining a sentence. The Defense of Kos argues that fairness requires that the Prosecution prove aggravating circumstances beyond a reasonable doubt. ⁽¹¹⁷⁷⁾ The Trial Chamber agrees with the Celebici Appeals Chamber that only those matters which are proven beyond reasonable doubt against an accused may be taken into account in the aggravation of a sentence. ⁽¹¹⁷⁸⁾

706. The Zigic Defense submits that committing a crime under the influence of drugs or alcohol serves as a mitigating factor because the defendant's mental capacity is diminished. In this regard, the Trial Chamber acknowledges that mental impairment is considered relevant in mitigation of sentences in many countries. ⁽¹¹⁷⁹⁾ However, when mental capacity is diminished due to use of alcohol or drugs, account must be taken of whether the person subjected himself voluntarily or consciously to such a diminished mental state. While a state of intoxication could constitute a mitigating circumstance if it is forced or coerced, the Trial Chamber cannot accept Zigic's contention that an intentionally procured diminished mental state could result in a mitigated sentence. ⁽¹¹⁸⁰⁾ Indeed, the Trial Chamber considers that, particularly in contexts where violence is the norm

(1172) Blaszkic' Trial Chamber Judgement, paras 779 and 780.

(1173) Kunarac Trial Chamber Judgement, para. 868.

(1174) Jelusic Trial Chamber Judgement, para. 124, Funendzija Trial Chamber Judgement, para. 284.

(1175) Krstic Trial Chamber Judgement, paras 705 et seq; see also Celebici Appeals Chamber Judgement, para. 847.

(1176) Krstic Trial Chamber Judgement, paras 713 et seq; Kos Final Trial Brief, p 150, citing the Kunarac Trial Chamber Judgement, para. 847.

(1177) Kos Final Trial Brief, p 150, citing the Kunarac Trial Chamber Judgement, para. 847.

(1178) Celebici Appeals Chamber Judgement, para. 763.

(1179) Celebici Appeals Chamber Judgement, para. 588, citing criminal and procedural codes of several national jurisdictions.

(1180) Todorovic Trial Chamber Judgement, footnote 98: "The fact that Stevan Todorovic' was drinking at the time of the offences will not be accepted as a mitigating factor".

and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor.

707. The Trial Chamber takes account of the fact that most of the crimes were committed within the context of participating in a joint criminal enterprise. Several aspects of this case were critical to our decision that the five defendants did participate significantly and unlawfully in a persecutory system against non-Serb detainees, and these aspects deserve recalling, even though they will not be considered as aggravating circumstances. The first aspect is the pervasive and intense nature of the cruelties and deprivations, recounted in detail in Parts II and IV. Omarska was not a place where occasional random acts of cruelty against inmates occurred or where living conditions were simply hard. This was a hellish environment in which men and women were deprived of the most basic needs for their survival and of their humanity: food of edible quality; the opportunity to freely perform basic bodily functions; a place to sleep; water to drink and use for washing; and access to friends or family. Omarska was a place where beatings occurred daily and with devilish instruments of torture. No one could mistake Omarska for merely a badly run prison; it was a criminal enterprise designed to operate in a way that destroyed the mind, body, and spirit of its prisoners.

708. The second aspect of this case that deserves recalling is that the defendants were not contrary to their assertions - mere lowly cogs in the wheel of the camp's operation. They were not janitors who swept the floors or even cooks who served the meals. Their function was the *raison d'être* of the camp: to ensure that these thousands of men and dozens of women remained captive in their deplorable surroundings, subject to the whims of errant guards, opportunistic visitors, or the official interrogators who came to abuse them. Without their guarding function, without the role they played in maintaining the efficient and continuous functioning of the camp, there could have been no camp at all. Moreover, whether active or reserve, four of the defendants were members of the police force, and thus were people charged with enforcing the laws and protecting the citizens.

709. Thirdly, none of the defendants here fall into the category of humanitarian workers whose principal function was to alleviate the prisoner's miseries as might, for instance, a doctor who came periodically to tend their bodies. The few instances of assisting detainees, such as delivering food to them brought by relatives, although to be considered in sentencing, did not detract from their primary work, which was to ensure the prisoners stayed in their miserable environments and the camp system functioned without disruption or hassle. The defendants worked in the camp from between 17 days to 3 months. If during this time they had relentlessly sought to improve the conditions, prevent crimes, and alleviate the suffering, they would likely escape liability for participating in the

persecutory scheme. None of the defendants in this case fits that bill. We have instead a spectrum that runs from actively participating in the physical and mental abuse of prisoners, to watching passively while detainees were abused, to those who pretended everything was normal in the face of emaciated inmates hobbling around with broken bones, black and blue marks, and other indicia of violence and abuse. All three attitudes deserve to be punished. In this case, those directly inflicting the pain and suffering deserve a harsher punishment than those remaining indifferent to the abusive treatment and conditions.

710. The Trial Chamber takes note of the sentencing practices of the Tribunal, in particular the sentences recommended to Trial Chamber III in the Keraterm camp case, in which the three accused pleaded guilty to one count of persecution as a crime against humanity. In that case, the Plea Agreements recommend 3-5 years imprisonment and 5-7 years imprisonment for the two accused who were guard shift leaders who did not physically perpetrate crimes.⁽¹¹⁸¹⁾ The Plea Agreement for Sikirica, Commander of Security in Keraterm for approximately 6 weeks, recommends a sentence of 10-17 years imprisonment. In the agreement, Sikirica admitted to

(1181) Kolundzija was "a shift leader at the Keraterm Camp for a portion of the time relevant to the Indictment". Before becoming a shift leader, he was a guard at the camp. He was "in a position to influence the day-to-day running of the Keraterm Camp when he was on duty. He had some control over other guards on his shift and could make life more bearable for detainees if he chose to do so." Significantly, the agreement states that "there is no evidence that the accused personally mistreated or condoned the mistreatment of detainees by others." Indeed, "he frequently prevented guards on his shift from mistreating detainees, and "he also prevented visitors to the Keraterm Camp from abusing the prisoners with varying degrees of success." The Plea Agreement recommends between 3-5 years imprisonment. Dosen "exercised some authority in the Keraterm Camp as a Shift Leader.... The accused had no role in the effective administration of Keraterm." He was in Keraterm from 3 June to early August 1992. Further "The accused did not hold any rank and was of the same seniority as the guards on his shift." The agreement notes that there is "evidence that when aware that beatings were about to take place, the accused attempted to prevent mistreatment of the detainees" and that he at times asserted "his influence to improve conditions and that he assisted a number of detainees to receive food and medical treatment." The Plea Agreement recommends that he receive between 5-7 years imprisonment. Prosecutor v. Duswko Sikirica et al., Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Dragan Kolundzija of a Plea Agreement, 30 August 2001, para. 3; Prosecutor v. Duswko Sikirica et al., Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Damir Dosen and Admitted Facts, 6 September 2001, para. 15(a).

murdering one detainee.⁽¹¹⁸²⁾

711. The Trial Chamber turns now to determine the appropriate sentence to be imposed upon the defendants in view of the factors examined above: the general sentencing practice of the former Yugoslavia for persons convicted of crimes against humanity and war crimes, the gravity of the crimes committed by the accused, and the existence and the weight of any aggravating and/or mitigating circumstances.

C. DETERMINATION OF SENTENCES

1. Miroslav Kvočka

712. Miroslav Kvočka, a Bosnian Serb, was 35 years old in 1992, at the time the crimes were committed. He was a professional policeman until his arrest by SFOR on 8 April 1998. Since that date, he has been detained in the UN detention unit in Scheveningen at The Hague in The Netherlands. The Trial Chamber found that Kvočka's knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for war crimes and crimes against humanity for persecution, murder and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

713. The crimes for which Kvočka is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp, and many of whom did not survive the violence and intense suffering.

714. Kvočka holds the highest level of authority of any of the defendants in this case. He was the deputy commander of the camp, a duty officer, and an experienced active duty policeman. Although he was not the architect of the persecutions committed against the non-Serb population confined in Omarska camp, he participated in the persecutions.

715. His participation in the enterprise renders him a co-perpetrator of the joint criminal enterprise. He played a key role in facilitating and maintaining the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved relatives or friends.

716. The Trial Chamber also notes that Kvočka gave a voluntary statement to the

(1182) Prosecutor V. Dusvko Sikirica et al., Case No. IT-95-8-T, Joint Submission of the Prosecution and the Accused Dusko Sikirica and Admitted Facts, 6 September 2001, para.

Prosecution and gave evidence in Court, which are mitigating factors. The Trial Chamber is also persuaded that Kvocka is normally of good character. He was described as a competent, professional policeman. His experience and integrity can be viewed as both mitigating and aggravating factors - his job was to maintain law and order and, although he apparently did a fine job of this prior to working in the camp, he failed seriously to perform his duty to uphold the law during his time spent in Omarska camp. Holding a position of respect and trust in the community, his failure to object to crimes and maintaining indifference to those committed in his presence was likely viewed as giving legitimacy to the criminal conduct.

717. The Trial Chamber takes note of the fact that Kvocka was not convicted of physically perpetrating crimes.

718. The Trial Chamber notes that Kvocka has been held in detention by the Tribunal for approximately 31/2 years. The Trial Chamber sentences Miroslav Kvocka to 7 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.⁽¹¹⁸³⁾

2. Dragoljub Prcac'

719. Dragoljub Prcac', a Bosnian Serb, was 55 years old at the time the crimes were committed.

He was a retired policeman and crime technician who was called upon to assist Zeljko Meakic' in

Omarska camp, after the departure of Kvocka. He was primarily an administrative aide, a pencil pusher, in Omarska camp. Prcac' was detained by SFOR on 5 March 2000, whereupon he was transferred to the Tribunal detention facility in The Hague.

720. The Trial Chamber found that Prcac'"s knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for war crimes and crimes against humanity for persecution, murder, and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

721. The crimes for which Prcac' is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp and many of whom did not survive the violence and intense suffering. He called out names of victims and had to know that in doing so, he was sending them to be tortured or killed.

722. The Trial Chamber takes note of the fact that Prcac' voluntarily gave a statement to the Prosecution and has not been convicted of physically perpetrating crimes.

723. Prcac's participated as a co-perpetrator in the crimes ascribed to him as part of the joint criminal enterprise. He facilitated and maintained the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved former colleagues or friends.

724. Prcac' spent approximately 22 days in the camp at the end of its existence. The Trial Chamber takes note of the fact that Prcac' is the oldest of the defendants, he is in ill health, and he has two disabled children.

725. The Trial Chamber notes that Prcac' did not turn himself in. He has been in detention in the custody of the Tribunal for over 19 months.

726. The Trial Chamber sentences Prcac' to 5 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served. ⁽¹⁸⁴⁾

3. Milojica Kos

727. Milojica Kos was 29 years old in 1992, at the time the crimes were committed. He was arrested by SFOR on 28 May 1998. In 1992, he worked as a waiter until he was mobilized as a reserve policeman to work as a guard shift leader in Omarska camp.

728. The Trial Chamber found that Kos' knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible as a co-perpetrator of war crimes and crimes against humanity for persecution, murder, and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

729. The crimes for which Kos is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp and many of whom did not survive the violence and intense suffering.

730. As a guard shift leader, Kos facilitated and maintained the functioning of the camp, which allowed the crimes to continue. On a few rare occasions he assisted detainees and attempted to prevent crimes.

731. The Trial Chamber notes that Kos has been convicted of perpetrating crimes of physical assault and harassing detainees by demanding money and stealing

(184) Rule 101 (C).

valuables from them. He exploited the vulnerability of detainees for his own personal gain.

732. The Trial Chamber notes that Kos is the youngest of the defendants, and he was an inexperienced and untrained police officer at the time he took up his duties in the camp, whereas three of the other defendants had extensive training in police matters. Because he did not hold a position of high esteem in the community prior to his position in Omarska, he likely would not have been a role model for the guards and thus his silence would not carry the same degree of complicity in encouraging or condoning crimes as would, for example, Kvočka and Prcac, who were treated with considerable respect in the community prior to their participation in the activities in Omarska.

733. Kiss stayed in Omarska camp for nearly the entire time the camp was in existence and he made no attempt to leave.

734. Kos was detained by SFOR on 28 May 1998 and thus has been in detention for just under 3 1/2 years.

735. The Trial Chamber sentences Kos to 6 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.⁽¹¹⁸⁵⁾

4. Mlado Radic'

736. Radic' was 40 years old in 1992, at the time the crimes were committed. He was a professional policeman, employed by the Omarska police station when he was requested by Meakic' to serve in the Omarska camp as a guard shift leader.

737. The Trial Chamber found that Radic's knowledge of crimes committed against vulnerable detainees within a joint criminal enterprise and his substantial participation in this system, which made these crimes possible, rendered him responsible for war crimes and crimes against humanity for persecution, murder and torture. The persecution involved the widespread and systematic murder, torture and beatings, sexual violence, harassment, humiliation and psychological abuse, and confinement in inhumane conditions of Bosnian Muslims, Bosnian Croats and others detained in the camp because of their ethnicity, religion, or political views.

738. The crimes for which Radic' is culpable encompass a large number of victims, all of whom were held as helpless prisoners in Omarska camp, and many of whom did not survive the violence and intense suffering.

739. Radic's participation in the crimes ascribed to him is one of a co-perpetrator of the criminal enterprise. He significantly participated in facilitating and maintaining the functioning of the camp, which allowed the crimes to continue. On a few occasions he assisted detainees and attempted to prevent crimes, but the vast majority of these instances involved detainees from the town

were he had worked as a policeman for 20 years.

740. The Trial Chamber notes that Radic' is convicted of committing rape and other forms of sexual violence against several women detained in the camp. He grossly abused his position of power in the camp by forcing or coercing the women into sexual activity for his own pathetic gain.

741. The Trial Chamber heard many witnesses recalling the excessive and deliberate cruelty of the guards on Radices shift. By contrast to his colleagues Kvocka and Prcac', professional policemen like him who were asked to serve in the camp and who ignored and tolerated the crimes, by all indications Radic' relished and actively encouraged criminal activity in the camp. He appeared to regard the abuses as entertainment.

742. The Trial Chamber notes that Radic' worked as a guard shift leader the entire duration of the camp's existence.

743. Radic' gave a voluntary statement to the Prosecution and gave evidence in Court which allowed clarifications of matters and thus expedition of the proceedings against him.⁽¹¹⁸⁶⁾

744. The Trial Chamber notes that Radic' was detained by SFOR on 8 April 1998 and thus he has been in detention for approximately 31/2 years.

745. The Trial Chamber sentences Radic' to 20 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.

5. Zoran Zigic'

746. Zoran Zigic was 33 years old in 1992, at the time the crimes were committed. Prior to the establishment of Omarska, Keraterm, and Trnopolje camps, Zigic was a taxi driver and was known by the policemen of the Omarska police station as a petty criminal. In 1994, he was tried and convicted by a Bosnian Serb court in Prijedor for murder and sentenced to 15 years imprisonment. In 1998, while he was still serving his sentence, he surrendered to the Tribunal and was subsequently transferred to The Hague. Due to the fact that Zigic' was imprisoned in Banja Luka at the time he surrendered to the Tribunal, the Trial Chamber does not consider his surrender to be a mitigating factor.

747. Except for a few week's stint in Keraterm camp, in which his job was essentially that of a delivery man, Zigic is the only defendant who was not a regular employee of the camps. Nonetheless, he did participate in the criminal enterprise of Omarska camp by co-perpetrating persecution, murder, and torture committed in the camp. He also committed, instigated, and aided and abetted serious crimes in Keraterm and Trnopolje camps, including the crimes of

(1186) As with Kvocka, Radic' agreed to be interviewed by the Office of the Prosecutor and gave testimony in Court.

murder, torture, cruel treatment, and outrages upon personal dignity. Indeed, the Trial Chamber found that Zigic' regularly entered the Omarska and Keraterm camps for the sole purpose of abusing detainees in the camps.

748. The extreme gravity of the crimes committed by Zigic' has already been noted by the Trial Chamber. The Defense asserts that many of the crimes were committed when Zigic was intoxicated. The Trial Chamber rejects Zigic's claim that intoxication should be a mitigating factor and instead finds it an aggravating factor. However, because the issue was not raised by the Prosecution, it declines to treat it as an aggravating factor in this case.

749. Zigic was transferred to the Tribunal on 16 April 1998 and thus he has been in the custody of the Tribunal for just over 31/2 years.

750. The Trial Chamber sentences Zigic to 25 years imprisonment, bearing in mind that the time spent in the custody of the Tribunal is to be deducted from the time to be served.⁽¹¹⁸⁷⁾

VI. DISPOSITION

A. SENTENCES

751. Based upon the facts and the legal findings as determined by the Trial Chamber and for the foregoing reasons, the Trial Chamber FINDS as follows:

1. Miroslav Kvocka

752. Miroslav Kvocka is GUILTY on the following counts:

Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;

- Count 5, Murder as a Violation of the Laws or Customs of War;

- Count 9, Torture as a Violation of the Laws or Customs of War.

753. The following counts are DISMISSED:

- Count 2, Inhumane Acts as a Crime against Humanity;

- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;

- Count 4, Murder as a Crime against Humanity;

- Count 8, Torture as a Crime against Humanity;

- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.

754. The Trial Chamber hereby sentences Miroslav Kvocka to a single sentence of seven (7) years imprisonment.

2. Dragoljub Prcac'

755. Dragoljub Prcac' is GUILTY on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane

(1187) Zit ic was in Bosnian Serb custody from 1996 until April 1998. This time should not be deducted, as it was served as punishment for another crime

conditions as a Crime against Humanity;

- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War.

756. The following counts are DISMISSED:

- Count 2, Inhumane Acts as a Crime against Humanity;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.

757. The Trial Chamber hereby sentences Dragoljub Prcać to a single sentence of five (5) years imprisonment.

3. Milošević

758. Milošević is GUILTY of the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War.

759. The following counts are DISMISSED:

- Count 2, Inhumane Acts as a Crime against Humanity;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;
- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War.

760. The Trial Chamber hereby sentences Milošević to a single sentence of six (6) years imprisonment.

4. Mladić

761. Mladić is GUILTY on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 5, Murder as a Violation of the Laws or Customs of War;
- Count 9, Torture as a Violation of the Laws or Customs of War;
- Count 16, Torture as a Violation of the Laws or Customs of War.

762. The following counts are DISMISSED:

- Count 2, Inhumane Acts as a Crime against Humanity;
- Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;

- Count 4, Murder as a Crime against Humanity;
- Count 8, Torture as a Crime against Humanity;
- Count 10, Cruel Treatment as a Violation of the Laws or Customs of War;
- Count 14, Torture as a Crime Against Humanity;
- Count 15, Rape as a Crime Against Humanity;
- Count 17, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War.

763. The Trial Chamber hereby sentences Mlado Radic' to a single sentence of twenty (20) years imprisonment.

5. Zoran Zlgoc

764. Zoran Zigic is GUILTY on the following counts:

- Count 1, Persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a Crime against Humanity;
- Count 7, Murder as a Violation of the Laws or Customs of War;
- Count 12, Torture as a Violation of the Laws or Customs of War;
- Count 13, Cruel Treatment as a Violation of the Laws or Customs of War.

765. The following counts are DISMISSED:

Count 2, Inhumane Acts as a Crime against Humanity;

Count 3, Outrages upon Personal Dignity as a Violation of the Laws or Customs of War;

- Count 6, Murder as a Crime against Humanity;
- Count 11, Torture as a Crime against Humanity.

766. The Trial Chamber hereby sentences Zoran Zigico to a single sentence of twenty five (25) years imprisonment.

B. CREDIT FOR TIME SERVED

767. Pursuant to Rules 101 (C) and 102, the sentences of Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radic' and Zoran Zigic shall begin to run from today and the full amount of time spent in the custody of the Tribunal shall be deducted from the time to be served.

Done on 02 November 2001 in English and in French, the English text being authoritative. At The Hague, The Netherlands

Judge Fouad Riad Judge Almiro Rodrigues Judge Patricia Wald
Presiding

[Seal of the Tribunal]